

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

In the Matter of	)	
	)	
Use of Common Antenna Site – Sections 73.239 and 73.635	)	MB Docket No. 19-282
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: October 25, 2019**

**Released: October 25, 2019**

**Comment Date: (30 days after date of publication in the Federal Register)**

**Reply Comment Date: (45 days after date of publication in the Federal Register)**

By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements.

**I. INTRODUCTION**

1. In this *Notice of Proposed Rulemaking (NPRM)*, we seek comment on whether we should eliminate or revise the requirements, in sections 73.239 and 73.635 of the Commission’s rules,<sup>1</sup> regarding access to FM and TV broadcast antenna sites. As described in more detail below, these rules prohibit the grant, or renewal, of a license for an FM or TV station if that applicant or licensee controls an antenna site that is peculiarly suitable for broadcasting in the area and does not make the site available for use by other similar licensees. We seek comment on whether these requirements, which are rarely invoked, are outdated and unnecessary in light of the significant changes in the broadcast marketplace, including significant growth in the availability of broadcast infrastructure that has occurred since these restrictions were first adopted nearly 75 years ago. With this proceeding, we continue our efforts to modernize our rules and eliminate or modify outdated and unnecessary regulations.<sup>2</sup>

**II. BACKGROUND**

2. The earliest rules on record adopted by the Federal Communications Commission (Commission) regarding the use of common FM and TV antenna sites date from 1945.<sup>3</sup> These rules provide that no FM or TV broadcast license, or license renewal, “will be granted to any person who owns,

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<sup>1</sup> 47 CFR §§ 73.239, 73.635.

<sup>2</sup> See *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome).

<sup>3</sup> See 47 CFR §§ 3.639 (TV) and 3.239 (FM), *Standard and High Frequency Broadcast Stations*, 1945 Supplement to the Code of Federal Regulations of the United States of America, pages 555-56 (4341-42), 627 (4413), 660 (4446), available online at <https://heinonline.org/HOL/P?h=hein.cfr/cfr1946004&i=566>. The rule for TV broadcast stations was moved to 47 CFR § 3.635 and then, in 1963, recodified at 47 CFR § 73.635. See *Radio Broadcast Services*, 47 CFR § 1953 at 107, 157, available online at <https://heinonline.org/HOL/P?h=hein.cfr/cfr1953004&i=115>; *Rules and Regulations, Federal Communications Commission, 47 CFR Parts 73 and 74, Reorganization and Revision of Chapter*, 28 FR 13572, 13573, 13670 (1963) (*Part 73 Reorganization*). The rule for FM broadcast stations was recodified at section 73.239 in 1963. See *Part 73 Reorganization*, 28 FR at 13573, 13634 (1963).

leases, or controls a particular site which is peculiarly suitable” for FM or TV broadcasting in a particular area, unless the site is available for use by other FM or TV licensees or there is another comparable site available in the area, and “where the exclusive use of such site by the applicant or licensee would unduly limit the number of” FM or TV stations that can be authorized in a particular area or would “unduly restrict competition among” FM or TV stations.<sup>4</sup> Section 73.239 applies to commercial full power FM radio stations,<sup>5</sup> and section 73.635 applies to full power commercial and noncommercial TV stations and Class A TV stations.<sup>6</sup> Notably, the AM and noncommercial educational FM radio rules do not contain a provision comparable to sections 73.239 and 73.635 governing common use of AM antenna sites.

3. At the time the rules were adopted, FM and television broadcasting were still in their infancy, and the infrastructure available to broadcast a signal over the air was sparse. Towers used by AM radio stations, the first broadcasting service, were generally incompatible with use by FM radio or television antennas.<sup>7</sup> While the reason underlying the initial adoption of common antenna site requirements is unclear, they were adopted at a time when shortages of equipment and materials needed for broadcasting were a serious impediment to the introduction of new broadcast services.<sup>8</sup> In the 1940s, the Commission also became concerned about the effect of ownership concentration and certain anticompetitive broadcast network practices on competition and diversity in the nascent broadcast industry.<sup>9</sup> The language of the rules themselves, which has remained unchanged since 1945, suggests that

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<sup>4</sup> Section 73.239 provides: “No FM broadcast station license or renewal of FM broadcast station license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for FM broadcasting in a particular area and (a) which is not available for use by other FM broadcast station licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of FM broadcast stations that can be authorized in a particular area or would unduly restrict competition among FM broadcast stations.” 47 CFR § 73.239.

Section 73.635, which contains language almost identical to Section 73.239, provides: “No television license or renewal of a television license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) which is not available for use by other television licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations.” 47 CFR § 73.635.

<sup>5</sup> See 47 CFR § 73.239. The rules relating to noncommercial educational FM stations and low power FM stations do not contain a provision comparable to section 73.239 relating to use of a common antenna site. See 47 CFR § 73, Subpart D (Noncommercial Educational FM Broadcast Stations) and 47 CFR § 73, Subpart G (Low Power FM Broadcast Stations (LPFM)). See also 47 CFR § 73.801 (Broadcast regulations applicable to LPFM stations).

<sup>6</sup> See 47 CFR § 73.635. See also 47 CFR § 73.6026 (Broadcast regulations applicable to Class A television stations). The rules relating to low power television (LPTV), TV translator, and TV booster stations do not contain a provision comparable to section 73.635 relating to common use of antenna sites. See 47 CFR, Subpart G (LPTV, TV Translator, and TV Booster Stations); 47 CFR § 74.780 (Broadcast regulations applicable to translators, low power, and booster stations).

<sup>7</sup> For AM stations, which use wavelengths at the lowest end of the radio spectrum, the entire tower serves as the station’s antenna and radiates energy, making it more difficult to use the tower for other purposes. See *An Inquiry Into the Commission’s Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification*, 28 FCC Rcd 12555, 12556, para. 3 (2013). In addition, because FM and TV signals are affected by physical barriers unlike AM signals, FM and TV transmission facilities are often sited on a mountain or tall building to avoid obstructions to the signal and permit greater coverage.

<sup>8</sup> During World War II, the U.S. imposed a freeze on broadcast station construction in order to conserve equipment and material needed for the war effort. See *Supplemental Statement of Policy Concerning Applications for Permits to Construct New Radio Stations or Make Changes in Existing Radio Facilities*, Public Notice, FCC, Jan. 16, 1945, available online at <https://www.fcc.gov/media/radio/radio-history-documents>.

<sup>9</sup> See, e.g., *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060 (May 1941), *modified*, *Supplemental Report on Chain Broadcasting* (October 1941), *appeal dismissed sub nom. NBC v. United States*, 47

(continued....)

the Commission at that time was concerned that exclusive use of an antenna site could unduly restrict the number of FM and TV stations in a particular area or otherwise impede competition among stations.<sup>10</sup>

4. In addition, it appears that the Commission may have intended to ensure that a renewal applicant or licensee that owns or controls a desirable antenna site make it available to other licensees on reasonable terms. In its order proposing adoption of the common antenna site rule for FM stations, the Commission noted that, when there is an antenna site in a particular area and “there is no other comparable site available in the area, [a] licensee or applicant as a condition of being issued a license or renewal of license shall be required to make the use of his antenna site available to other FM licensees upon the payment of a reasonable rental and upon a showing that the shared use of the antenna site will permit satisfactory operation of all stations concerned.”<sup>11</sup> With respect to section 73.635, the Commission has noted that the common TV antenna rule “makes clear that its purpose is to remove unnecessary impediments to competition, ensuring that the public will have access to a variety of different broadcast sources.”<sup>12</sup>

5. Needless to say, the broadcast marketplace has evolved substantially since the antenna site sharing rules were adopted. In 1945, there were 46 licensed FM broadcast stations;<sup>13</sup> today, there are 6,726 FM commercial stations and 4,179 FM educational stations.<sup>14</sup> The terrestrial radio broadcast market today also includes 4,610 AM stations, 2,178 low power FM (LPFM) stations, and over 8,000 FM

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F.Supp. 940 (S.D.N.Y. 1942), *aff'd*, 319 U.S. 190 (1943), available online at <https://earlyradiohistory.us/1941cb.htm>. In the Report, the Commission notes that it recently adopted rules “restricting multiple ownership of stations furnishing these new broadcast services.” *Id.* at I.B. The Report also notes that the rules governing AM stations (referred to as the “standard broadcast service”) do not contain comparable multiple ownership provisions but that “the Commission is working out a policy in its day-to-day decisions” regarding AM. *Id.* As noted above, *see supra* para. 2, the AM rules also do not contain a rule similar to Sections 73.239 and 73.635 regarding use of common AM antenna sites.

<sup>10</sup> 47 CFR §§ 73.239(c), 73.635(c).

<sup>11</sup> *FM Broadcasting, Order Setting for Hearing Suggested Regulations*, 10 FR 8914 (1945).

<sup>12</sup> *K-W TV, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 3617, 3620, para. 17 (1992). Section 73.635 has been interpreted to cover towers as well as land for antenna sites. *See Common Use of TV Towers*, Notice of Inquiry, 68 FCC 2d 634, 635, para. 6 (1978) (*TV Tower Notice of Inquiry*), citing *Chronicle Publishing Co.*, 4 R.R. 2d 579 (1965), *recon denied*, 5 R.R. 2d 635 (1965), *aff'd*, 366 F.2d 632 (D.C. Cir. 1966). In 1981, the Commission declined to expand these rules by amending section 73.635 to specifically permit UHF TV stations to place their antennas on VHF TV station towers. *See Common Use of TV Towers*, 46 FR 28684 (1981) (*Common Use of TV Towers*). Specifically, the Commission declined to issue a notice of proposed rulemaking in connection with a proposal that specific language be added to section 73.635 requiring a condition to be placed on grants of construction permits for new or changed facilities of a VHF TV station which involve construction or modification of a tower to permit any UHF station, upon request, to place its antenna on the tower. *Id.* *See also TV Tower Notice of Inquiry*, 68 FCC 2d 634 (1978). The Commission concluded that, while arrangements for the sharing of antenna towers are desirable to reduce individual station costs and permit utilization of more advantageous transmitter sites which can improve signal quality, the current language of section 73.635 “strikes the proper balance between the exercise of a licensee’s business judgment and the Commission’s responsibility to regulate the broadcast industry in the public interest.” *Common Use of TV Towers* at para. 8.

<sup>13</sup> *See Eleventh Annual Report, Federal Communications Commission, Fiscal Year Ended June 30, 1945 (1946) (FCC Eleventh Annual Report)* at 19, available online at <https://www.fcc.gov/reports-research/reports/annual-reports-congress/11th-annual-report-congress-1945>.

<sup>14</sup> *See Broadcast Station Totals as of June 30, 2019 (June 2019 Broadcast Station Totals)*, available online at <https://www.fcc.gov/document/broadcast-station-totals-june-30-2019>. In 2017, 90% of Americans ages 12 and older listened to terrestrial broadcast (AM/FM) radio in a given week. *See Communications Marketplace Report*, 33 FCC Rcd 12558, 12639, para. 161 (2018) (*2018 Marketplace Report*).

translator and booster stations that retransmit and extend the signal of a parent FM station.<sup>15</sup> The TV marketplace similarly has expanded greatly since the rule regarding antenna sites was first adopted. In 1945, there were nine television stations;<sup>16</sup> today, there are 1,757 commercial and noncommercial educational full power television stations, 387 Class A television stations, almost 1,900 low power television (LPTV) stations, and more than 3,600 TV translator stations that retransmit the signal of a parent TV station.<sup>17</sup>

6. The dramatic increase in the number of television and radio stations since 1945 has contributed to a corresponding increase in the number of antenna sites suitable for broadcasting. While some communications towers are owned and operated by FM and TV broadcasters, the vast majority appear to be owned by non-broadcast entities, including companies specializing in tower leasing such as American Tower, Crown Castle, InSite Wireless Group, and Vertical Bridge.<sup>18</sup> Thus, while it appears that broadcasters were more likely to have owned their towers in 1945, this is less the case today, and there is now widespread availability of tower capacity from a variety of tower companies. Moreover, many antenna sites are available for lease and shared use by broadcasters and wireless carriers, thereby helping broadcaster tower tenants and other entities to avoid the capital investment, environmental, zoning and other concerns involved in building new communications towers. The trend toward co-location of communications towers on antenna farms has also reduced the cost and other barriers to entry associated

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<sup>15</sup> See *June 2019 Broadcast Station Totals*. See also *2018 Marketplace Report* at 12632, para. 140 (2018). The LPFM service, which consists of stations which serve a much smaller area than full power FM stations and operate at lower power, was established in 2000. See *Creation of Low Power FM Service*, Report and Order, 15 FCC Rcd 2205 (2000) (subsequent history omitted). The number of AM and FM radio stations has been fairly steady in recent years, while the number of LPFM stations has increased somewhat. See *2018 Marketplace Report* at 12632, para. 142. In many areas of the country, there are no frequencies available on which a new radio station could begin operating. *Id.* at 12634, para. 148. As a result, the Commission does not allocate many new stations and, if it does, the station is likely to be in a smaller market and operate at a lower power level. *Id.* Thus, an entity's best chance of entering the terrestrial radio business would be to try to acquire an existing station. *Id.*

<sup>16</sup> See *FCC Eleventh Annual Report* at 21. Six of these stations were commercial television stations and three were experimental stations. *Id.*

<sup>17</sup> See *June 2019 Broadcast Station Totals*. The Commission has not auctioned a license for a new full power commercial television station since 2011. See *2018 Marketplace Report*, 33 FCC Rcd at 12613, para. 90. The Class A television service, which consists of low power television stations that have been accorded primary status, was established in 2000. See *Establishment of a Class A Television Service*, Report and Order, 15 FCC Rcd 6355 (2000), Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 8244 (2001)(*Class A MO&O*). LPTV and TV translator stations are secondary to full power and Class A television stations. While the number of individual television stations has recently declined as a result of the Commission's Broadcast Incentive Auction, which resulted in 145 full power and Class A TV stations electing to relinquishing their broadcast license, see <https://auctiondata.fcc.gov/public/projects/1000>, many of these stations elected to continue operating by sharing a channel licensed to another television station that retained its broadcast license. See *Incentive Auction Closing and Channel Reassignment Public Notice; The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, 32 FCC Rcd 2786, at Appendix A (2017) (*Closing and Channel Reassignment PN*), available online at <https://www.fcc.gov/document/fcc-announces-results-worlds-first-broadcast-incentive-auction-0>.

<sup>18</sup>American Tower currently operates more than 40,000 telecommunications towers in the United States. See <http://wirelessestimator.com/top-100-us-tower-companies-list/>. According to the American Tower website, the company works with approximately 240 television broadcasters and over 700 radio broadcasters and has over 1,500 sites currently in use by broadcasters. See <https://www.americantower.com/us/solutions/towers/broadcast-towers.html>. Crown Castle also operates 40,000 telecommunications towers. See <https://investor.crowncastle.com/static-files/e2d9530c-7a09-4247-8e63-449ea2bc3926>. Of InSite's total of 2,000 towers, 180 have broadcasters as tenants. See <https://www.aglmediagroup.com/insite-grows-broadcast-tower-portfolio/>. See also <https://www.verticalbridge.com/our-partners/broadcast>.

with the need to build new transmission facilities.<sup>19</sup> In addition, the development of broadband antennas<sup>20</sup> now permits multiple FM and TV stations in a market to share an antenna, thereby reducing the cost of antenna and tower facilities for the sharing stations and permitting towers with broadband antennas to accommodate more individual FM and TV tower tenants.

### III. DISCUSSION

7. We invite comment on whether we should eliminate or revise sections 73.239 and 73.635 of our rules. In particular, we invite comment on whether the requirements regarding the use of common FM and TV antenna sites continue to serve the public interest in light of the vast changes in the broadcasting marketplace and infrastructure since they were first adopted nearly 75 years ago. For example, to what extent do FM and TV broadcasters own towers today? Publicly available information suggests that the tower market is dominated by non-broadcast owned tower companies that are in the business of leasing their capacity. Is there currently a sufficient supply of towers and antenna sites suitable for FM and TV broadcast use? Does the current abundance of towers and antenna sites owned or controlled by non-broadcast entities render the rules regarding use of common antenna sites unnecessary?

8. Do these rules remain necessary to ensure that today's consumers have access to an adequate variety of FM and TV broadcast sources? Do they remain necessary to "remove unnecessary impediments" to broadcast competition?<sup>21</sup> Do the rules make sense as a practical matter given that there are few new full-power FM or TV channels being allotted today and no new Class A TV channels being allotted?<sup>22</sup> That is, new entrants into FM or TV broadcasting would likely operate on existing channels using existing broadcast infrastructure and existing broadcasters, with the exception of stations subject to the Incentive Auction repack, are unlikely to be changing channels such that they will require new towers. Were we to eliminate these rules, would the likelihood increase that TV and FM broadcasters would need to construct their own towers?

9. We seek comment and data on whether requests for use of particular antenna sites under these rules are even made in today's broadcast marketplace. The only evidence we could find of the common antenna site rules being raised is in the context of disputes in which the rules are invoked unjustifiably, contributing to unnecessary adjudication expenses and delays.<sup>23</sup> Would elimination of the

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<sup>19</sup> Antenna farms are widely available in the United States. *See, e.g.*, <https://www.americantower.com/us/industries/broadcasters.html>. Indeed, one source reported that most major metropolitan areas now have at least one antenna farm. *See* [https://en.wikipedia.org/wiki/Antenna\\_farm](https://en.wikipedia.org/wiki/Antenna_farm).

<sup>20</sup> A broadband or panel antenna operates across more than one channel and can be shared by multiple TV or FM stations.

<sup>21</sup> *See supra* para. 4 and n. 12.

<sup>22</sup> *See supra* n. 15 and n. 17. The licensing of new full power television stations, including NCE stations, was first frozen to accommodate the digital television transition and, more recently, continued to accommodate the Commission's first-ever incentive auction. *See Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes, Public Notice, 19 FCC Rcd 14810 (2004); Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order, 29 FCC Rcd 6567 (2014), affirmed, National Ass'n of Broadcasters v. FCC, 789 F.3d 165 (D.C. Cir. 2015)*. The freeze on new television allotments remains in place. With respect to Class A stations, a station had to be operational prior to the establishment of the Class A television service in order to qualify for Class A status so no new Class A TV stations can be allotted. *See Class A MO&O*, 16 FCC Rcd at 8250-52, paras. 15-18.

<sup>23</sup> *See, e.g., NCE MX Group 430*, Memorandum Opinion and Order, 31 FCC Rcd 4241, 4243, n. 12 (2016) (noting that an applicant failed to provide "the necessary factual foundation" to invoke section 73.239), *Indiana Community Radio Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 10963, 10964, n. 13 (2008) (noting that an applicant "fail[ed] to provide any specific allegations of fact sufficient to show" a violation of section 73.239), *Stromberg Carlson Co.*, Memorandum Opinion and Order, 44 FCC 2d 62, 63, para. 2 (1954) (denying a complaint and request for declaratory ruling and the issuance of a cease and desist order on the grounds, inter alia, that the common antenna site rules do not provide for the issuance of a declaratory ruling or cease and desist order and that the

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rules help conserve industry and Commission resources by avoiding unnecessary complications in disputes between stations? To the extent legitimate requests for access to an antenna site have been made, are such requests ever refused? Are such refusals, if any, based on reasonable grounds? Are there instances in which the terms of use are unreasonable?<sup>24</sup>

10. We ask commenters that advocate retaining the rules to provide information and data about specific circumstances in which the rules have proven useful in promoting access to sites peculiarly suitable for broadcasting. In this regard, we note that, for both rules, four elements must be satisfied in order to establish a violation,<sup>25</sup> and this may be part of the reason why it appears that no party that has relied on sections 73.239 or 73.635 in disputes regarding access to a tower or tower site has been successful in establishing a violation of either rule. Indeed, we are aware of no instance where a license application or license renewal application was denied on the basis of a violation of these rules. If we were to retain the rules, should they be revised to make them more useful to parties seeking access to antenna sites? If so, what changes should we make?

11. We ask commenters who advocate eliminating the common antenna site rules to discuss the potential benefits and costs of eliminating the rules. How burdensome are the rules for broadcasters? How would stations be affected if the rules were eliminated.<sup>26</sup> Would stations that own towers have an incentive to engage in anticompetitive behavior going forward if the rules were eliminated? Or, is it in their financial interest to lease capacity on their towers to the extent requested? Are there impending changes to the broadcast industry, including the transition to ATSC 3.0 and the importance of distributed

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complaint “relates to proposed broadcast facilities for which no application is presently pending” and to common carrier facilities, and noting that the complainant also failed to obtain the necessary zoning approval to construct an antenna). *See also* *RKO General, Inc. (WOR-TV)*, Memorandum Opinion and Order, 49 FCC 2d 106 (1974) (denying a motion to enlarge issues to determine whether RKO General, Inc. (RKO), the existing licensee of TV channel 9 in New York City, “violated the principles of [s]ection 73.635” in refusing to sell its antenna system to a competing applicant in the event the competing applicant’s application for the channel was granted). Among other grounds for its decision, the Commission’s Review Board concluded that there was no indication that the competing applicant would not be able to obtain a comparable antenna site and that “there is nothing in Rule 73.635 evincing an intent to require a losing applicant for renewal of license to make its facilities available to its competitor” or to require the Commission “to direct a losing renewal applicant to make available a turn-key operation to its competitor.” *Id.* at 108, para. 4. *See also* *Duchossois Communications*, Memorandum Opinion and Order, 10 FCC Rcd 8072 (1995) (*Duchossois*) (denying a challenge to an application for assignment of license of an FM station where the challenger asserted that the assignee “intends to evict” the challenger from its current antenna site where the assignment was already consummated, the assignee controlled the lease for the site, and the challenger was still a tenant at the site).

<sup>24</sup> In *Common Use of TV Towers*, the Commission noted that the supporters of the proposed rule to permit UHF stations to place their antennas on VHF stations’ towers could cite only one instance of a refusal to consider the joint use of a tower. *See Common Use of TV Towers* at para. 6.

<sup>25</sup> To be successful in invoking Section 73.635 or 73.239, a party must show that **a particular broadcast site “is peculiarly suitable” for broadcasting** in a particular area **“and (a) ...is not available for use”** by other TV or FM licensees; **“and (b) no other comparable site is available in the area; and (c) ... the exclusive use of such site by the applicant or licensee would unduly limit the number of”** TV or FM stations “that can be authorized in a particular area or would unduly restrict competition among” such stations. 47 CFR §§ 73.635, 73.239 (emphasis added). *See Duchossois*, 10 FCC Rcd at 8073 (“[a]ll three elements of Section 73.239, the unique antenna site rule, must be satisfied before the rule is applicable to an FM licensee.”), *D&D Broadcasting, Inc.*, 7 FCC Rcd 8082, 8084 (1992) (“Newsweb has not demonstrated the lack of a comparable site, one of the three parts of Section 73.635, all of which must be satisfied before the unique antenna site rule is applicable to a television licensee.”).

<sup>26</sup> Even in cases where the common antenna site rules were not directly at issue, the Commission has cited the rules in support of efforts to ensure equitable treatment of stations with respect to access to antenna sites. *See, e.g., WTCN Television Inc.*, 14 FCC 2d 870, 893, para. 46 & n.36 (1968).

transmission system (DTS) single frequency networks (SFN) to ATSC 3.0,<sup>27</sup> that will increase demand for antenna sites and provide a greater need for rules regarding access to common antenna sites? To the extent that parties believe that there are not sufficient towers and antenna sites available, they should document this concern with specificity and data. Commenters that advocate in favor of or against retaining the rules should discuss whether and how the benefits of doing so outweigh any costs. Are there any other considerations or data that the Commission should take into account in determining whether to retain these nearly 75 year-old rules?

#### IV. PROCEDURAL MATTERS

12. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>28</sup> the Commission has prepared an Initial Regulatory Flexibility Act Analysis (IRFA) relating to this *NPRM*. The IRFA is set forth in Appendix B.

13. *Initial Paperwork Reduction Act Analysis.* This document may result in new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).<sup>29</sup> 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 RA. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,<sup>30</sup> the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

14. *Ex Parte Rules - Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>31</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 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.

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<sup>27</sup> See *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930, 9987-88, paras. 115-120 (2017).

<sup>28</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>29</sup> Public Law 104-13 (44 U.S.C. §§ 3501 through 3520).

<sup>30</sup> Public Law 107-198 (44 U.S.C. § 3506(c)(4)).

<sup>31</sup> 47 CFR §§ 1.1200 *et seq.*

15. *Filing 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 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

16. *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.

17. *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 FCC's Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

18. *Additional Information.* For additional information on this proceeding, please contact Kim Matthews of the Media Bureau, Policy Division, [Kim.Matthews@fcc.gov](mailto:Kim.Matthews@fcc.gov), (202) 418-2154.

## V. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 303(r), 307, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 307, 309 this *Notice of Proposed Rulemaking* **IS ADOPTED**.

20. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center **SHALL SEND** a copy of this *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

**APPENDIX A****Proposed Rules**

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

**PART 73 – RADIO BROADCAST SERVICES**

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

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

2. Section 73.239 is removed and reserved.
3. Section 73.635 is removed and reserved.

## APPENDIX B

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities of the policies and rules proposed in the *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 the *NPRM*. The Commission will send a copy of the *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 Rule Changes**

2. The *NPRM* seeks comment on whether to eliminate or revise the requirements, in Sections 73.635 and 73.239 of the Commission’s rules,<sup>4</sup> regarding access to use of television and FM broadcast antenna sites. These rules prohibit the grant of a license for a broadcast television or FM station, or a license renewal, to an entity that owns, leases, or controls a site that “is peculiarly suitable” for TV or FM broadcasting in a particular area unless the site is available for use by other TV or FM licensees or there is another comparable site available in the area, and where the exclusive use of the site by the applicant or licensee “would unduly limit the number of” TV or FM stations that can be authorized in a particular area or would “unduly restrict competition among” TV or FM stations. We seek comment on whether these requirements are outdated and unnecessary in light of the significant changes in the broadcast marketplace, including significant growth in the availability of broadcast infrastructure that has occurred since these restrictions were first adopted nearly 75 years ago. With this proceeding, we continue our efforts to modernize our rules and eliminate outdated and unnecessary regulations.<sup>5</sup>

**B. Legal Basis**

3. The action is authorized pursuant to Sections 1, 4(i), 4(j), 303, 307, and 309 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 154(j), 303, 307, 309.

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

4. 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>6</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>7</sup> In addition, the term “small business” has the

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> 47 CFR §§ 73.635, 73.239.

<sup>5</sup> *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (MB 2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome).

<sup>6</sup> 5 U.S.C. § 603(b)(3).

<sup>7</sup> 5 U.S.C. § 601(6).

same meaning as the term “small business concern” under the Small Business Act.<sup>8</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>9</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. The rules we seek comment on herein directly affect small FM radio and full power and Class A television stations. Below, we provide a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Radio Stations.* This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.”<sup>10</sup> The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts.<sup>11</sup> Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.<sup>12</sup> Of that number, 2,806 firms operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$24,999,999 and \$50 million, and 26 with annual receipts of \$50 million or more.<sup>13</sup> Therefore, based on the SBA’s size standard the majority of such entities are small entities.

7. According to Commission staff review of the BIA/Kelsey, LLC’s Media Access Pro Radio Database on January 8, 2018, about 11,372 (or about 99.9 percent) of 11,383 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated that there are 6,726 licensed FM commercial stations.<sup>14</sup> We note the Commission has also estimated the number of licensed noncommercial (NCE) FM radio stations to be 4,179.<sup>15</sup> However, the Commission does not compile or 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.

8. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.<sup>16</sup> The Commission’s estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition,

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<sup>8</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>9</sup> 15 U.S.C. § 632.

<sup>10</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

<sup>11</sup> 13 CFR § 121.201; NAICS code 515112.

<sup>12</sup> U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112), [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4/naics~515112](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515112).

<sup>13</sup> *Id.*

<sup>14</sup> See *Broadcast Station Totals as of June 30, 2019*, Press Release, FCC (June 30, 2019 Broadcast Station Totals), available online at <https://www.fcc.gov/document/broadcast-station-totals-june-30-2019>.

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

<sup>16</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 power to control both.” 13 C.F.R. § 121.103(a)(1).

to be determined a “small business,” an entity may not be dominant in its field of operation.<sup>17</sup> We further note that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis; thus, our estimate of small businesses may therefore be over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities, and the estimates of small businesses to which they apply may be over-inclusive to this extent.

9. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>18</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>19</sup> 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 studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.<sup>20</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of \$25 million or less, 25 had annual receipts between \$24,999,999 and \$50 million, and 70 had annual receipts of \$50 million or more.<sup>21</sup> Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

10. The Commission has estimated the number of licensed full power commercial television stations to be 1,371.<sup>22</sup> Of this total, 1,257 stations had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on January 8, 2018, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 386.<sup>23</sup> These stations are non-profit, and therefore considered to be small entities.<sup>24</sup>

11. There are also 387 Class A stations.<sup>25</sup> Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

12. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>26</sup> must be included. Our estimate, therefore,

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<sup>17</sup> 13 C.F.R. § 121.102(b).

<sup>18</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

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

<sup>20</sup> 13 CFR § 121.201; 2012 NAICS Code 515120.

<sup>21</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting), [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4/naics~515120](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515120).

<sup>22</sup> See June 30, 2019 Broadcast Station Totals.

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

<sup>24</sup> See generally 5 U.S.C. § 601(4), (6).

<sup>25</sup> See June 30, 2019 Broadcast Station Totals.

<sup>26</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 the power to control both.” 13 CFR § 21.103(a)(1).

likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an 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 broadcast 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 is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

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

13. The *NPRM* seeks comment on whether to eliminate or revise the requirements, in Sections 73.635 and 73.239 of the Commission’s rules, regarding access to use of television and FM broadcast antenna sites. These rules prohibit the grant of a license for a broadcast television or FM station, or a license renewal, to an entity that owns, leases, or controls a site that “is peculiarly suitable” for TV or FM broadcasting in a particular area unless the site is available for use by other TV or FM licensees or there is another comparable site available in the area, and where the exclusive use of the site by the applicant or licensee “would unduly limit the number of” TV or FM stations that can be authorized in a particular area or would “unduly restrict competition among” TV or FM stations. Elimination of these rules would reduce compliance requirements for full power and Class A television and FM stations, which are currently required to comply with the rules. The *NPRM* also seeks comment on whether, if the rules are retained, they should be revised and, if so, how.

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

14. 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, standard; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>27</sup>

15. The *NPRM* seeks comment on whether to eliminate or revise the requirements, in Sections 73.635 and 73.239 of the Commission’s rules, regarding access to use of television and FM broadcast antenna sites. Eliminating these requirements would eliminate the costs of compliance with the Commission’s rules, including any related managerial, administrative, legal, and operational costs. The *NPRM* asks whether stations that own towers would have an incentive to engage in anticompetitive behavior going forward if the rules are eliminated. The Commission also seeks comment on the alternative of not eliminating these requirements, or of revising them.

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

16. None.

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<sup>27</sup> 5 U.S.C. § 603(c).

**STATEMENT OF  
CHAIRMAN AJIT PAI**

Re: *Use of Common Antenna Site – Sections 73.239 and 73.635*, MB Docket No. 19-282;  
*Modernization of Media Regulation Initiative*, MB Docket No. 17-105.

When we launched our *Modernization of Media Regulation Initiative*, I noted that “[a] rule that might have been necessary at one time can become yellowed and obsolete with age. In some cases, repeal of such a rule is just a matter of good housekeeping; the conduct covered by the rule simply doesn’t happen anymore, so the rule is literally irrelevant.”<sup>1</sup> Today’s Notice of Proposed Rulemaking asks, among other things, whether our Common Antenna Siting rules are in need of some housekeeping.

These rules date back to 1945. At the time, there was a freeze on broadcast station construction in order to conserve equipment and material needed for World War II. The Commission was also concerned about developing the still-nascent FM radio and TV services at a time when broadcasters were still the predominant antenna site owners. But that was a long, long time ago; today, there are abundant FM and TV stations, the tower site market is flourishing, and Commission staff has been unable to find a single instance where these rules were successfully invoked. What they *have* found are parties citing these rules without a factual basis for doing so, resulting in unnecessary delay of Commission proceedings. All this raises the question: Are these rules still necessary? With this Notice, we aim to find out.

I’d like to thank the staff that dug deep into the FCC’s history to prepare this item: from the Media Bureau, Michelle Carey, John Cobb, Martha Heller, Paul Jackson, and Kim Matthews; and from the Office of General Counsel, Susan Aaron, David Konczal and Bill Richardson.

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<sup>1</sup> See *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406, 4411 (2017) (Statement of Chairman Ajit Pai).

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Use of Common Antenna Site – Sections 73.239 and 73.635*, MB Docket No. 19-282;  
*Modernization of Media Regulation Initiative*, MB Docket No. 17-105.

Suffice it to say that we are truly cleaning out the underbrush here, proposing elimination of rules that have almost never been invoked. The item does, however, demonstrate the arcane regime that undergirds the broadcast industry, with rules still on the books from the time when the Greatest Generation came home from Europe to launch the American Century. At that time, the nascent infrastructure needed to build out television and radio networks was vastly underdeveloped, but 75 years later the industry has matured and now faces new, powerful competitors who are not bound by such ancient regulations. We must keep up the effort to free traditional, regulated industries from regulatory burdens where appropriate; otherwise, they will continue to fight with one, or both, of their proverbial hands tied behind their backs.