

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

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

NOTICE OF PROPOSED RULEMAKING

Adopted: November 22, 2019

Released: November 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 Commissioners Carr issuing separate statements; Commissioners Rosenworcel and Starks concurring and issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on whether we should modify or eliminate section 73.3556 of the Commission's rules (the radio duplication rule), which prohibits any commercial AM or FM radio station from devoting "more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any other station in the same-service (AM or FM) which is commonly owned or with which it has a time brokerage agreement if the principal community contours . . . of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station."¹ The current version of this rule was adopted in 1992, and there have since been considerable changes in the radio broadcast industry. This NPRM therefore seeks comment on whether any modifications should be made to the radio duplication rule and whether the rule remains necessary to serve the public interest goals of competition, programming diversity, and spectrum efficiency that it was originally intended to foster. With this proceeding, we continue our efforts to modernize our rules and modify or eliminate outdated and unnecessary media regulations.²

II. BACKGROUND

2. The Commission's broadcast radio programming duplication rules have evolved with changes in the radio broadcast market. In 1964, the Commission first limited radio programming duplication by commonly owned stations in the same local area by prohibiting FM stations in cities with populations over 100,000 from duplicating the programming of a co-owned AM station in the same local

¹ 47 CFR § 73.3556. Principal community contours are defined as "predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations." *Id.* A time brokerage agreement generally involves the sale by one radio licensee of blocks of time to a broker who then supplies programming to fill that time and sells the commercial spot advertising to support it.

² The Commission launched its media modernization efforts in 2017. *See Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCC Red 4406 (2017).

area for more than 50% of the FM station's broadcast day.³ In adopting this cross-service limitation, the Commission observed that it had never regarded program duplication as an efficient use of FM frequencies, but had allowed it "as a temporary expedient to help establish the FM service."⁴ The Commission moved to limit duplication in a way that would minimize the economic impact to radio broadcasters.⁵ In particular, the rule adopted in 1964 allowed for waivers upon a substantial showing that programming duplication would be in the public interest, and provided that compliance would be monitored through the license renewal process.⁶ In 1976, the Commission observed that if new broadcasting frequencies remained available, "the public does not have to depend on non-duplication to add diversity."⁷ The Commission concluded, however, that "the virtually complete absence of available channels as well as the strengthened economic position of FM" warranted tightening the restriction to limit FM stations to duplicating only 25% of the average program week of a co-owned AM station in the same local area if either the AM or FM station operated in a community of over 25,000 population.⁸ The Commission established the tighter limit due to "the greatly diminished availability of FM channels in communities of any substantial size," which could inhibit programming diversity, and "the inherent wastefulness of duplication," *i.e.*, it was not the most efficient use of spectrum.⁹

3. In 1986, in response to a petition for rulemaking seeking to exempt late night hours when determining compliance with the radio duplication rule, the Commission eliminated the cross-service radio duplication rule entirely, finding that FM service had developed and FM stations were fully competitive.¹⁰ The Commission further found that the rule was no longer necessary to promote spectrum efficiency because market forces would lead stations to provide separate programming where economically feasible, and, where separate programming was not economically feasible, duplication was preferable to a station curtailing programming or going off air entirely to comply with the rule.¹¹

³ *Amendment of Part 73 of the Commission's Rules Regarding AM Station Assignment Standards and the Relationship Between the AM and FM Broadcast Services*, Report and Order, 45 FCC 1515 (1964).

⁴ *Id.* at 1530, para. 36. Once the number of applicants seeking licenses exceeded the number of vacant FM channels available in large cities, the Commission decided to begin a "gradual" process to end programming duplication. *Id.* at 1532, paras. 41-42.

⁵ *Id.* at 1532, paras. 41-42.

⁶ *Id.* at 1533-34, 1537, para. 46, App. A.

⁷ *AM-FM Program Duplication*, Report and Order, 59 FCC 2d 147, 151, para. 9, App. A. (1976).

⁸ *Id.* Because the Commission had 12 years' experience observing the effects of the radio duplication rule, it delayed implementation of the tightened 25% limit on smaller cities for approximately four years, establishing interim limits that prohibited FM stations from duplicating more than 25% of average broadcast week programming of a commonly owned AM station in communities over 100,000 and 50% of programming of a commonly owned AM station in communities over 25,000 but under 100,000. *Id.* at 153, paras. 12-13.

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

¹⁰ *Amendment of Section 73.242 of the Commission's Rules and Regulations in Regard to AM-FM Program Duplication*, Report and Order, 103 FCC 2d 922, 924, 925, 930, paras. 5, 7, 9-10, App. B (1986) (*1986 Report and Order*).

¹¹ *Id.* at 925, 926, 927, paras. 11, 13, 15. In reaching this conclusion, the Commission noted that duplication could save costs for many AM stations experiencing economic difficulties due to listeners switching to FM. *Id.* at 927-928, paras. 16-17. Because it eliminated the cross-service radio duplication rule on other grounds, the Commission did not determine whether, as claimed by some parties, the rule violated broadcasters' First Amendment rights. *Id.* at 928-29, para. 19.

4. In 1992, as part of a broad proceeding reviewing its national and local radio ownership rules, the Commission adopted a new radio programming duplication rule limiting the duplication of programming by commonly owned stations or stations commonly operated through a time brokerage agreement in the same service (AM or FM) with substantially overlapping signals to 25%.¹² The Commission saw no public benefit in allowing commonly owned same-service stations in the same local market to duplicate programming substantially, observing that, “when a channel is licensed to a particular community, others are prevented from using that channel and six adjacent channels at varying distances of up to hundreds of kilometers. The limited amount of available spectrum could be used more efficiently by other parties to serve competition and diversity goals.”¹³ The Commission concluded, however, that some programming duplication had benefits, stating “we are persuaded that limited simulcasting, particularly where expensive, locally produced programming such as on-the-spot news coverage is involved, could economically benefit stations and does not so erode diversity or undercut efficient spectrum use as to warrant preclusion.”¹⁴

III. DISCUSSION

5. We invite comment on whether we should modify or eliminate the radio duplication rule contained in section 73.3556 of our rules. To begin with, we invite comment on whether the rule has outlived its utility or whether it remains necessary to further the public interest goals of competition, programming diversity and spectrum efficiency for which it was intended.

6. There is little doubt that the broadcast industry has changed significantly since the Commission adopted the current radio programming duplication rule in 1992. We note that one factor promoting competition and programming diversity is the greatly increased number of radio stations licensed and operating across the country today as opposed to twenty-seven years ago. In 1992, there were roughly 11,700 commercial AM and FM and FM translator stations; today there are close to 19,500.¹⁵ Also today there are many more non-commercial/educational radio stations (4,122 versus 1,588 in 1992) as well as more than two thousand low power FM stations, all adding to diverse programming.¹⁶ Further, radio broadcasters now expand their content offerings by using station websites and mobile applications, allowing users to listen to a variety of programming on multiple devices either for free or with a paid subscription.¹⁷ This significant growth in the number of radio broadcasting outlets, combined with the new and varied formats in which broadcasters disseminate their programming, has led to greater radio broadcasting competition and programming diversity.

¹² *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2788, para. 57 (1992) (*1992 Radio Rules Order*); 47 CFR § 73.3556.

¹³ *1992 Radio Rules Order*, 7 FCC Rcd at 2788, para. 57, citing *Review of The Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273, 6329-30 (1991). The Commission also incorporated time brokerage agreements in the rule, stating that while it did not see a great likelihood of harm, it was concerned about the possibility that “widespread and substantial time brokerage arrangements among stations serving the same market, in concert with increased common ownership permitted by our revised local rules, could undermine our continuing interest in broadcast competition and diversity.” *1992 Radio Rules Order*, 7 FCC Rcd at 2788, para. 64.

¹⁴ *1992 Radio Rules Order*, 7 FCC Rcd at 2798, para. 57.

¹⁵ See FCC, <https://www.fcc.gov/media/broadcast-station-totals> (last visited Oct. 16, 2019). The Commission also recently announced an auction for 130 FM construction permits for vacant allotments. See *Auction of FM Construction Permits Scheduled for April 28, 2020; Comment Sought on Competitive Bidding Procedures for Auction No. 106*, AU Docket No. 19-290, Public Notice, DA 19-1027 (MB OEA Oct. 10, 2019).

¹⁶ *Id.* See also FCC, *Broadcast Station Totals as of September 30, 2019*, News Release (Oct. 2, 2019), <https://www.fcc.gov/document/broadcast-station-totals-september-30-2019>.

¹⁷ See *Communications Marketplace Report*, 33 FCC Rcd 12558, 12632, para. 143 (2018).

7. Broadcast radio technology has also improved with the introduction of digital radio, which enables FM stations to provide clear sound comparable in quality to CDs, and enables AM stations to provide sound quality equivalent to standard analog FM sound quality.¹⁸ Stations broadcasting in digital are also able to provide multiple streams of programming as well as other data such as information about music airing on the station, weather updates, traffic reports and other news.¹⁹

8. Further, our AM revitalization proceeding has brought AM programming to the FM band and enabled greater competition. The Commission began allowing AM stations (both commercial and noncommercial) to use currently authorized FM translator stations to retransmit their AM service within their AM stations' current coverage areas in 2009.²⁰ In 2016, the Commission opened two exclusive windows for AM stations to apply to relocate FM translator stations, giving them the ability to expand service by broadcasting at night when their signals may be substantially reduced. In response, the Commission granted more than 1,000 such applications.²¹ The Commission opened two additional spectrum windows, in 2018 and 2019, and awarded licenses for more than 1,700 new FM translator stations to AM stations not participating in the earlier windows.²² These efforts have helped AM stations to increase their audiences, and potentially their advertising revenues, in an effort to better compete against stronger rivals.

9. Collectively, how do these changes affect the need for the radio duplication rule? Is it still needed to promote radio broadcast competition or programming diversity? Is our assessment of the increased competition and programming diversity within the radio broadcast industry correct? Are there advantages to competition and programming diversity from giving radio broadcasters additional programming freedom? Or, alternatively, is the radio duplication rule needed to ensure continued competition and diversity, and if so, could elimination or modification of this rule potentially harm programming diversity? Do other sources of audio programming, such as satellite radio or digital streaming audio services, impact the analysis of the need for the radio duplication rule, and if so, how? Has there been consolidation in any aspect of the media marketplace, and if so, how does it impact our analysis? Should we also consider the impact of non-audio sources of information and entertainment, such as video providers, newspapers, and social media outlets, and if so, how? We also seek comment on whether elimination of the radio duplication rule would affect any other public interest goals articulated by the Commission; for example, the public interest goals of broadcast localism, competition and diversity. We also seek comment on whether the elimination or modification of this rule would impact local news gathering and journalism, and how the elimination or modification of this rule could impact consumers who rely on local news for information about their community. Would the elimination or modification of this rule have any special impact on current or prospective station owners who are women or people of color and their ability to compete? Commenters should support any assertions on these points with relevant data and analyses.

¹⁸ *Id.* at 12631, n.402.

¹⁹ *Id.* at 12631, para. 140. See also FCC, *Digital Radio*, <https://www.fcc.gov/media/radio/digital-radio> (last visited Oct. 16, 2019).

²⁰ See *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642, 9658 (2009); 47 CFR § 74.1201(g).

²¹ See FCC, *AM Revitalization Springs Forward*, March 30, 2016, available at <https://www.fcc.gov/news-events/blog/2016/03/30/am-revitalization-springs-forward>.

²² See *Opening of First Auction Filing Window For AM Broadcasters Seeking New FM Translators*, Public Notice, 32 FCC Rcd 5159 (2017); *Filing Instructions For Second Cross-Service FM Translator Auction Filing Window For AM Broadcasters (Auction 100) To Be Open January 25 – January 31, 2018, Freeze on FM Translator And Low-Power FM Station Minor Change Applications and FM Booster Applications January 18 – January 31, 2018*, Public Notice, 32 FCC Rcd 10173 (MB/WTB 2017).

10. We also seek comment on whether the radio duplication rule remains necessary to promote spectrum efficiency. Due in part to the increased number of stations, radio broadcast spectrum is now fully utilized. Demand for spectrum for wireless data applications has mushroomed, leading to the first-ever incentive auction to repurpose television broadcast spectrum for wireless broadband²³ and continuous Commission efforts to free more spectrum for wireless applications.²⁴ Spectrum remains a scarce and valuable resource, and increased demand for spectrum now pushes radio broadcasters, and indeed all spectrum users, to maximize efficiency. Should the Commission be concerned that absent the radio duplication rule, radio broadcasters will use spectrum less efficiently? Or, are the increased number of stations and demand for spectrum today sufficient to ensure that radio broadcasters use spectrum efficiently and supply varied programming to the local market so that the current same-service duplication rule can be eliminated or modified? Is there any evidence to show that radio broadcasters currently use their spectrum inefficiently? Would the limited amount of spectrum available be used more efficiently by current licensees broadcasting duplicative content or other parties to serve competition and diversity goals?

11. We note that in 1986, the Commission eliminated the previous cross-service programming duplication rule, which had restricted certain FM stations from rebroadcasting the programming of commonly owned AM stations in the same local market. Initially adopted to encourage the growth of the FM band and foster competition among local stations, the Commission eliminated the rule once it determined that the FM service was sufficiently established and FM stations were fully competitive.²⁵ The Commission found that the rule was no longer necessary to promote spectrum efficiency because market forces would lead stations to provide separate programming where economically feasible.²⁶ Where separate programming was not economically feasible, the Commission found that duplication was preferable to a station curtailing programming or going off the air entirely due to failure to comply with the rule.²⁷ Do the reasons that caused the Commission to eliminate the cross-service programming duplication rule apply equally to our consideration of the same-service duplication rule (section 73.3556)? Is competition among local broadcast radio stations sufficiently robust to ensure that overlapping, commonly owned same-service stations will provide separate programming where economically feasible? And where not economically feasible, is duplication of programming preferable to a station ceasing operation or curtailing programming?

12. In adopting section 73.3556 in 1992, the Commission noted certain benefits to permitting some level of program duplication. Specifically, the Commission found that some duplication could save local broadcaster resources invested in producing expensive programming.²⁸ In setting the limit on programming duplication at 25% of the total hours of a station's average weekly programming, the Commission sought to strike an appropriate balance between affording stations the ability to repurpose costly programming and continuing to foster competition and programming diversity in the local market.²⁹ Do the benefits previously identified by the Commission related to the duplication of

²³ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014), *aff'd Nat'l Assn of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir 2015).

²⁴ See e.g., *Wireless Telecommunications Bureau and Office of Engineering and Technology Approve Five Spectrum Access System Administrators to Begin Initial Commercial Deployments in the 3.5 GHz Band*, Public Notice, GN Docket No. 15-315, 34 FCC Rcd 8106 (WTB 2019).

²⁵ *1986 Report and Order*, 103 FCC 2d at 924, 925, 930, paras. 5, 7, 9-10, App. B (1986).

²⁶ *Id.* at 925, 926, 927, paras. 11, 13, 15.

²⁷ *Id.* In eliminating the rule, the Commission noted that duplication of programming on commonly owned AM and FM stations could reduce operating costs for many AM stations experiencing economic difficulties due to listeners switching to FM. *Id.* at 927-28, paras. 16-17.

²⁸ *1992 Radio Rules Order*, 7 FCC Rcd at 2798, para. 57.

²⁹ *Id.*

programming still exist in today's market? Given the changes that have occurred over the past twenty-seven years, as discussed above, does permitting duplication of 25% of the total hours of a station's average weekly programming continue to strike the appropriate balance? If we were to retain and modify the rule, should the amount of programming that can be duplicated on commonly owned stations be increased or decreased, and if so, what would that appropriate percentage be? We ask that commenters substantiate any proposed change in the amount of permitted programming duplication and explain the benefits that they believe would redound to the stations and their listeners. Further, if we were to modify and retain the radio duplication rule, would the restriction on broadcasters' programming choices raise any First Amendment concerns?

13. Additionally, in the event the rule is retained, does the trigger for the rule, namely, that the overlap between the stations constitutes more than 50% of the principal community contour service area of either station, continue to be the appropriate standard? Does an overlap of principal community contours appropriately identify stations that should be subject to a programming duplication rule? Should the overlap percentage be revised so that the rule applies if there is some greater, or lesser, amount of overlap between the commonly owned stations? And if so, what should that overlap be? We ask that commenters substantiate any proposed change in the amount of overlap before the program duplication rule would be triggered and explain any potential benefits or harms. For example, would any potential modification of the rule's trigger have differential effects on small entities? What impact could increasing or decreasing the contour overlap trigger have on duplicative programming? For example, could modifying the contour overlap trigger result in some communities receiving more duplicative programming, thereby harming localism and availability of diverse programming? Could modifying the rule so that it is triggered by a larger contour overlap percentage make valued programming available to more listeners?

14. Given the economic and technical challenges facing AM broadcasters, should the programming duplication rule treat the AM service differently than the FM service? For example, should we keep the rule for the FM service but eliminate it for the AM service? Given reception challenges in the AM band, particularly in urban environments, would eliminating or loosening the AM portion of the rule allow more listeners to hear popular programming?

15. Finally, we seek comment on the benefits and costs associated with possible modification or elimination of the radio duplication rule. We ask commenters supporting retention, modification, or elimination of the rule to explain the anticipated economic impact of any proposed action, including the impact on small entities, and, where possible, to quantify benefits and costs of proposed actions and alternatives. Does the current radio duplication rule create benefits or costs for any segment of consumers, advertisers, or broadcasters? If so, how would elimination or modification of the rule alter the benefits and costs? If the rule were eliminated or modified, how could that impact small entities' ability to compete for advertising dollars? What are the comparative benefits and costs of modifying the rule rather than eliminating it entirely?

IV. PROCEDURAL MATTERS

16. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),³⁰ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this NPRM. The IRFA is set forth in Appendix B.

17. *Initial Paperwork Reduction Act Analysis.* This document may result in new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501 through 3520). If the Commission adopts any new or revised information collection

³⁰ See 5 U.S.C. § 603. The RFA, see 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).

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.”

18. *Ex Parte Rules – 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.³¹ 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.

19. *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://apps.fcc.gov/ecfs/>.
- 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 12th 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.

³¹ 47 CFR §§ 1.1200 *et seq.*

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

20. *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 or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

21. *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 12th Street, SW, CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

22. *Additional Information.* For additional information on this proceeding, contact Julie Saulnier, julie.saulnier@fcc.gov, of the Industry Analysis Division, Media Bureau, (202) 418-1598.

V. ORDERING CLAUSES

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

24. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket Nos. 19-310 and 17-105 on or before thirty (30) days after publication in the *Federal Register* and reply comments on or before forty five (45) days after publication in the *Federal Register*.

25. **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 Act 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 73.3556 is removed and reserved.

APPENDIX B

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this NPRM. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in 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).² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

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

2. This NPRM seeks comment on whether the Commission should eliminate or modify the radio duplication rule, which limits same-service programming duplication to 25% for commercial AM and FM radio stations with substantial overlap that are commonly owned or subject to a time brokerage agreement.⁴ The radio broadcast industry has seen significant changes since the Commission adopted the rule in 1992, including a greatly increased number of licensed radio stations, the introduction of AM broadcasting to the FM band through FM translator stations, improved digital radio broadcast technology, and new, digital methods for distributing audio content to multiple devices. Based on these changes, the NPRM seeks comment on whether the radio duplication rule has outlived its utility or whether it remains necessary to further the public interest goals of competition, programming diversity, and spectrum efficiency for which it was intended.

B. Legal Basis

3. The proposed action is authorized under Sections 14(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 303.

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 rule revisions, if adopted.⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁶ In addition, the term “small business” has

¹ 5 U.S.C. § 603. The RFA, 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). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ 47 CFR § 73.3556.

⁵ 5 U.S.C. § 603(b)(3).

⁶ 5 U.S.C. § 601(6); *see infra* note 7 (explaining the definition of “small business” under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining “small organization” as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, 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(5) (defining “small governmental jurisdiction” as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or

(continued....)

the same meaning as the term “small business concern” under the Small Business Act (SBA).⁷ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁸ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Radio Broadcasting.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”⁹ Programming may originate in the establishment’s own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.¹⁰ Economic Census data for 2012 show that 2,849 firms in this category operated in that year.¹¹ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.¹² Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

6. The Commission has estimated the number of licensed the number of commercial FM radio stations to be 6,728, the number of commercial FM translator stations to be 8,177 and the number of commercial AM radio stations to be 4601, for a total of 19,505 commercial radio stations.¹³ Of this total, 19,496 stations (or 99.9%) had revenues of \$38.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Radio Database (BIA) on October 7, 2019, and therefore these stations qualify as small entities under the SBA definition.

7. In assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹⁴ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules may apply does

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sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.*

⁸ 15 U.S.C. § 632(a)(1)-(2)(A).

⁹ U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

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

¹¹ U.S. Census Bureau, U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112 Radio Stations) https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515112.

¹² *Id.*

¹³ See FCC, Broadcast Station Totals as of September 30, 2019, News Release (Oct. 2, 2019), <https://www.fcc.gov/document/broadcast-station-totals-september-30-2019>.

¹⁴ “[Business concerns] are affiliates of each other when one [concern] controls or has the power to control the other, or a third party or parties controls or has to power to control both.” 13 CFR § 121.103(a)(1).

not exclude any radio station from the definition of small business on this basis and is therefore possibly over-inclusive.

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

8. The NPRM seeks comment on whether to modify or eliminate the radio duplication rule. If the Commission were to eliminate the rule, it would be expected to reduce compliance requirements for radio broadcasters, including small entities. If the rule were retained but modified to increase the contour overlap necessary to trigger the rule or increase the amount of programming permitted to be duplicated on the commonly owned stations, the compliance requirements would be reduced for radio broadcasters, as the current restriction would be made more permissive. Conversely, were the rule to be modified so as to decrease the contour overlap necessary to trigger the rule or to decrease the amount of programming permitted to be duplicated, it could increase the number of radio broadcasters subject to the rule and/or potentially increase the compliance requirements for those broadcasters in situations that are not subject to the existing rule.

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

9. 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.¹⁵ The NPRM seeks comment on eliminating the radio duplication rule, which would relieve radio broadcasters, including small entities, from costs of compliance with the rule. The NPRM also seeks comment on modifying the rule, instead of repealing it, and seeks comment on alternatives that will minimize any burden on small entities, as well as comment on retention of the rule.

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

10. None.

¹⁵ See 5 U.S.C. § 603(c).

**STATEMENT OF
CHAIRMAN AJIT PAI**

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

In 1992, Barcelona hosted the 25th Summer Olympics, Bill Clinton was elected President of the United States, Quentin Tarantino released his first film, *Reservoir Dogs*—and the FCC adopted the current version of Section 73.3556, which prohibits certain commonly-owned radio stations from airing duplicative programming. Six Summer Olympics, three Presidents, and eight¹ Tarantino movies later, the duplicative programming rule lingers on.

This rule was meant to promote competition, programming diversity, and spectrum efficiency. But in the last generation, there have been massive changes in the radio marketplace. Over the past 27 years, the number of commercial AM, FM, and FM translator stations has nearly doubled, from 11,600 to 19,400. The number of non-commercial education stations has more than doubled, from 1,588 to 4,122. And the Commission has since established the low power FM service, which comprises over 2,000 hyper-local stations providing unique and hyper-local content. We've also seen broadcasters use online platforms to disseminate content and entirely new entrants such as Spotify and Pandora emerge as sources of audio entertainment. Suffice to say, these developments have yielded competition, diversity, and spectrum efficiency in the radio industry.

Which brings us to ask: Is this rule still necessary? And if so, should it be modified? Consistent with the overall theme of our *Modernization of Media Regulation Initiative*, we're kicking off this proceeding in order to answer these questions.

I want to thank the Commission staff that prepared this item: from the Media Bureau, Michelle Carey, Brendan Holland, Julie Saulnier, and Sarah Whitesell, and from the Office of General Counsel, David Konczal, Bill Richardson, and Royce Sherlock.

¹ "How Many Films Has Quentin Tarantino Made (& Why Does He Count It Wrong)?," available at <https://screenrant.com/quentin-tarantino-movies-how-many/>.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

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

It feels like this is the 75th item in this FCC's work to modernize our media regulations. (I'm only slightly exaggerating.) And while some might try to sneak in a quick nap when we start talking about rules governing the duplication of radio programming or, last month's barn burner, broadcast antenna siting, I think that would be a mistake. Because what nearly every one of our media modernization initiatives show is the unnecessary extent to which the FCC has historically micromanaged the business operations of local broadcasters. And it must stop.

There are clearly circumstances in which some measure of program duplication in the same market is beneficial, such as rebroadcasting locally oriented programming that is often expensive to produce but is of particular interest to local listeners. At the same time, there aren't always going to be compelling reasons to rebroadcast 100% of another station's programming. But those decisions should be determined in the market by the listening public and not in the pages of the Code of Federal Regulations. With the significant increase in the number of local radio stations and an explosion of other options for information and entertainment programming, I can see little reason for keeping this rule on the books. Perhaps the record will show otherwise.

The media marketplace is changing rapidly, and broadcasters need to change with it. So the FCC should let them get on with that effort. This is particularly true in the smallest markets, where we need to do everything we can to incentivize investment in local news and public interest programming. Yet these broadcasters remain subject to anachronistic and asymmetrical regulations that limit their ability to serve their markets in the most efficient and effective way possible. That's why I am glad the FCC is working to address these issues, big and small.

I would also like to thank my colleagues for agreeing to seek comment on two additional issues in today's Notice. First, I'm glad we are now asking questions about the impact of non-broadcast sources of news and information on the need for this rule. After all, we must consider the realities of the modern media marketplace when reviewing our broadcast rules. Second, the item now asks whether the FCC's existing restriction on programming raises any First Amendment concerns. I look forward to reviewing the record that develops on that question.

Finally, I want to thank the Media Bureau for its work on the item. It has my support.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
CONCURRING**

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

This week, PEN America—an organization devoted to the freedom of expression—released a new report on the status of local news in this country. Comb through it and you will find words like crisis, closure, and cuts. It details how newspapers and broadcasters are grappling with how to continue to produce the journalism and newsgathering that Americans rely on every day. It's important because we need this news to make informed decisions about our communities, our country, and our democracy.

Research shows that local news remains the most trusted form of journalism. It is also the news medium closest to the work of the Federal Communications Commission. That's because when we issue licenses for broadcasting, those licenses represent a public trust—and they come with a unique duty. Under the law, they are required to serve their community.

I think this background is essential context for today's rulemaking. It proposes to change a rule that prevents radio station licensees from devoting more than a quarter of their time to programming that duplicates another station in the same market. This policy was designed to support radio localism, competition, and diversity. Take it away and the quantity of local programming in any local market could easily decline. Newsgathering could fall by the wayside. Journalism jobs could be cut—in media markets where they are already cut to the bone. Instead of promoting such outcomes, I think we should be strengthening the institutions we have to support the production of local news and information.

I appreciate that we need to modernize our policies to reflect new realities for radio broadcasting. I also appreciate that my colleagues included some additional questions in this rulemaking at my request but hope that any changes we make do not lead listeners to find fewer voices and sources of local news the next time they tune in. I choose to concur.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS
CONCURRING**

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

Much of our time here at this agency is dedicated to managing the use of spectrum – an incredibly valuable and finite public resource that powers our wireless communications, from broadcasting to broadband. As of now, next month's open meeting will consider how to more efficiently use two bands to enable next generation licensed and unlicensed wireless services. Moreover, we remain in the midst of the post-auction transition of our broadcast incentive auction, a groundbreaking process that we used to repurpose a vast swath of spectrum from broadcasters to wireless service providers – responsive to changing market forces and consumer demands.

This weighed on my mind as we consider today a proceeding largely about whether to eliminate a rule preventing radio broadcasters from duplicating content on commonly owned stations in the same local area. I can think of precious few situations where such an arrangement would be the best use of our spectrum. For this reason, I concur today.

The prospect of allowing current radio station owners to broadcast duplicative content seems particularly questionable to me at a time when women and people of color remain largely absent from radio ownership and opportunities for new diverse owners to enter this business are few and far between. Our latest data, which I must note becomes increasingly outdated by the minute, indicates that women only own 8 percent of this country's commercial FM radio stations; African Americans own 1 percent; Latinos, about 4 percent; and Asian Americans own less than one half of one percent.¹ What does this amount to? Out of thousands of radio station licenses awarded by the Commission, women and people of color collectively only own a few hundred, if that.

So, while I am skeptical that eliminating or modifying this rule would best serve our goals as an agency, I am open to hearing from our stakeholders. To that end, and in the spirit of better understanding how a rule change here would impact diversity, I am grateful that my colleagues agreed to add additional questions. Namely, I am interested in learning more about whether these rule changes would have any special impact on women or people of color who currently own stations or hope to enter this industry, and whether spectrum would be used more efficiently by radio operators airing duplicative content or by other parties in service to our competition and diversity goals. I am hopeful that parties will engage on these questions in the record.

As always, I appreciate the hard work of the Media Bureau. Thank you.

¹ See FCC, Third Report on Ownership of Commercial Broadcast Stations at 14-15 (2017), <https://docs.fcc.gov/public/attachments/DOC-344821A1.pdf>.