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

In the Matter of	)	
	)	
Amendment of Section 1.420(f)	)	MM Docket No. 95-110
of the Commission's Rules	)	
Concerning Automatic Stays of	)	
Certain Allotment Orders	)	

REPORT AND ORDER

Adopted: July 5, 1996 **Released:** August 8, 1996

By the Commission:

I. INTRODUCTION

1. By this Report and Order, we delete that portion of Section 1.420(f) of the Commission's rules, 47 C.F.R. § 1.420(f), which, for rulemaking proceedings to amend the FM or TV Table of Allotments, provides for an automatic stay, upon the filing of a petition for reconsideration of any Commission order modifying an authorization to specify operation on a different FM or TV channel. By this action, we remove an incentive for the filing of petitions for reconsideration that are largely without merit, thereby expediting the provision of expanded service to the public and conserving Commission resources now expended processing these meritless petitions. Further, we shall apply this procedural change to pending proceedings, thereby lifting automatic stays currently in effect pursuant to the existing rule.[1]

II. BACKGROUND

The Existing Rule

2. The automatic stay rule currently provides, in pertinent part:

> ...The filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel shall stay the effect of a change in the rules pending action on the petition.[2]

[1] Pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, we initiated this proceeding on our own motion to improve Commission procedures governing proposals to amend the FM Table of Allotments and the Television Table of Allotments. Notice of Proposed Rulemaking in MM Docket No. 95-110, 10 FCC Rcd 7753 (1995).

[2] 47 C.F.R. § 1.420(f).

3. The rule applies to amendments to the TV or FM Tables of Allotments where the Commission has modified the authorization of the petitioner, another licensee, or another permittee to specify operation on a different channel. Where a licensee or permittee other than the petitioner might be directed to operate on a different channel in order to accommodate a proposed allotment change, that licensee or permittee is notified of the pending proceeding and is ordered to show cause, if any, why the modification should not be approved.[3] Also, although Section 1.420(f) refers only to petitions for reconsideration, the rule has also been applied routinely to orders challenged by applications for review.[4] In repealing the automatic stay provision for petitions for reconsideration, we also abandon this parallel policy.[5]

4. The automatic stay was adopted by the Commission in 1975 as part of a provision that requires service of petitions for reconsideration in proceedings for amendment of the FM and TV Tables of Allotments on any licensee or permittee whose authorized frequency could be changed. In addition to the automatic stay provision cited above, Section 1.420(f) provides:

> Petitions for reconsideration and responsive pleadings shall be served on parties to the proceeding and on any licensee or permittee whose authorization may be modified to specify operation on a different channel, and shall be accompanied by a certificate of service...[6]

Thus, the automatic stay was intended to help ensure that affected parties have the opportunity to comment before proposed modifications to their authorizations become effective.[7]

5. However, as discussed in the Notice, broadcasters whose authorizations are not proposed to be modified frequently file challenges to approvals of their competitors' proposals to improve service, thereby triggering the automatic stay. Only a very small percentage of these challenges are ultimately successful. The automatic stay prohibits licensees from constructing modified facilities authorized by the Commission until final resolution of any outstanding petition for reconsideration or until the stay is otherwise lifted. Our proposal to repeal the rule is intended to remove the incentive it creates for parties to challenge agency approval of a competitor's modification proposal simply to forestall institution of new competitive service. The Notice asserted that these petitions cause unjustifiable expense for parties and absorb valuable

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[3] See 47 U.S.C. § 316(a); 47 C.F.R. § 1.87. For convenience, we shall use the term "licensee" to include both licensees and permittees.

[4] See Arlington, TX, 6 FCC Rcd 2050, 2051 n. 2 (1991).

[5] For convenience, we shall use the term "petitions for reconsideration" to include applications for review.

[6] 47 C.F.R. § 1.420(f).

[7] See Memorandum Opinion and Order, 57 FCC 2d 699, 700 (1975).

staff resources that might otherwise be directed to resolution of new proposals to improve broadcast service.

Amending the Rule

6. Comments. Most of the commenters in this proceeding, including the Federal Communications Bar Association (FCBA), agree with the Notice's preliminary observations and analysis, supporting our proposal to eliminate the automatic stay rule.[8] Citing their own experiences, several licensees contend that the rule has harmed them and obstructed the public interest.[9] They assert that, as a general matter, the public is disserved by delaying the benefits of improved service. Further, they state, a licensee's reason for seeking a channel reallotment is often to allow it to remain financially viable. However, because of the delay caused by the automatic stay rule, the facilities in question may go dark or never be constructed at all, despite the Commission's having already approved the needed modification.[10]

7. In contrast, two other parties claim that they and the public interest are protected by the existing rule.[11] They argue that, once a licensee has appealed an involuntary reallotment, it should remain protected from having to cause disruption to itself and to the community by changing its operating channel until there is greater certainty, as determined by the appeal, that to do so would serve the public interest. These commenters state that the automatic stay rule serves the public interest in providing such protection.[12] Similarly, they add, the petitioners that are seeking the changes can themselves benefit from the automatic stay provision, because the rule spares them the expense of effecting a change that the Commission subsequently disallows

[8] Seven parties, five of whom support the proposal, submitted comments or reply comments in this proceeding.

[9] See Comments of Carlos J. Colón Ventura (Colón); KRTS, Inc. (KRTS); Randolph Weigner (Weigner); and Westview Communications (Westview). Our discussion of these individual situations is limited to the effect of the automatic stay, regardless of the outcome of the appeal. This Report and Order should in no way be interpreted to address the merits of any of these cases.

[10] See, e.g., Colón Comments at 3, 5.

[11] Comments of Sampit Broadcasters (Sampit) and Roy E. Henderson (Henderson). For example, Henderson, the permittee of station KHEN(FM), Caldwell, Texas, states that he has been directed to change to another channel in order to accommodate another broadcaster's reallotment. He adds that he is seeking reconsideration of that action, and that the automatic stay is currently protecting his and the public's interests during the appeal. Henderson Comments at 5. Henderson's petition for reconsideration was subsequently denied. Caldwell, TX, et. al, 10 FCC Rcd 7285 (Alloc. Branch 1995), recon. denied, DA 96-654 (released May 9, 1996).

[12] Sampit cites specific cases in which the automatic stay provision has protected a party from having to make what would have been an unnecessary change to its facilities: Sampit Comments at 2-3, citing Elkins, West Virginia, et. al, 6 FCC Rcd 5830 (Alloc. Branch 1991), recon. granted, 7 FCC Rcd 5527 (Policy and Rules Div. 1992), rev. denied, 10 FCC Rcd 10433 (1995); Ashland, MO, et. al, 8 FCC Rcd 1799 (Alloc. 1993), recon. granted, 9 FCC Rcd 2306 (Policy and Rules Div. 1994).

on appeal.[13] Even if most third-party appeals are meritless, the commenters assert, the benefits of preventing disruptive and involuntary changes that will have to be undone upon the resolution of even that small percentage of appeals that are merited outweigh the expense or inconvenience caused by the rule.[14] Finally, Henderson argues that if the Commission is concerned about the time being taken to process petitions for reconsideration, then the remedy is to devote more resources to processing. The commenter claims that it should not take long to dispose of meritless appeals, adding that the party seeking to uphold the Commission's action can always request expedited review.[15]

8. Commenters that favor repealing the rule respond that its primary purpose would still be promoted even if it were eliminated: affected parties would still have the opportunity to comment before a directed change in their facilities becomes effective. For example, the FCBA notes that the Commission's rules would still require it to inform affected stations of actions having an impact on their interests. Further, the commenter contends, the substantive merits of an appeal would not be affected by the absence of an automatic stay. Instead, the appellate process would more closely resemble that used by the Commission in broadcast contexts such as station sales, where the parties may consummate their transaction before finality at their own risk.[16] Moreover, to address the additional expenses incurred by an accommodating station when reconsideration is granted, commenters suggest that the station that had implemented the change could be required to reimburse the licensee for the costs of reverting to the original authorization.[17] Finally, commenters note that even without the automatic stay rule, the Commission has the authority to stay an action, either upon its own motion or upon the request of a party.[18] Therefore, they state, if it appears that a petition for reconsideration may have merit, the Commission can issue a stay, determining that the public interest would be served by maintaining the status quo, rather than by risking an unnecessary and disruptive change in facilities.[19]

9. Discussion. The record before us confirms the Notice's observation that the automatic stay rule has regularly resulted in delay in the commencement of construction and the provision of expanded service to the public. Not even those commenters who oppose a change in the rule

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[13] Sampit Comments at 3-4, citing Lancaster, Wisconsin, et. al, 6 FCC Rcd 6113 (Alloc. Branch 1991), recon. granted, 9 FCC Rcd 1937 (Policy and Rules Div. 1994).

[14] Henderson Comments at 1-3; Sampit Comments at 2-4.

[15] Henderson Comments at 4.

[16] FCBA Comments at 3, 5-6; KRTS Comments at 5-6.

[17] FCBA Comments at 4-5; KRTS Reply Comments at 3.

[18] 47 C.F.R. §§ 1.102(b) and 1.106(n).

[19] FCBA Comments at 5; Colón Reply Comments at 2-3; KRTS Reply Comments at 3.

dispute the assertion that the vast majority of petitions for reconsideration are ultimately denied. We believe that the many apparently meritless petitions for reconsideration the rule appears to have encouraged have imposed a substantial and unwarranted cost on local communities, individual broadcasters, and the Commission itself. First, significant populations are denied the advantages of improved service for long periods of time. Second, the inability to effect the authorized change can cause stations to go dark or not be constructed at all, harming both broadcasters and the public. Third, as both video and audio technologies evolve, television and radio broadcasters must be able to adapt as quickly as possible to changes in their competitive environments. The delays inherent in an automatic stay procedure necessarily constrain broadcasters' flexibility in this regard. Finally, by facilitating meritless petitions for reconsideration, the rule needlessly diverts resources that otherwise would be available to the Commission for the performance of other necessary functions. In short, we see numerous benefits to eliminating the automatic stay provision. We recognize, as Henderson has suggested, that more expeditious processing would reduce the delay involved in automatic stay cases, but unavoidable delays grounded in necessary pleading cycles and the time required to prepare and consider decisions disposing of the case, would remain.[20] Such postponements in implementing improved service to the public are simply unwarranted where they are prompted by meritless or frivolous petitions.

10. In assessing the advisability of deleting the stay provisions, we must, of course, consider any detriments which might result from such action. We conclude that any costs imposed by eliminating the stay provision are modest or can be significantly moderated by other, less restrictive processing approaches. Specifically, we note that permittees and licensees affected by allotment changes who would no longer be entitled to the protection of an automatic stay would nonetheless continue to have substantial procedural protections under the Commission's Rules. Because Section 1.420(f) will continue to require that petitions for reconsideration be served on any licensee or permittee whose authorization could be modified, the rights of these parties to be affirmatively informed of actions potentially affecting their interests will continue to be protected. And, any licensees or permittees whose authorizations would actually be modified to accommodate an underlying allotment change would continue to be afforded the full procedural benefits of a show cause proceeding in which they might object to the required frequency change. Further, in order to minimize the risk of imposing significant costs on licensees or permittees required to change channels as a result of an allotment change, we will make every effort to reach and promptly decide any petition for reconsideration filed against the underlying allotment action by such a party. Where it is not possible to do so, we retain the authority, as the commenters have noted, to impose a stay in individual cases and we will be particularly cognizant of requests for stay filed by any party whose authorization would be

[20] We note in this regard that, over the past year, the staff has significantly diminished the time it takes to process petitions for reconsideration. Moreover, the staff specifically undertakes to identify and quickly dispose of frivolous petitions.

changed involuntarily.[21] Finally, we note that elimination of the automatic stay provision will not prejudice final resolution of any challenges to the underlying staff decision.

11. As a result of the action we take here, parties requesting amendment of the Table of Allotments may, upon release of an initial staff decision granting their request, proceed to implement the change through applications and construction notwithstanding the filing of petitions for reconsideration of the initial decision. We emphasize, of course, that parties electing to proceed before the allotment decision is final do so at their own risk and must bear the costs of any subsequent action reversing or revising the allotment decision.[22]

Application to Pending Cases

12. Comments. Most parties that address the issue assert that the elimination of the automatic stay rule should be applied to all existing cases, to expedite service to the public. They note that, just as with prospective cases, no prejudice will occur to parties seeking reconsideration, because the Commission will still consider each case on its merits. Also, they state, the Commission can impose stays on a case-by-case basis if necessary.[23] On the other hand, Henderson argues that application to pending cases would impose increased inequity on licensees and their communities, and it would needlessly disrupt cases in progress.[24]

13. Discussion. We disagree with Henderson's analysis of applying the amended rule to pending cases. Section 1.420(f) of the Commission's Rules, 47 C.F.R. § 1.420(f), involves matters of Commission practice and procedure. The change we adopt today will not affect our substantive analysis of any pending petition for reconsideration or application for review. Changes in procedural rules may be applied in adjudications arising before their enactment

[21] See 47 C.F.R. §§ 1.102(b), 1.106(n), and 1.429(k). We note that a party has a high burden to meet in order to demonstrate that a stay of a Commission action is warranted. Specifically, the Commission will grant a motion for stay only if the moving party can demonstrate that: (1) there is a substantial likelihood that it will succeed on the merits; (2) it will suffer irreparable injury if the stay is not granted; (3) the injury which the party suffers will outweigh the harm to the adverse party; and (4) the stay will be in the public interest. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), and Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958).

[22] Colón proposes that we further amend Section 1.420(f) by making the application for review the immediate method of appealing an initial staff allotment action. Colón argues that eliminating petitions for reconsideration will save time for all parties, conserve Commission resources, and still ensure the right of all parties to full Commission review. Colón Comments at 4-6. We decline to adopt this proposal. We believe that our actions today are sufficient to accomplish the goals cited by Colón.

[23] See, e.g., FCBA Comments at 6; KRTS Comments at 6.

[24] Henderson Comments at 5.

without raising concerns about retroactivity.[25] Moreover, in repealing the automatic stay rule, we are concluding that such action will not cause undue inequity or disruption to future cases. Henderson does not indicate how the effect on pending cases would be any different, since all parties will continue to have their rights of appeal to the Commission undisturbed. Further, we have no indication in the record that any parties will endure any unusual hardships by application of the rule to pending cases. Consequently, we see no reason to retain a rule that we have determined does not serve the public interest. Accordingly, we shall lift the stay with respect to any petitions for reconsideration or applications for review pending as of the effective date of this Report and Order. By increasing the efficiency of our processes even sooner and with regard to more cases, we will further our objective of expediting provision of improved service to the public.

III. ADMINISTRATIVE MATTERS

Paperwork Reduction Act of 1995 Analysis

14. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, and found to impose or propose no modified information collection requirement on the public.

Ordering Clauses

15. ACCORDINGLY, IT IS ORDERED that Section 1.420(f) of the Commission's Rules, 47 C.F.R. § 1.420(f), IS AMENDED as set forth in Appendix C.

16. IT IS FURTHER ORDERED that any stay granted pursuant to Section 1.420(f) of the Commission's Rules, 47 C.F.R. § 1.420(f), that is in effect on the effective date of this Report and Order IS LIFTED.

17. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the amendment set forth in Appendix C WILL BECOME EFFECTIVE either 30 days after publication in the Federal Register or upon the receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, whichever is later.

18. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

19. Additional Information. For additional information regarding this proceeding, please contact Paul R. Gordon, Mass Media Bureau, Policy and Rules Division, (202) 418-2130.

[25] See Landgraf v. USI Film Products, 114 S.Ct. 1483, 1502 (1994), citing Ex parte Collett, 337 U.S. 55, 71, (1949).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in this proceeding.[26] The Commission sought written public comments on the proposals in the NPRM, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis[27] in this Report and Order is as follows:

A. Need For and Objectives of Action:

The Commission's Rules provide for an automatic stay, upon the filing of a petition for reconsideration, of any Commission order modifying an authorization to provide for operation on a different FM or TV channel, which is effected by way of an allotment rule making proceeding. The automatic stay provisions for certain reconsideration petitions in these proceedings has created an incentive for the filing of petitions for reconsideration that are largely without merit, thereby delaying the provision of expanded service to the public. In order to reduce that delay, the Commission is repealing the rule.

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

No comments were received specifically in response to the Initial Regulatory Flexibility Analysis contained in Notice of Proposed Rulemaking. However, commenters generally addressed the effects of the automatic stay rule on FM and TV licensees, including small businesses. Several commenters argued that the delay associated with the automatic stay can prevent licensees from effecting authorized improvements to their facilities, and they accordingly supported the rule change. A few commenters contended that the current delay protects third-party licensees from incurring the costs associated with needlessly modifying and remodifying their stations.

C. Description and Number of Small Entities To Which the Rule Will Apply:

1. Definition of a "Small Business"

Under the Regulatory Flexibility Act, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The Regulatory Flexibility

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[26] Notice of Proposed Rulemaking in MM Docket No. 95-110, 10 FCC Rcd 7753 (1995).

[27] Our final analysis conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, P.L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Subtitle II of CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996".

Act, 5 U.S.C. § 601(3) generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. 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 Small Business Administration ("SBA"). Id. According to the SBA's regulations, entities engaged in radio or television broadcasting may have a maximum of $5.0 million or $10.5 million, respectively, in annual receipts in order to qualify as a small business concern.[28] 13 C.F.R. §§ 121.201 This standard also applies in determining whether an entity is a small business for purposes of the Regulatory Flexibility Act.

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." While we tentatively believe that the foregoing definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the new rules on small business, we did not propose an alternative definition in the IRFA.[29] Accordingly, for purposes of this Report and Order, we utilize the SBA's definition in determining the number of small businesses to which the rules apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations and to consider further the issue of the

[28] This revenue cap appears to apply to noncommercial educational television stations, as well as to commercial television stations. See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

[29] We have pending proceedings seeking comment on the definition of and data relating to small businesses. In our Notice of Inquiry in GN Docket No. 96-113 (In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses), FCC 96-216, released May 21, 1996, we requested commenters to provide profile data about small telecommunications businesses in particular services, including television, and the market entry barriers they encounter, and we also sought comment as to how to define small businesses for purposes of implementing Section 257 of the Telecommunications Act of 1996, which requires us to identify market entry barriers and to prescribe regulations to eliminate those barriers. The comment and reply comment deadlines in that proceeding have not yet elapsed. Additionally, in our Order and Notice of Proposed Rule Making in MM Docket No. 96-16 (In the Matter of Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines), 11 FCC Rcd 5154 (1996), we invited comment as to whether relief should be afforded to stations: (1) based on small staff and what size staff would be considered sufficient for relief, e.g., 10 or fewer full-time employees; (2) based on operation in a small market; or (3) based on operation in a market with a small minority work force. We have not concluded the foregoing rule making.

number of small entities that are radio and television broadcasters in the future. Further, in this RFA, we will identify the different classes of small radio and television stations that may be impacted by the rules adopted in this Report and Order.

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We were unable at this time to define or quantify the criteria that would establish whether a specific television or radio station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any television or radio station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We attempted to factor in this element by looking at revenue statistics for owners of television and radio stations. However, as discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use to apply the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 C.F.R. § 121.104(d)(1). The SBA defines affiliation in 13 C.F.R. § 121.103. While the Commission refers to an affiliate generally as a station affiliated with a network, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, 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 C.F.R. § 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Instead of making an independent determination of whether radio and television stations were affiliated based on SBA's definitions, we relied on the data bases available to us to afford us that information.

3. Estimates Based on BIA Data

We have performed a study based on the data contained in the BIA Publications, Inc. Master Access Television Analyzer Database, which lists a total of 1,141 full-power commercial television stations. We have excluded from our calculations Low Power Television (LPTV) Stations and translator stations, two secondary services that have traditionally not had standing in allotment proceedings, which are the subject of this rule. It should be noted that the percentage figures derived from the data base may be underinclusive because the data base does not list revenue estimates for noncommercial educational stations, and these are therefore excluded from our calculations based on the data base. Non-commercial stations also have a diminished regulatory burden by virtue of the rule change adopted in this Report and Order. The data indicate that, based on 1995 revenue estimates, 440 full-power commercial television stations had an estimated revenue of 10.5 million dollars or less. That represents 54 percent of commercial television stations with revenue estimates listed in the BIA program. The data base does not list estimated revenues for 331 stations. Using an extreme scenario, if those 331 commercial stations for which no revenue is listed are counted as small stations, there would be a total of 771 stations with an estimated revenue of 10.5 million dollars or less, representing approximately 68 percent of the 1,141 commercial television stations listed in the BIA data base.

Alternatively, if we look at owners of commercial television stations as listed in the BIA data base, there are a total of 488 owners. The data base lists estimated revenues for 60 percent of these owners, or 295. Of these 295 owners, 158 or 54 percent had annual revenues of 10.5 million dollars or less. Using an extreme scenario, if the 193 owners for which revenue is not listed are assumed to be small, the total of small entities would constitute 72 percent of owners.

In summary, based on the foregoing extreme analysis based on the data in the BIA data base, we estimate that as many as approximately 771 commercial television stations (about 68 percent of all commercial televisions stations) could be classified as small entities. As we noted above, these estimates are based on a definition that we believe greatly overstates the number of television broadcasters that are small businesses. Further, it should be noted that under the SBA's definitions, revenues of affiliated businesses that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. The estimates overstate the number of small entities since the revenue figures on which they are based do not include or aggregate such revenues from non-television affiliated companies.

There are approximately 10,250 commercial radio broadcasting stations and 1,810 noncommercial radio broadcast stations of all sizes in the nation, with approximately 5,200 different commercial owners. For the same reasons as above, the exact number of small radio broadcasting entities to which the elimination of the rule will apply is unknown. Based on 1995 revenue estimates, the BIA Publications, Inc. MasterAccess Analyzer Database data base indicates that 3,314 commercial radio stations had an estimated revenue of $5.0 million or less. That represents approximately 90 percent of commercial radio stations with revenue estimates listed in the BIA program. The data base does not list estimated revenue for 6,571 stations. Using the

most extreme scenario, if those 6,571 stations for which no revenue estimates is listed are counted as small stations, there would be a total of 9,885 stations with an estimated revenue of $5.0 million dollars or less, representing approximately 96 percent of the 10,257 commercial radio stations listed in the BIA data base.

Alternatively, if we look at owners of commercial radio stations as listed in the BIA data base, there are a total of 5,207 owners. The data base lists estimated revenues for 29 percent of these owners, or 1,532. Of these 1,532 owners, 1,344 or 88 percent had annual revenue of less than $5.0 million. Using the most extreme scenario, if the 3,675 owners for which revenue estimates are not listed are assumed to be small businesses, then the total of small entities would constitute 96 percent of commercial radio station owners. Further, many noncommercial radio broadcasters are considered to be small entities. Thus, a large number of owners of radio broadcast facilities of several types (commercial AM, commercial FM, and noncommercial FM stations) could benefit from the rule amendment herein adopted.

4. Alternative Classification of Small Stations

An alternative way to classify small radio and television stations is by the number of employees. The Commission currently applies a standard based on the number of employees in administering its Equal Employment Opportunity Rule (EEO) for broadcasting.[30] Thus, radio or television stations with fewer than five full-time employees are exempted from certain EEO reporting and recordkeeping requirements.[31] We estimate that the total number of broadcast stations with 4 or fewer employees is approximately 4,239.[32]

[30] The Commission's definition of a small broadcast station for purposes of applying its EEO rule was adopted prior to the requirement of approval by the Small Business Administration pursuant to Section 3(a) of the Small Business Act, 15 U.S.C. § 632(a), as amended by Section 222 of the Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 222(b)(1), 106 Stat. 999 (1992), as further amended by the Small Business Administration Reauthorization and Amendments Act of 1994, Pub. L. No. 103-403, § 301, 108 Stat. 4187 (1994). However, this definition was adopted after the public notice and the opportunity for comment. See Report and Order in Docket No. 18244, 23 FCC 2d 430 (1970).

[31] See, e.g., 47 C.F.R. § 73.3612 (Requirement to file annual employment reports on Form 395 applies to licensees with five or more full-time employees); First Report and Order in Docket No. 21474 (In the Matter of Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395), 70 FCC 2d 1466 (1979). The Commission is currently considering how to decrease the administrative burdens imposed by the EEO rule on small stations while maintaining the effectiveness of our broadcast EEO enforcement. Order and Notice of Proposed Rule Making in MM Docket No. 96-16 (In the Matter of Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines), 11 FCC Rcd 5154 (1996). One option under consideration is whether to define a small station for purposes of affording such relief as one with ten or fewer full-time employees. Id. at ¶ 21.

[32] Compilation of 1994 Broadcast Station Annual Employment Reports (FCC form 395B), Equal Opportunity Employment Branch, Mass Media Bureau, FCC.

D. Projected Compliance Requirements of the Rule:

This Report and Order imposes no new reporting, recordkeeping, or other compliance requirements.

E. Significant Alternatives Considered Minimizing the Economic Impact on Small Entities and Consistent with the Stated Objectives:

The action taken does not impose additional burdens on small entities and, as discussed in detail at ¶¶ 9-10 of the Report and Order, will in fact have a positive economic impact, as entities, including small entities, will be able to increase their service more expeditiously and with fewer legal challenges. A small entity opposing Commission action by petitioning for reconsideration will still be able to seek a stay in an individual case, based on the merits of that case. In those cases where a third party is required to move involuntarily, all costs are borne by the party initiating the request for changes to the allotment table. This should adequately address the concerns of commenters opposed to this rule change.

F. Report to Congress

The Secretary shall send a copy of this Final Regulatory Flexibility Analysis along with this Report and Order in a report to Congress pursuant to Section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, codified at 5 U.S.C. § 801(a)(1)(A). A copy of this RFA will also be published in the Federal Register.

APPENDIX B

List of Commenters

Carlos J. Colón Ventura
Federal Communications Bar Association
Roy E. Henderson
KRTS, Inc.
Sampit Broadcasters
Randolph Weigner
Westview Communications

List of Reply Commenters

Carlos J. Colón Ventura
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APPENDIX C

Rules

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 1 -- PRACTICE AND PROCEDURE

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

AUTHORITY: 47 U.S.C. 151, 154, 303, and 309(j), unless otherwise noted.

2. Paragraph (f) of § 1.420 is revised to read as follows:

§ 1.420 Additional Procedures in Proceedings for amendment of the FM or TV Table of Allotments.

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(f) Petitions for reconsideration and responsive pleadings shall be served on parties to the proceeding and on any licensee or permittee whose authorization may be modified to specify operation on a different channel, and shall be accompanied by a certificate of service.

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