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

In the Matter of	)	
	)	
	)	
Review of the Commission's Regulations	)	
Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations	)	
Review of Policy and Rules	)	MM Docket No. 87-8

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1996 **Released: November 7, 1996**

Comment Date: February 7, 1997
Reply Comment Date: March 7, 1997

By the Commission: Commissioners Quello, Ness, and Chong issuing separate statements.

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APPENDIX A: Initial Regulatory Flexibility Analysis Regulatory Flexibility Act

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By the Commission:

I. Background

1. Last year, the Commission adopted a broad-ranging *Further Notice of Proposed Rule Making* in this docket.[1] In that item, the Commission proposed a new analytical framework within which to evaluate the Commission's national and local broadcast television ownership rules. In particular, the *TV Ownership Further Notice* set forth a competition and diversity analysis for examining our ownership rules. Based on this analysis, it proposed changes or revisions to the national television ownership rule, the local television ownership rule, and the radio-television cross-ownership rule. In addition, the Commission requested comment as to whether certain broadcast television local marketing agreements ("LMAs") should be considered to be an attributable interest in a manner similar to radio LMAs.

2. On February 8, 1996, the Telecommunications Act of 1996 (the "1996 Act")[2] was signed into law. Section 202 of the 1996 Act directs the Commission to undertake significant and far-reaching revisions to its broadcast media ownership rules, some of which -- like the relaxation of the national television ownership limit -- were proposed in the *TV Ownership*

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[1] *Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd 3524 (1995) (hereinafter *TV Ownership Further Notice*).

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996).

Further Notice.[3] Section 202 also requires us to review other aspects of our local ownership rules which were also the subject of the *TV Ownership Further Notice*. In particular, Section 202 requires the Commission to do the following: 1) to conduct a rulemaking proceeding concerning the retention, modification or elimination of the duopoly rule;[4] and 2) to extend the Top 25 market/30 independent voices one-to-a-market waiver policy to the Top 50 markets, "consistent with the public interest, convenience, and necessity."[5] Additionally, both the Act and its legislative history contain statements regarding the appropriate treatment of existing television local marketing agreements ("LMAs") under our ownership rules.[6] Because our previous request for comments occurred before the enactment of the 1996 Act, we believe inviting additional comments pertaining to the duopoly rule, the radio-television cross-ownership rule, and the treatment of existing television LMAs is appropriate.

3. As we noted in the *Television Ownership Further Notice*, "our concern with diversity is most acute with respect to local ownership issues."[7] We believe that we should proceed with reasonable caution to consider the impact of changes in industry structure made possible by the new legislation and by other forces changing, often in unpredictable ways, the marketplace for video programming may have on diversity. In light of the 1996 Act requiring a careful re-evaluation of our ownership rules, we believe it is important to solicit further comment on a number of issues before making final decisions in this proceeding. We confine this *Second Further Notice* to issues related to our local television ownership rule (the duopoly rule), the one-to-a-market rule, and LMA grandfathering issues. Issues relating to the national television ownership limit,[8] which was specifically modified by the 1996 Act, were addressed in a previously released *Order* implementing these modifications[9] and are also discussed in a

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[3] Section 202(c) of the 1996 Act eliminates the numerical limit on the number of television stations an entity could own nationally, and raised the national audience reach limit from 25% to 35%. *See Order*, FCC 96-91, 61 Fed. Reg. 10691 (March 15, 1996) (implementing this provision of the 1996 Act). The *TV Ownership Further Notice*, at 3568, sought comment on relaxing the national ownership rule in a similar manner.

[4] Section 202(c)(2) of the 1996 Act.

[5] Section 202(d) of the 1996 Act.

[6] Section 202(g) of the 1996 Act.

[7] *Television Ownership Further Notice* at 3574.

[8] *See* 47 C.F.R. § 73.3555(e).

[9] *See Order*, FCC 96-91, 61 Fed. Reg. 10691 (Mar. 15, 1996).

separate *Notice of Proposed Rule Making*[10] adopted contemporaneously with this *Second Further Notice*. In addition, issues related to the broadcast attribution rules are the subject of a *Further Notice of Proposed Rule Making*[11] in our attribution proceeding that is also being adopted today.

4. In the sections that follow, we invite comment on several discrete issues prompted by the 1996 Act. We also take this opportunity to solicit further comment in light of our review of comments filed in this proceeding to date. Specifically, we invite comment on our tentative conclusion to modify the local television ownership rule to a generally less restrictive Designated Market Area ("DMA")[12] and Grade A signal contour standard and on a number of specific waiver standards for the local television ownership rule. We also seek comment as we reexamine the radio-television cross-ownership rule in light of the 1996 Act. Finally, we seek comment on how, if we decide to make television local marketing agreements ("LMAs") attributable for ownership purposes, existing LMAs should be treated under the Act and the new rules.[13] These comments will supplement the record gathered in response to the Commission's January, 1995 *TV Ownership Further Notice*. The updated record will facilitate the Commission's efforts to resolve the issues and questions raised in the *Further Notice* and in this *Second Further Notice* prior to our issuing a *Report and Order* in this proceeding.

5. We note that the competition concerns that form an integral part of our analysis are similar in many respects to the analysis conducted by the Department of Justice in reviewing the antitrust implications of mergers, including mergers that involve broadcast stations. The Department's antitrust determinations regarding broadcast station common ownership are indeed relevant to our analysis and we do not wish to duplicate efforts. We also recognize, however, that our jurisdiction and obligation with respect to competition in broadcast markets is not coincident with that of the Department of Justice. Rather, our interests in this area are

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[10] MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 7, 1996) (*National Television Ownership Notice*).

[11] MM Docket No. 94-150 and 87-15, FCC 96-436 (rel. Nov. 7, 1996) (*Attribution Further Notice*).

[12] A DMA is a registered trademark of the A. C. Nielsen Company. A DMA represents a geographic area in the U.S. Each DMA consists of counties that, according to Nielsen, can be grouped together on the basis of actual household viewing patterns in those counties. For that reason, stations, networks, advertisers and others find DMAs to be useful in selling and buying advertising time on broadcast television stations.

[13] In a companion notice (*see supra* note 11), we seek further comment concerning possible revision of our attribution rules. We deal with issues related to attribution of LMAs in our companion item. The discussion of LMA issues in this *Further Notice* relates only to the grandfathering of existing television LMAs. *See infra* at ¶ 83.

complementary.[14] For example, our review of television transfer and assignment applications requires us to assess, unlike the Department of Justice, whether the public interest, convenience, and necessity would be served by the proposed transaction, including an analysis of the diversity effects of the transaction.

6. In soliciting comment on these issues, we note that the ownership rules and the proposals we make in this proceeding are designed for regulating analog television broadcasting. The introduction of digital broadcast television ("DTV") technology may transform the broadcast television market in ways that the current ownership rules may not contemplate.[15] We also note that, looking beyond any rule changes we may adopt in this proceeding, we will be conducting a biennial review of our ownership rules beginning in 1998 as required by the 1996 Act.[16] As part of these reviews, we will be in a position to assess future technological developments such as DTV, and to modify further our ownership rules as necessary.

II. The Local Television Ownership Rule

A. Background

7. Our local television ownership rule presently prohibits common ownership of two television stations whose Grade B signal contours overlap.[17] The *TV Ownership Further Notice* set out a comprehensive analytical framework for reviewing this rule in light of three principal goals. First, we seek through our local television ownership rule to promote diversity, particularly program and viewpoint diversity.[18] Second, we intend to foster the competitive

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[14] *See Jacor Communications, Inc.*, FCC 96-380 (released September 17, 1996), ¶ 16.

[15] Digital encoding and transmission technology will permit a station to broadcast multiple streams of Standard Definition Television ("SDTV") programming, a single High Definition Television ("HDTV") signal, a combination of the two, or a combination with other digital ancillary services. *See Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, Further Notice of Proposed Rule Making and Third Notice of Inquiry*, 10 FCC Rcd 10540 (1995); *Fifth Further Notice of Proposed Rule Making*, 11 FCC Rcd 6235 (1996).

[16] In this biennial review, the Commission "shall determine whether any of such [ownership] rules are necessary in the public interest as the result of competition" and the Commission "shall repeal or modify any regulation it determines to be no longer in the public interest." Section 202(h) of the 1996 Act.

[17] 47 C.F.R. § 73.3555(b) ("No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station (computed in accordance with 47 C.F.R. § 73.684) and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.").

[18] *TV Ownership Further Notice* at 3573-74.

operation of broadcast television stations' program distribution and advertising markets.[19] Finally, we seek to promote greater certainty by adopting generally applicable rules.

8. The television industry has grown and changed significantly since 1964 when we adopted the local television ownership rule.[20] In light of those changes, the *TV Ownership Further Notice* sought comment on a number of proposed modifications to the television local ownership rule. These proposals raised questions concerning the appropriate geographic scope of the rule and whether the Commission should permit joint ownership of two stations in the same geographic market.

9. In addition to updating our record in light of the new environment created by the 1996 Act,[21] in this *Second Further Notice* we solicit comment on our tentative conclusion as to the proper geographic scope of the local television ownership rule. This tentative conclusion is based on our review of comments filed to date concerning our earlier proposals and on our own reconsideration of those proposals in light of intervening events since the adoption of the *TV Ownership Further Notice*. This tentative conclusion and specific waiver criteria for allowing common ownership of two television stations in the same market are discussed in Sections B and C. We also recognize that the 1996 Act and additional Commission proceedings may have a

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[19] *Id.* at 3570-72. The *TV Ownership Further Notice* also discussed the effects of the local ownership rule on the video program production market. These effects, however, raise lesser concerns than the potential effects on other markets as the video program production market is more national in scope. Producers of video programming typically create product which is marketed for broadcast in more than one local market. *Id.* at 3572.

[20] *See TV Ownership Further Notice* at 3536-39. *See also* F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991). Since the rule's adoption, the number of commercial television stations has more than doubled. As of August 31, 1996, there were 1186 commercial television stations in the U. S. *See* FCC News Release, September 6, 1996. At the time the current local television ownership rule was adopted, there were 564 commercial television stations on the air. See the *1995 TV & Cable Factbook*. Multichannel video programming delivery systems have grown substantially. Approximately sixty-four million, or two-thirds of U. S. television households, now subscribe to cable or other multichannel video programming services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, App. G (1995). Accordingly, television viewers have more choices among video programming delivery services than at the time of this rule's adoption.

[21] In a series of *Orders* released this past spring, the Commission implemented a number of provisions of the 1996 Act that (1) eliminated the national numerical limitations on television station ownership and raised the television national audience reach limit from 25% to 35%, *Order*, FCC 96-91, 61 Fed. Reg. 10691 (March 15, 1996); (2) relaxed the dual network rule, *id.*; (3) eliminated national radio ownership limitations and substantially relaxed our local radio ownership rules, *Order*, FCC 96-90, 61 Fed. Reg. 10689 (March 15, 1996); and (4) reformed the broadcast license renewal process, by, among other things, eliminating comparative renewal challenges, *Order*, FCC 96-172, 11 FCC Rcd 6363 (1996).

cumulative effect on the ability of small stations or stations owned by minorities and women to compete effectively in this new environment.[22] We seek comment on what aggregate effect these proposed rules may have on small stations, or stations owned by minorities and women.

B. Geographic Scope of the Rule

10. The *TV Ownership Further Notice* proposed to narrow the geographic scope of the duopoly rule by prohibiting station overlaps on the basis of Grade A contours (with a radius of approximately 30-45 miles) rather than Grade B contours (with a radius of approximately 50-70 miles).[23] We also sought comment on whether Nielsen's DMA was a better measure of a local television market than Grade B signal contours.[24] While some commenters opposed any change of the local ownership rule at all,[25] most advocated a relaxation of the rule, with many supporting some form of the proposed Grade A test.[26]

11. We continue to question whether the Grade B contour best reflects the market in which a television station operates for purposes of our local ownership rule. The *TV Ownership Further Notice* indicated that the area within the Grade B contour does not necessarily reflect

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[22] *See, e.g.*, the Comments of NABOB in response to the *Notice of Inquiry* implementing Section 257 of the Telecommunications Act of 1996, Market Entry Barriers for Small Businesses, GN Docket No. 96-113, 11 FCC Rcd 6280 (1996). NABOB argued that many minority broadcasters have had difficulty competing for desirable properties since the passage of the 1996 Act. NABOB also asserted that it is difficult for minority owned stations to compete against stations that are "rapidly becoming parts of large broadcast groups." *Id.*

[23] These two signal contours are ones to which the Commission makes frequent reference. Grade B represents a signal strength which provides a picture which the median observer would classify as of "acceptable" quality to the best 50 percent of receiving locations at least 90 percent of the time. Grade A provide an "acceptable" picture to the best 70 percent of receiving locations at least 90 percent of the time. See *IEEE Transactions on Broadcasting*, Vol. BC-14, No. 4, December 1968; *see also Amendment of the Commission's Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service, Fifth Report and Order*, 41 F.C.C. 142, 177 (1951). The *TV Ownership Further Notice* stated that the Grade B contour encompasses approximately a 50-70 mile radius around the television station's transmitter while the Grade A encompasses approximately a 30-45 mile radius. *TV Ownership Further Notice* at 3574 n.144.

[24] *See TV Ownership Further Notice* at 3540.

[25] Black Citizens for a Fair Media, AFTRA, AFTRA-Pittsburgh Local, and Press Broadcasting oppose any change to the local television ownership rule. (A list of the commenters is attached as Appendix B. Abbreviations used in the text are those listed in Appendix B.)

[26] The parties supporting such a relaxation were Kentuckiana, Smith, Group W, Centennial, CBS, Pulitzer, Capital Cities/ABC, Malrite, Cedar Rapids, Post-Newsweek, Texas Operators, Golden Orange, Louisiana Television, Dispatch, and Texas Television.

the station's "core market," (*i.e.*, the viewers the station is trying to reach).[27] It further pointed to a number of benefits, including economies of scale, that could be gained by relaxing the rule.[28] Various parties have commented that the Grade B contour test should be relaxed because stations with overlapping Grade B contours are generally unlikely to have enough viewers in common to raise competition or diversity concerns if the stations were jointly owned.[29] Commenters also pointed to the greater number of alternatives now afforded many viewers with cable and other multichannel video program services.[30]

12. While we believe the Grade B test may be overly restrictive, we are concerned that the Grade A contour alone may not be the appropriate measure to adopt in its place. We recognize that in the *TV Ownership Further Notice*, we indicated that the record at the time supported moving to a Grade A approach. Upon further consideration of these issues and of the comments submitted in response to the *TV Ownership Further Notice*, however, we believe a combination of the DMA and Grade A signal contours may be a more appropriate measure of the geographic scope of the local television ownership rule.

13. Our tentative conclusion is that the local television ownership rule should permit common ownership of television stations in different DMAs so long as their Grade A signal contours do not overlap.[31] In this section, we set forth the reasons as to why this approach may more accurately reflect a television station's geographic market and may further our diversity and competition goals. We invite parties to comment on this tentative conclusion and how it

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[27] *TV Ownership Further Notice* at 3575.

[28] *Id.* The *TV Ownership Further Notice* cited commenters' asserted savings resulting from streamlining management, marketing, and station administration. The EI Study, at pages 90-91, claimed that eliminating the current Grade B rule would permit savings from combining supervisory and administrative personnel and certain operations. Economists Incorporated, *An Economic Analysis of the Broadcast Television, National Ownership, Local Ownership and Radio Cross-Ownership Rules*, May 17, 1995 (filed on behalf of ABC, CBS/Group W, and NBC), hereinafter, the "EI Study."

[29] *See* Group W Comments at 25 citing EI Study at 88; Capital Cities/ABC Comments at 21; Cedar Rapids Comments at 6.

[30] *See, e.g.*, EI Study at 9-13, Appendix A; Comments of ALTV at 19.

[31] This DMA/Grade A rule is nominally more stringent in very large DMAs than the existing rule because it would not permit common ownership of stations in the same DMA even if they had no Grade B contour overlap. However, the DMA/Grade A rule would, as a practical matter, have little adverse effect on existing broadcasters. As we explain later in this section (in our discussion of grandfathering), we believe that stations with no Grade B contour overlaps in the same DMA are, by and large, already commonly owned and we propose to grandfather these existing combinations of stations. Thus, we believe that there are few stations in the same DMA that could be owned in common under the existing rule that would be disadvantaged by this DMA/Grade A local television ownership rule.

might be superior or inferior to a standard that is based solely on signal contours or one that is based solely on DMAs.

14. The Relevance of DMAs. The record indicates that the DMA provides, as a general matter, a reasonable proxy of a television station's geographic market. We recognized this in the *TV Ownership Further Notice*, at 3577, in stating that "economic and diversity analysis . . . suggests that the DMA region definition may be more descriptive of a broadcast television station's potential market." For example, in its reply comments, Allbritton stated that DMAs "are workable, marketplace-recognized boundaries delineating common viewing patterns in areas of effective competition that facilitate transactions between advertisers and broadcasters."[32] CCA and ALTV also argued that the DMA was the relevant geographic market for local advertising.[33] The principal economic studies of broadcasting competition and diversity submitted in this proceeding -- filed by Economists Incorporated[34] and NERA -- also employed DMAs as the relevant geographic market in local advertising and in delivered video programming markets.[35]

15. The Commission has previously noted that the "benefit of the DMA definition is that it attempts to capture the actual television viewership patterns and each county is assigned to a unique television market, unlike the Grade A and B contour standards which ignore the carriage of broadcast signals over cable systems."[36] Thus, DMAs are designed to reflect actual

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[32] *See* Allbritton Reply Comments at i, 3.

[33] *See* Comments of CCA at 14; Comments of the ALTV at 7-8.

[34] *See* EI Study at 48-59. The EI Study looks at diversity "markets" defined by conducting the analytical exercise of imagining that a particular group of media, controlled by a hypothetical monopoly, has begun to produce news and public affairs programming with a monolithic (*e.g.*, liberal or conservative) viewpoint. Then EI asks what, if any, sources of alternative (in this case, political) viewpoints are available to consumers, to which they *could* turn. Additionally, EI asserts that it is necessary to ask what suppliers of other programming (*e.g.*, entertainment) could switch to the production of differing viewpoints on local news and public affairs. Table 7 is cited at 59 by EI as an "example" illustrating their approach to diversity. Table 7 relies on DMAs as measures of the geographic market.

[35] *See* the EI Study at 14, 29-32 and Appendices B and F. *See also* Howard P. Kitt and Phillip A. Beutel, National Economic Research Associates (NERA), Inc., *An Economic Analysis of the Relevant Advertising Market(s) within Which to Assess the Likely Competitive Effects of the Proposed Time Brokerage Arrangement between WUAB Channel 43 and WOIO Channel 19* (filed on behalf of Malrite), July 15, 1994, at 2-3. Finally, *see* Sumanth Addanki, Phillip A. Beutel, and Howard P. Kitt, NERA, *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule* (filed on behalf of the Local Station Ownership Coalition), May 17, 1995, at Tab K.

[36] *See TV Ownership Further Notice* at 3540.

household viewing patterns and advertising markets -- critical ingredients for determining a station's geographic market, both for competition and diversity purposes.

16. In designating DMAs, Nielsen collects viewing data from diaries placed in samples of television households four times a year. Nielsen assigns counties to DMAs annually on the basis of television audience viewership as recorded in those diaries.[37] Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in that DMA.[38]

17. Nielsen audience ratings data are used by television stations in deciding which programming should be aired, and by advertisers and stations in negotiating advertising rates.[39] Moreover, DMAs reflect the fact that a station's audience reach, and hence its "local market," is not necessarily confined to the area of its broadcast signal coverage. Rather, a station's over-the-air reach can be extended by carriage on cable systems and other multichannel delivery systems, as well as through such means as satellite and translator stations.[40]

18. The Commission traditionally has employed a similar geographic measure to the DMA in other rules. That geographic measure is the Area of Dominant Influence ("ADI"), used by the Arbitron Company to define a television station's geographic market according to audience viewing patterns. For instance, we now use ADIs to measure "audience reach" under our national television ownership rules,[41] although we have proposed to use DMAs in that context as well.[42] Also, television broadcasters are entitled to assert must-carry rights on cable systems throughout their ADIs.[43] Commercial market measurements such as DMAs and ADIs

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[37] *See Nielsen Station Index, NSI Reference Supplement 1994-1995*, at 1.

[38] *See TV Ownership Further Notice* at 3540.

[39] *See supra* notes 32-35.

[40] For example, Salt Lake City television stations are located in the northeast corner of the state of Utah. However, because of extensive use of microwave and translators, the Salt Lake City DMA encompasses the entire state of Utah and portions of other states.

[41] *See* 47 C.F.R. § 73.3555(e)(2)(i).

[42] *See National TV Ownership Notice* in MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 7, 1996).

[43] We note that the Commission uses ADIs to define the market within which a broadcast television station is entitled to cable must-carry or retransmission consent. However, Arbitron stopped updating its ADI market data in 1993. Accordingly, in future must-carry determinations, the Commission will use DMAs instead

are used by the Commission to define markets in other contexts as well, *e.g.*, waivers of the one-to-a-market rule in the top twenty-five markets and application of the Commission's "cross-interest" policy.[44]

19. We thus invite parties to comment further upon whether the DMA provides a reasonable, general approximation of a television station's geographic market, and whether the DMA is an appropriate basis for application of our local ownership rules. Furthermore, we seek comment on the consistency of DMA classifications from year to year. We recognize that some degree of change in these classifications is inevitable as viewing patterns shift, but ask parties to address whether these changes are so frequent or of such significance that they would undermine our goal of crafting an ownership rule that provides certainty and consistency in its application. We also seek comment on the basis upon which changes in DMA boundaries are made, and on whether boundaries are changed at the request of local broadcast television stations.

20. Supplementing the DMA Test with a Grade A Contour Standard. While it is our present view that DMAs may be better than either Grade B or Grade A signal contours as measures of the market, we also tentatively conclude that we should supplement our proposed DMA-based rule with a Grade A contour criterion. There are at least two reasons why we would include both the DMA and Grade A signal contours in the local television ownership rule. First, because the DMA is based on the preponderance, not necessarily the majority, of audience viewing, broadcast television stations in neighboring DMAs may in fact be such significant competitors that joint ownership should not be allowed. Broadcast television stations with overlapping Grade A signal contours, whether in the same DMA or not, may compete for viewers and advertising dollars. Second, the common ownership of two broadcast stations in different DMAs with overlapping Grade A signal contours may reduce voice and program diversity available to the viewers in the overlap area. Thus, we believe that a supplemental

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of ADIs. *Report and Order and Further Notice of Proposed Rule Making* in CS Docket No. 95-178, 11 FCC Rcd 6201 (1996). We have shifted our reliance on ADIs to DMAs in other contexts as well. *See, e.g., Brissette Broadcasting* 11 FCC Rcd 6319 n.3 (1996) (temporary waiver of the duopoly rule); *Media Communications Partners L.P.*, 10 FCC Rcd 8116, 8116 n.3 (1995) (waiver of the one-to-a-market rule).

[44] We note that waivers of the radio-television cross-ownership rule are based in part upon the number of radio and television "voices" for the top twenty-five ADIs. In smaller markets or in large markets with fewer than thirty voices, stations applying for waivers must meet a more stringent waiver standard than that required of stations in of the top twenty-five markets where there are at least 30 other broadcast voices (see Section III). 47 C.F.R. § 73.3555 Note 7. Also, in applying the Commission's "cross-interest" policy, we have focused on DMAs or ADIs to determine whether various media compete with one another. *See Roy M. Speer*, FCC 96-89, released March 11, 1996. Also, we used ADIs to identify the markets to which we applied our now-repealed Prime Time Access Rule, formerly 47 C.F.R. § 73.658(k) Note 1.

Grade A overlap criterion will serve to forestall potentially anti-competitive and diversity-reducing mergers in the broadcast television industry.

21. Total viewing for a particular broadcast television station may include viewing in counties both within and outside the station's DMA. Nielsen in fact examines all such viewing attributed to stations in counties in and outside the station's DMA and reports this viewing data under the heading "Station Totals."[45] The fact that there is viewing outside the DMA suggests that, at least in some instances, stations in neighboring DMAs may compete for some of the same audience. This may especially be the case in the eastern U.S. where counties and DMAs tend to be smaller than west of the Mississippi River. In these areas it may be that significant portions of an individual station's audience reside in adjacent DMAs, particularly for stations located near DMA boundaries. We seek comment on whether our composite DMA/Grade A rule will adequately address these concerns.

22. The Commission recognizes that actual viewing patterns may not be limited to instances where stations in different DMAs find their Grade A signal contours overlapping. We believe, however, that the areas in which such Grade A signal contours overlap are likely to be among those where the competitive and diversity concerns raised by common ownership of the two stations would be greatest. This is because the Grade A contour represents the core over-the-air market. We seek comment on this belief.

23. A further reason we tentatively conclude that a composite DMA/Grade A rule is advisable is because the DMA designation relies on ratings in both cable and non-cable households in describing the geographic reach and extent of television markets. We note, however, that slightly more than one-third of television viewers do not subscribe to cable.[46] Thus, reliance on a DMA market definition may conceal the extent to which viewers that rely on free-over-the-air television might be harmed from a diversity perspective if the duopoly rule takes no independent account of the extent to which two stations serve the same viewers solely on an "over-the-air" basis.

24. For example, the common ownership of two stations in different DMAs with overlapping Grade A contours will cause viewers that previously had access over the airwaves to two separately owned stations now having one fewer separately owned television station and having potentially one fewer source of program diversity available to them by broadcast. If

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[45] These audience data appear in Nielsen's *Viewers in Profile: The Local Market Report.* This publication, which also includes DMA audience figures, is used by television stations and advertisers in negotiating advertising rates.

[46] The October 21, 1996 issue of *Broadcasting & Cable* indicates at page 70 that cable penetration is 65.3 percent of the television household universe of 95.9 million.

those viewers do not subscribe to cable, then the potential decrease in diversity may be especially significant since the total number of television stations available to them will be fewer than the number available to cable subscribers. We seek comment on whether our tentative conclusion to employ a DMA/Grade A local television ownership rule will adequately address this potential diversity concern.

25. We ask for comment on whether there are any other such issues raised by reliance on DMA market designations which the Commission should consider. To the extent that such problems exist and are significant, will adding a Grade A component to the rule remedy them and thereby ease our competition and diversity concerns?

26. Large DMAs and Counties. We believe that a DMA/Grade A approach will generally be less restrictive than the current Grade B signal contour test. There may be some situations, however, where this is not the case, particularly in some geographically large DMAs west of the Mississippi River. In these situations, the DMA may be large enough so that two stations could be situated in the DMA yet not have overlapping Grade B contours; common ownership of the two stations would be permitted under the existing rule but not under the DMA/Grade A approach. We note, however, that a preliminary review of station locations and Nielsen DMAs suggests that there are currently few stations within the same DMA that could be commonly owned under the existing Grade B signal contour standard that are not already jointly owned. We invite comment on whether parties agree with this assessment, and whether, as a practical matter, the issue is essentially mooted by our proposal to grandfather these existing arrangements.[47] In the event this is not the case, we invite comment as to how we should address this issue in defining the local geographic market and implementing the television duopoly rule. One alternative would be to adopt a two-tiered rule under which we would permit common ownership both in cases where there is no DMA/Grade A overlap and in situations where there is no Grade B overlap. Such a rule would be no more restrictive than our current regulation and would not disrupt current ownership patterns. We seek comment on this approach.

27. A related issue concerns the possibility that certain western counties are sufficiently large, measured by area, that populations in cities or towns at opposite ends of the same county watch stations in different DMAs. Nielsen's methodology for assigning counties would nonetheless award the county based on the preponderance of overall viewing in the county. This could, potentially, lead to a situation in which Nielsen assigns a significant portion of the viewing population of that county, say residents of town A, to a DMA with stations that are not viewed by those television households. Such assignment might occur because Nielsen relies on the preponderance of cable and non-cable viewers in both town A and the larger town B at the opposite end of the county. As a result, under a DMA-based duopoly rule, stations

[47] *See supra* ¶ 28.

licensed to towns A and B could not be commonly owned even if their Grade B contours do not overlap and they actually serve entirely different markets. Our preliminary analysis, however, indicates that the number of instances in which this might occur may be small. Indeed, we note that Nielsen has, in certain instances, split counties among different DMAs based on the disparate viewing habits of residents in various locations in the county.[48] We seek comment on whether this assessment is accurate. What would be the appropriate response in the event the record shows that this issue in fact presents a significant problem?

28. Grandfathering. As noted, recognizing that our proposal could disrupt existing ownership arrangements involving stations in the same DMA with no Grade B overlaps, we seek comment on whether we should, if we adopt a DMA/Grade A rule, grandfather existing joint ownership combinations that conform to our current Grade B test. We also seek comment on whether the grandfathered status we propose for existing joint ownership combinations in the same DMA should cease at the time an applicant seeks to assign or transfer a grandfathered station, or whether we should allow the grandfathered status to be transferred to a new owner. In the event we were to grandfather these combinations, the apparently more restrictive aspects of a DMA/Grade A duopoly approach would appear to have little effect on existing broadcasters,[49] while the relaxation of the duopoly standard inherent in the change from a Grade B to a DMA/Grade A criterion would afford broadcasters significant opportunities to obtain the efficiencies which common ownership may offer. We tentatively conclude that, overall, our DMA/Grade A rule will make the local television rule less restrictive without harming our competition and diversity goals.

C. Exceptions and Waivers to the DMA/Grade A Approach

29. The *TV Ownership Further Notice* invited comment on whether, in at least some situations, we should allow a company to acquire stations within the same geographic market. We asked parties to address a number of possible exceptions to a "one station" local ownership rule, such as (1) permitting combinations of two UHF stations located in the same market or permitting combinations of one UHF station and one VHF station located in the same market, and (2) permitting such combinations only if a certain number of independently-owned broadcast television stations remain after the transaction.[50] We also sought comment on the criteria to be

[48] For example, Kern County in California is split between two DMAs: Bakersfield and Los Angeles. Also, Apache County in Arizona is split between the Phoenix DMA and the Albuquerque DMA. *See DMA Test Market Profiles, 1995*, Nielsen Station Index, A. C. Nielsen Company, 1995.

[49] *See* note 31.

[50] *TV Ownership Further Notice* at 3575-78.

used in a case-by-case waiver approach.[51] In response, a number of parties opposed any relaxation of our current rules,[52] while other commenters urged us to modify our rules to permit same-market combinations in certain circumstances.[53]

30. We invite parties to update the record on the general issue of whether we should permit television duopolies in certain circumstances by rule or waiver. We also seek additional comment on a specific exception and on specific waiver criteria for the local station ownership rule. Specifically, we consider the advisability of affording UHF stations more lenient treatment than VHF stations. We also invite comment on continuing the existing satellite exception to the duopoly rules.[54] There are also several possible waiver criteria that might permit common ownership of stations in the same local market. We solicit comment on the appropriateness of these exceptions and waiver criteria, which we examine in more detail in sub-sections C.1 and C.2.

31. We invite parties to update the record on these issues to reflect the changes effected by the 1996 Act and other recent developments they may believe are relevant. We also reiterate our request that parties arguing for relaxation of the local ownership rule provide specific evidence of the projected economic benefits of such relaxation.[55] We seek to develop better quantitative estimates of the efficiencies that may result from greater ownership concentration in local broadcasting in order to weigh these benefits against the potential harm of such concentration to competition and diversity.

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[51] *Id.* at 3576.

[52] *See supra* note 25.

[53] *See* Centennial Comments at 2 (Grade B contour overlap prohibition should be maintained, any relaxation to Grade A contour delineation should be limited to UHF stations, any relaxation to permit joint ownership where city grade contours overlap should be limited to UHF licensees that are not group owners and only upon a showing of public interest benefit); NBC Comments at 27 (permit Grade A overlap as long as 7 separately owned stations remain and competition not harmed); CBS Comments at 57 (public interest showing supports joint ownership); Lee Comments at 5-6 (permit some Grade A overlap); Group W Comments at 28 (permit overlap involving at least one UHF station in the Top 25 markets); Golden Orange Comments at 2, Ellis Comments at 6, ALTV Comments at 29, MAC Comments at 8, Louisiana Television Comments at 2-7, NBC Comments at 26, New World Comments at 25-26 (permit UHF/UHF and UHF/VHF combinations); Texas Television Comments at 2, 5-7 (permit UHF/UHF combinations); Cedar Rapids Comments at 6 (permit overlapping Grade A contours); New World Comments at 24 (first come, first served basis provided six separately-owned licensed stations remain in medium and large markets); WYDO Comments at 3-5 (own up to 50 percent of a local market share).

[54] *See infra* ¶ 37.

[55] *TV Ownership Further Notice* at 3576.

32. In addition, we seek further evidence regarding the relationship between ownership and diversity. Greater ownership concentration traditionally has been thought to reduce diversity.[56] We seek comment, analysis and evidence on whether it reduces viewpoint and program diversity. For example, would a single owner of two stations be less likely to present diverse opinions, and less likely to serve diverse audiences, than would two unaffiliated owners? Conversely, would an owner of two stations in a market be more likely to counterprogram and thereby serve the interests and views of more viewers?[57] With respect to these questions, what can we learn from the waivers of local television ownership rules that we have already granted? Have they led to a decrease or an increase in programming or viewpoint diversity? Similarly, taking account of the important differences between television and radio, what can we learn from "radio duopolies," which have been permissible since 1992?

1. Exceptions

a. Distinguishing Between UHF and VHF Stations

33. In response to the *TV Ownership Further Notice*, several parties raised a threshold issue in arguing that local television station combinations involving UHF stations should receive more favorable treatment than those involving VHF stations.[58] We invite parties to comment on the extent to which we should explicitly distinguish between UHF and VHF stations in determining whether to allow common ownership of stations in the same market. In particular, should we treat the common ownership of UHF stations in the same DMA or even in the same city more favorably than that of non-UHF stations? As several parties noted,[59] some UHF stations are major network affiliates with large market shares, but many are not. These parties

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[56] *See, e.g., First Report and Order*, Docket No. 18110, 22 F.C.C.2d 306, 310-311 (1970); *see generally TV Ownership Further Notice* at 3550-3551. Similarly, our minority ownership policy has been premised on the belief that minority ownership and participation in station management is in the public interest because it increases the diversification of control of the media and the diversity of program content. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980-982 (1978).

[57] *See TV Ownership Further Notice* at 3550-51 (citing studies that argue that a monopolist may have an incentive to air diverse programming to generate the largest collective audience it reaches).

[58] ALTV, Tribune, and Silver King argue that UHF stations are not assured of must-carry on cable even if the Supreme Court rules favorably because historic signal disparities permit cable systems, under the 1992 Cable Act, to file a petition claiming that the cable community is not located in the station's market. Furthermore, they allege that VHF stations remain more attractive to networks than UHF stations, and that UHF can compete with VHF on signal quality only at great expense. *See also* Comments of Centennial, Louisiana Television, Dispatch, Tribune, Jet, Golden Orange, and Texas Television.

[59] *See, e.g.*, Kentuckiana Comments at 7-9; Post-Newsweek Comments at 7.

therefore raise a question as to the continuing validity of the need for differential treatment of UHFs.

34. With respect to our review of the local television ownership rule, we ask whether the reasons historically given for distinguishing between VHF and UHF stations remain valid for some purposes.[60] Commenters who believe UHF disadvantages exist and remain relevant to Commission policy concerns should state whether this issue is better addressed by looking at those factors directly as part of a case-by-case waiver analysis rather than as part of a general UHF-based exception to the rule.

b. Satellite Stations

35. Television satellite stations are authorized under Part 73 of the Commission's Rules to retransmit all or part of the programming of a parent station. The two stations are ordinarily commonly owned.[61] Satellite stations are generally exempt from our broadcast ownership restrictions. An application for television satellite status will be presumed to be in the public interest if the applicant meets three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station.[62]

36. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations. Later we began to authorize satellite stations in smaller markets already served by full-service operations but not reached by major national networks. More recently, we have authorized satellite stations

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[60] Pursuant to Section 73.3555(e)(2)(i) of the Commission's Rules, we attribute UHF facilities with only one half the audience reach of VHF stations in the same market when calculating a group station owner's national audience reach. This "UHF discount" policy was adopted in 1985 as the result of a concern that UHF stations had inherent signal reach limitations compared to VHF stations. In the *National TV Ownership Notice* adopted today we defer consideration of the question of the UHF discount until our biennial review of our broadcast ownership rules that we will conduct in 1998 pursuant to the 1996 Act. As part of that review we will examine the continuing need for the discount policy. *See National TV Ownership Notice* in MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 6, 1996). Parties are invited to comment on any specific ownership issues they believe the Commission should review in particular as part of its overall 1998 biennial review of these rules under the 1996 Act.

[61] *See Television Satellite Stations, Report and Order*, 6 FCC Rcd 4212 (1991) (petition for reconsideration pending).

[62] *Id.*

in larger markets when the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.[63]

37. We presently see no reason to alter our current policy exempting satellite stations from our local ownership rules.[64] Our satellite station policy, resting in significant part on the satellite station's questionable financial viability as a stand-alone operation, has furthered our ownership policies by adding additional voices to local television markets where otherwise no additional voices might have emerged. The criteria we utilize to evaluate requests for satellite status -- including service to underserved areas and a demonstrated unwillingness by potential buyers to operate the station on a stand-alone basis -- ensure that satellite operations are consistent with our underlying goals of promoting diversity and competition. Under these circumstances, we believe that continued exception of satellite stations from the local ownership rules is appropriate. We invite comment on this conclusion.

2. Waivers

38. We sought comment in the *TV Ownership Further Notice* on a number of general criteria that might be considered in a case-by-case approach in allowing common ownership of stations within the same local market. These criteria included the financial condition of the station to be purchased, the competition and diversity characteristics of the market, potential public interest benefits, and the number of independent suppliers serving the market.[65] We now seek comment on the more specific waiver criteria described in sub-sections 2.a through 2.e. While we believe that it is proper and consistent with congressional intent to seek comment on these waiver criteria, we reaffirm that "our concern with diversity is most acute with respect to local ownership issues."[66] We intend to proceed cautiously with respect to waivers of the television duopoly rule to ensure that broadcast television licensees continue to serve the public interest, convenience, and necessity. Pending the outcome of this proceeding, we will follow

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[63] *See* Note 5 to Section 73.3555 of the Commission's rules. There are 107 licensed satellite stations. *See* BIA MasterAccess TV Database, BIA Publications, Inc., Chantilly, VA 22021. They are a small proportion of the total of 1550 full-power television stations licensed as of August 31, 1996. *See* FCC News Release No. 64958, September 6, 1996.

[64] *See* 47 C.F.R. § 73.3555, note 5. In addition, pursuant to 47 C.F.R. § 73.3555(e)(2)(ii), we do not count the audience reach of satellite stations when calculating a group television station owner's national audience reach. However, in the pending national television ownership proceeding, we have proposed to repeal that satellite exemption when the parent and satellite stations are in separate markets. *See National TV Ownership Notice* in MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 7, 1996).

[65] *See TV Ownership Further Notice* at 3576-3577.

[66] *See TV Ownership Further Notice* at 3573.

an interim waiver policy whereby we will generally grant waivers of the television duopoly rule, conditioned on compliance with the requirements ultimately adopted in this proceeding, where the television stations seeking common ownership are in different DMAs with no overlapping Grade A signal contours. We will be disinclined to grant waiver requests not falling in this category (i.e., those involving stations in the same DMA or with overlapping Grade A signal contours), absent extraordinary circumstances.[67]

a. UHF/VHF

39. We have discussed, as a possible exception to the local television ownership rule, exempting certain UHF combinations from the application of the local television ownership rule. Another approach toward the same end would be to create waiver criteria by which the Commission might waive the application of the rule for certain UHF combinations. Many of the comments from parties on possible criteria to be used in permitting common ownership of stations within the same local market focussed on permitting combinations involving UHF stations. Golden Orange and Louisiana Television argued that UHF/UHF and UHF/VHF combinations should be allowed without restriction. Alternatively, they suggested that combinations should be allowed in DMAs where there is substantial independent competing media, with media defined to include broadcast video, cable systems, and local daily newspapers.[68] Media America Corporation ("MAC") argued that joint television ownership can promote localism and may be the only way for local broadcasters to compete with national media conglomerates. MAC limited its proposal to combinations where at least one of the merging companies was a UHF station in markets where four full-power television voices would remain after the transaction.[69]

40. Given these comments, we request additional comment on whether we should treat UHF station combinations differently from VHF combinations with respect to local ownership and, if so, how. Commenters citing disadvantages that they believe UHF stations continue to suffer should also list very specific criteria for waiving the duopoly rule that would correspond to those disadvantages, e.g., small audience share or limited area of signal coverage. We ask parties to comment on the use of such criteria in granting waivers in light of our competition and diversity goals. In addition, while the 1996 Act itself is silent on the question, the *Conference Report* to the Act states that "[i]t is the intention of the conferees that, if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling

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[67] *See supra* ¶¶ 56-58.

[68] *See* Comments of Golden Orange at 2-3; Comments of Louisiana Television at 2.

[69] *See* Comments of Media America at 8.

circumstances."[70] Thus, we seek comment on whether there are particular locations (such as Alaska or Hawaii) where there are such compelling circumstances that the Commission might allow some VHF/VHF combinations for reasons analogous to those cited in support of UHF combinations.[71] Commenters supporting this view should describe the nature of the showing that should be required and the effect of any such waivers on diversity and competition in these markets.

b. Failed Station

41. We invite comment on whether, if an applicant can show that it is the only viable suitor for a failed station, the Commission should grant the application regardless of contour overlap or DMA designations. A "failed" broadcast station for purposes of our one-to-a-market rule waiver standard is a station that has not been operated for a substantial period of time, *e.g.*, four months, or that is involved in bankruptcy proceedings.[72] We ask whether this failed station standard would be appropriate in evaluating a potential duopoly application.[73] We invite comment on whether it is preferable to have two operating stations with a single owner than to have one operating and one dark station. The Commission also invites comment on whether any such standard should be relatively strict or generous. For example, should only failed stations qualify, or should we consider failing stations as well? If so, what is the appropriate definition of a failing station? Should applicants be required to demonstrate that they are the only qualified and viable purchaser for the failed stations? We seek comment on whether this standard is appropriate, on how a demonstration that a station has "failed" or is failing might be accomplished.

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[70] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996) ("Conference Report").

[71] *See* 142 CONG. REC. S687, S705 (daily ed. Feb. 1, 1996) (colloquy between Senators Hollings and Inouye suggesting that the television market in Hawaii may raise the type of compelling circumstances that would warrant common ownership of two VHF television stations in the same market).

[72] *See* note 7(2) of 47 C.F.R. § 73.3555.

[73] We note that in the *Sixth FNPRM* in the DTV proceeding we stated that no new NTSC applications would be accepted beyond 30 days after publication of the item in the Federal Register. However, under the proposed definition of a failed station, the station would have retained its license and would not need to make application for a new one. *See Advanced Television Systems and their Impact on the Existing Television Service, Sixth Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 61 Fed. Reg. 43209, ¶ 106 (rel. Aug. 14, 1996)("*Sixth FNPRM*").

c. Vacant and New Channel Allotments

42. In our recent *Sixth Further Notice of Proposed Rule Making* ("*Sixth FNPRM*") in the DTV proceeding, we proposed to delete all vacant TV allotments in order to provide existing television stations with DTV allotments with comparable coverage.[74] In the *Sixth FNPRM*, however, we indicated that "in some communities -- mainly rural areas -- unused channels may remain even after all existing broadcasters receive allotments."[75]

43. In the *Sixth FNPRM*, we sought comment on whether and how we should make such vacant channels available. Among other questions, we asked:

> Should we consider other possibilities, such as permitting existing broadcasters, either individually or jointly, to use the available channel or channels for additional broadcast or subscription programming? Should we permit broadcasters in a community to propose . . . an allotment plan that would allow them to use, jointly or individually, more than one vacant channel apiece?[76]

44. We also reiterate our question from the *Sixth FNPRM* whether we would be required in this situation to consider other mutually exclusive applications.[77] In *Ashbacker*, the Supreme Court held that the Commission is required under Section 309 of the Communications Act[78] to give consideration to all *bona fide* mutually exclusive applications.[79] In so holding, the Court did not, however, preclude the Commission from establishing threshold qualification standards that must be met before applicants are entitled to comparative consideration. Indeed, in *Storer*, the Court held that, in the context of a rule making proceeding, the Commission may

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[74] *Id.*

[75] *Id.*, ¶ 45. Also, we noted that "in Bangor/Orono, Maine, currently there are four NTSC stations. The . . . DTV Table of Allotments provides DTV allotments for these four stations. However, even considering LPTV and TV translator operations, there appears to be sufficient spectrum in this area to operate a number of additional channels, either NTSC or DTV." *Id.*, n.22.

[76] *Id.*, ¶ 46.

[77] *See Ashbacker Radio v. FCC*, 326 U.S. 327 (1945).

[78] 47 U.S.C. § 309.

[79] *See also Reuters Ltd.v. FCC*, 781 F.2d 946 (D.C. Cir. 1986); *Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry*, 10 FCC Rcd 10541, 10545 (1995).

establish eligibility standards that applicants must meet in order to receive comparative consideration.[80]

45. We invite comment on whether we should entertain a waiver request to the local television ownership rule to enable a local broadcast television licensee to apply for a channel allotment that has long remained vacant or unused, *e.g.*, five years. We believe that it may not be in the public interest to have allotted broadcast channels lie fallow -- particularly in markets where it might be possible to allow additional NTSC stations to come on the air without adversely impacting the proposed DTV allotment table and the transition to digital television. Evidence that an allotment has remained vacant for five years, or evidence of a pattern of failure in applications for that allotment, may suggest that the operation of another television station on a stand-alone basis in the community in question is not economically viable. In those circumstances, the public interest in diversity may be advanced by permitting an existing station in the market to acquire the station, rather than allowing the channel to remain unused. Similarly, if it is possible to create new channel allotments in a market without interfering with nearby channels and without adversely impacting the proposed new DTV allotment table,[81] we seek comment on whether the Commission should entertain applications by an incumbent television licensee to establish a new channel in a market.[82] We note that there currently is a freeze placed on new applications as the result of our DTV proceeding.[83] We anticipate that, in the event we adopt a vacant channel waiver criterion, it would not apply until a DTV table of allotments is finalized in that proceeding.[84] We seek comment on this issue, including whether there may be circumstances where it would be appropriate to consider such waiver requests before DTV allotments are finalized.

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[80] *See United States v. Storer Broadcasting*, 351 U.S. 192 (1956).

[81] We note that these new allotments would not be paired with an additional DTV conversion channel as contemplated in our proposal to allow existing broadcast television stations to convert to digital technology. *See Sixth FNPRM*, 61 Fed. Reg. 43209.

[82] For example, a channel study of Bangor and Portland (ME) suggests that some additional UHF stations could be added in Bangor and some additional UHF stations in Portland. In such situations, local television broadcasters might no longer be prohibited from filing applications for the vacant allotment or from petitioning to change the Table of Allotments. If the local broadcaster was found to be qualified, a license for a second station in the market might be granted in these circumstances. We note that, unless we establish new more restrictive threshold eligibility criteria, the broadcaster's application would be subject to competing applications as provided under our rules (47 C.F.R. § 73.3564(c)), which could require a comparative hearing.

[83] *See supra* note 72.

[84] *See Sixth FNPRM*, 61 Fed. Reg. 43209.

46. A vacant channel waiver criterion is analogous to waivers for failed stations. We believe that granting waivers for failed stations and vacant allotments would be consistent with our objective to advance diversity and competition. We therefore seek comment on whether these failed and vacant channel waiver proposals increase the amount and diversity of programming and viewpoints available in the market. Similarly, we seek comment on a possible competitive or economic efficiency rationale for prohibiting existing broadcasters from expanding their capacity into unused broadcast spectrum that no other person wants to use. Specifically, we ask commenters to discuss the rationale that unassigned channels might need to be preserved for new broadcasters to accommodate future growth in demand for local television broadcasting. We solicit comment on these observations and especially upon the feasibility of this proposal given the proposed new DTV allotment table.

d. Small Market Share/Minimum Number of Voices

47. In addition, the Commission seeks comment on whether it should entertain waivers to allow joint ownership of stations that (1) have very small audience or advertising market shares and (2) are located in a very large market where (3) a specified minimum number of independently owned voices remain post-merger. The purpose of such a waiver standard would be to enhance competition in the local market by allowing small stations to share costs and thereby compete more effectively. It could also increase the availability of programming and, perhaps, program diversity were such stations to use their economic savings to produce new and better-quality programming or related enhancements. Such advantages may be particularly helpful to small and independent UHF stations.

48. Market Share. We seek comment as to the size of market shares that would be sufficiently low to meet this standard. We also seek comment on whether a small market share waiver standard would tend to limit the application of this waiver standard, either absolutely or generally, to UHF stations and to independent stations not affiliated with any major network. In addition, if after a duopoly waiver is granted, such joint ownership results in the previously struggling stations developing large shares of the viewing audience, should the Commission terminate the waiver for joint ownership in the event the owner seeks to assign or transfer the stations' licenses?

49. Minimum Number of Voices. The *TV Ownership Further Notice* discussed whether waivers would be appropriate where a sufficient number of independently owned

broadcast television voices remained in the market post-merger.[85] Several parties argued for variations on similar waiver standards.[86]

50. We have previously sought comment on whether a minimum of six independently owned broadcast television stations in an ADI is an appropriate standard in light of our competition and diversity goals.[87] In addition, the *TV Ownership Further Notice* tentatively concluded that non-broadcast sources of video programming and local news and information, such as cable, newspapers and radio, are relevant for diversity purposes,[88] and solicited comment on whether such non-broadcast media should be counted for purposes of setting local ownership limits.[89] At the same time, we also emphasized that despite these other media, "we must be cautious in our analysis of outlet diversity" because "[a]ll services are not equally available to the general population."[90] For example, some may be subscription only, others may not be available in all areas.

51. Comments from parties ranged from those that would include a variety of media in addition to broadcast video in evaluating diversity to those that would limit the analysis to broadcast video only. The EI Study, for example, argued for including local newspapers, cable, radio stations, magazines, and Direct Broadcast Satellite Service (DBS) in considering diversity.[91] An alternative point of view is provided by Black Citizens for a Fair Media *et al.* They argue that television is the dominant source of news and must therefore be considered separately from other media.[92]

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[85] *TV Ownership Further Notice* at 3576-78.

[86] NBC argued for a "seven-owner" presumption that a particular transaction was in the public interest if seven independently-owned broadcast stations continued to serve the relevant market. NBC Comments at 27. Cedar Rapids argued for a different type of floor involving 10 separately-owned providers of video media, a standard which would include nonbroadcast video media such as cable. Cedar Rapids Comments at 9.

[87] *Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111, 4115 (1992).

[88] *TV Ownership Further Notice* at 3556-58.

[89] *Id.* at 3576.

[90] *Id.* at 3573-74.

[91] *See* EI Study at 54-56.

[92] *See* the Statement of Dr. Mark Cooper, Director of Research at the Consumer Federation of America, filed with the Reply Comments of BCFM.

52. The Commission's 1995 *TV Ownership Further Notice* raised numerous questions about the extent to which other video and non-video products and services were competitive or diversity substitutes for broadcast television.[93] We noted the lack of unanimity among the parties as to which products and services are substitutes and which are not. Given the many changes that are taking place in the television industry and the lack of consensus in the record, we ask here for comment on whether we should, until we observe further marketplace developments, focus only on broadcast television outlets in counting voices for this proposed waiver.[94] Or, for example, should we give consideration to cable television systems when cable has a very high penetration level in the market? If so, how should a cable system be counted for these purposes? In view of recent developments regarding DBS, Open Video Systems (OVS), and on-line services, we also seek comment on whether and how these services should be counted as voices. For a given minimum number of independently owned broadcast television voices, an approach that counted only broadcast television voices would establish a more difficult standard for station owners in most markets to meet as compared to an approach that included a broader array of media as independent voices. Indeed, such an approach might limit waivers under this criteria to only the very largest markets. However, based on experience gained from granting waivers in these circumstances, we could then consider relaxing the rule further as part of a future biennial review of our ownership rules.[95]

53. Market Size. We also invite comment on whether, if we adopt a small market share and minimum number of voices waiver policy, we should add a market size test. In other words, we might limit waivers based on a minimum number of television voices in the very largest markets. We invite comment on whether the largest markets already have sufficiently numerous competing broadcast television outlets to safeguard our competition and diversity concerns. Or, are there so few such large markets that development of a waiver criterion is not an efficient means to promote diversity? Parties are also asked to comment on the appropriate minimum number of voices under such an approach. For example, should this standard require a minimum number of independently-owned broadcast television stations (including both commercial and non-commercial stations) licensed to communities in the DMA after the proposed transaction? The Commission seeks comment on alternative standards, and whether waivers based on these criteria should be limited, at least for the time being, to only the largest markets.

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[93] *TV Ownership Further Notice* at 3536-3543, 3552-3558.

[94] In our discussion of the radio-television cross-ownership rule, we directly question the degree of substitutability between radio and television. *See infra* ¶ 63. On the basis of evidence available to us at this point, we are not prepared to resolve the issue of whether radio and television can be considered as substitutes. As a result, our discussion of this potential waiver standard for the local television ownership rule will focus primarily on broadcast television stations in a local market.

[95] *See* Sec. 202(h) of the 1996 Act.

e. Public Interest and Unmet Needs

54. Finally, we seek comment on the circumstances in which the Commission should grant a waiver if the applicant demonstrates that the public interest benefits that will flow from a waiver would include public interest programming that would not be provided were the stations owned separately. The Commission has on numerous occasions taken into account an applicant's programming enhancements in granting permanent and temporary waivers of the television duopoly rule although these waivers typically involved only limited amounts of contour overlap between the stations.[96] In *Paramount*, for example, we found that a waiver of the duopoly rule was not only in the public interest, but consistent with the objectives of the duopoly rule, to foster diversity and economic competition.[97] We seek comment on how we should consider public interest programming enhancements in granting permanent waivers of the television duopoly rule.

55. We also seek comment on how, if this waiver criterion were adopted, programming benefits would fit into our analysis of the public interest. Should we rely only on types of programming that the Commission has traditionally considered "public interest" programming, such as children's educational programming, news, public affairs and access of political candidates to the airwaves? Should we permit broadcasters to identify additional types of programming that would support a waiver, such as programming that serves the needs of an underserved segment of the local market or underprovided public interest programming? Should

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[96] *See, e.g., Brissette Broadcasting*, 11 FCC Rcd 6319 (1996) (commitment to expand newscasts on its television stations by at least one hour each weekday; expand community programming with emphasis on local live coverage of community events; employ closed-captioning technology; retain an educational consultant to help develop additional meaningful programming for various age groups in the community); *Stockholders of CBS*, 11 FCC Rcd 3733, 3741, 3762 (1996) (commitment to augment the amount of children's educational programming broadcast over the CBS network and its owned and operated stations; increase by nearly one-third the amount of locally originated news programming on one station; establish a news bureau in New Jersey's capital; linking WCBS-TV to a network of New Jersey-based transmission facilities for live remote broadcasts); *Station Partners*, 10 FCC Rcd 12383 (1995) (increasing locally originated news programming on the acquired station from 14½ hours to 27 hours per week, including an increase of at least 50 percent in the amount of locally originated news reports of special interest to New Jersey; proposing to operate a news bureau in Trenton and to assign a full-time reporter to New Jersey issues).

[97] *Paramount Station Group of Philadelphia*, 10 FCC Rcd 10963, 10967 (1995) (*"Paramount"*) (adding a ½ hour public affairs program each week focusing on topics of interest to African-American and other minority residents of New Jersey; establishing a full-time reporter dedicated exclusively to coverage of issues and events pertaining to Camden and central and southern New Jersey) citing *Multiple Ownership Rules*, 2 Rad. Reg.2d at 1476-1477; *see also H & C Communications*, 9 FCC Rcd at 146 (a duopoly rule waiver based upon programming representations is consistent with the objectives of the multiple ownership rules); *Station Partners*, 10 FCC Rcd at 12388 (a duopoly rule waiver based upon programming representations is consistent with the objectives of the duopoly rule).

we follow up on the representations made by licensees in their waiver requests? Finally, we seek comment on whether it would be preferable to consider this waiver criterion, if at all, only in conjunction with one or more of the other criteria discussed above.

3. Waivers Pending the Outcome of this Proceeding

56. There has been an increase in broadcast transactions since the passage of the 1996 Act, with a number of these involving requests for waiver of our ownership rules.[98] Our current television duopoly rule will, of course, remain in place pending the outcome of this proceeding, but we take this opportunity to provide parties guidance regarding our policy in waiving the rule during this interim period. We hope that doing so will facilitate planning for these transactions as well as staff processing of license transfer and assignment applications.

57. During this interim period, we will generally grant waivers of the television duopoly rule, conditioned on coming into compliance with the requirements ultimately adopted in this proceeding within six months of its conclusion, where the television stations seeking common ownership are in different DMAs with no overlapping Grade A signal contours. Commission staff will have delegated authority to act on applications seeking such waivers as long as the applications do not raise new or novel issues. We have tentatively concluded that the record in this proceeding supports relaxation of the geographic scope of the duopoly rule from its current Grade B overlap standard to a standard based on DMAs supplemented with a Grade A overlap criterion. While we are providing an opportunity for comment on this tentative conclusion, we do not believe granting waivers satisfying the proposed standard, and conditioning them on the outcome of this proceeding, will adversely affect our competition and diversity goals in the interim. It will also have the benefit of providing parties some flexibility in moving forward on merger transactions that do not comply with the current duopoly rule.

58. We will be disinclined to grant waiver requests not falling in this category (*i.e.*, those involving stations in the same DMA or with overlapping Grade A signal contours), absent extraordinary circumstances. These types of waiver requests will be acted upon by the full Commission.

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[98] *See* "Ownership Rules on the Way," *Broadcasting & Cable*, Sept. 9, 1996, at 8. *See also Applications of Capital Cities/ABC and The Walt Disney Co.*, 11 FCC Rcd 5841, 5872 (1996) (*quoting WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)) in which the Commission granted a permanent and a temporary waiver of the duopoly rule and *Brissette Broadcasting*, 11 FCC Rcd 6319, in which the Commission granted three temporary waivers.

III. Radio-Television Cross-Ownership Rule

59. The radio-television cross-ownership rule, or the one-to-a-market rule, generally forbids joint ownership of a radio and a television station in the same local market.[99] The rule seeks to promote competition as well as viewpoint and programming diversity in broadcasting.[100] In 1989, we amended the rule to permit, on a waiver basis, radio-television mergers in the Top 25 television markets if, post-merger, at least 30 independently owned broadcast voices remained, or if the merger involved a failed station or if the merger satisfied a group of five other criteria.[101] Waivers premised on the first two criteria -- large market size or financial failure -- were presumed to be in the public interest, while waivers based on the "five factors" were evaluated based on the strength of the applicant's individual showings.

60. In the *TV Ownership Further Notice*, we proposed to eliminate the cross-ownership restriction in its entirety or replace it with an approach under which cross-ownership would be permitted where a minimum number of post-acquisition, independently owned broadcast voices remained in the relevant market. We tentatively concluded that there were two alternative approaches towards modifying the one-to-a-market rule. If radio stations and television stations do not compete in the same local advertising, program delivery or diversity markets, we proposed to eliminate this rule entirely and rely on our local ownership rules to ensure competition and diversity at the local level. Under the local radio ownership rules in effect at that time, this would have permitted entities to own one AM, one FM, and one television station in small markets. In large markets, one entity would have been able to own up to 2 AMs, 2 FMs, and 1 television station. If, on the other hand, radio and television did compete in some or all of the same local markets, then we proposed to modify the one-to-a-market rule to allow radio-television combinations (AM-TV, FM-TV, or AM-FM-TV)

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[99] All licensees are permitted to own one AM radio station and one FM radio station in the same market (*i.e.*, an AM-FM combination). The geographic scope of the rule for television licensees is the ADI television market whereas the geographic scope of the rule for radio licensees is the television metropolitan market.

[100] *See Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order*, 22 F.C.C.2d 306, 310, 313 (1970); *TV Ownership Further Notice* at 3578.

[101] These criteria include the potential public service benefits of joint operation of the facilities involved in the merger, the types of facilities involved, the number of stations already owned by the applicant, the financial situation of the station(s), and the nature of the post-merger market in light of our diversity and competition concerns. *See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, MM Docket No. 87-7, 4 FCC Rcd 1741, 1753 (1989).

in those markets that have a sufficient number of remaining alternative suppliers/outlets as to ensure sufficient diversity and competition.[102]

61. Commenting parties responded with a variety of positions ranging from recommending repeal of the rule,[103] to relaxation of the rule,[104] to retention of the rule.[105] Parties favoring repeal argue that any market power problems are adequately addressed by the individual radio and television ownership rules as well as by the antitrust laws.[106] Additionally, they point to the possible increase in programming diversity to be derived from the savings available from joint ownership.[107] They also point to the Commission having granted essentially all waiver applications under the rule.[108] Several comments advocating relaxation of the rule would do so only if the Commission required that a minimum number of independently owned voices remained after a merger to protect diversity.[109] Those who would retain the rule offer a variety of reasons including the alleged arbitrariness of any mandated number of post-merger independently owned voices, the loss of broadcasting employment due to repeal, and reduced public affairs and news programming on radio as a result of increased numbers of television-radio mergers.[110]

62. Since those comments were received, Congress passed the 1996 Act. The 1996 Act affects our radio-television cross-ownership rule in at least two ways. First, Section 202(d) of that Act directs the Commission to extend our radio-television cross-ownership waiver policy

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[102] *TV Ownership Further Notice* at 3580-81.

[103] *See* Media Institute Comments at 12; Group W Comments at 30-34; CBS Comments at 63; Golden Orange Comments at 14-17; Texas Television Comments at 3, 17; CCA Comments at 21; Capital Cities/ABC Comments at 25; Capital Broadcasting Comments at 8; WYDO-TV Comments at 5-6; Citicasters Comments at 1; Jet Broadcasting Comments at 5-10; Smith Comments at 6; FOE Comments at 17; Cedar Rapids Comments at 10.

[104] *See* New World Comments at 27.

[105] *See* BCFM Comments at 40; AFTRA-National Comments at 11; AFTRA-Pittsburgh Comments at 1; AFTRA-Los Angeles Comments at 1.

[106] *See* Capital Cities/ABC Comments at 25; Capitol Broadcasting Comments at 8; CBS Comments at 63; Cedar Rapids Comments at 10; Citicasters Comments at 1.

[107] Capitol Broadcasting Comments at 8.

[108] Citicasters Comments at 5-6 (citing 42 reported cases decided between 1989 and 1995).

[109] CBS Comments at 63; Cedar Rapids Comments at 10; Citicasters Comments at 10.

[110] AFTRA-NY Comments at 6; AFTRA-National Comments at 11; BCFM Comments at 32, 34.

to the Top 50 rather than the top 25 television markets ". . . consistent with the public interest, convenience and necessity." Second, the 1996 Act significantly liberalized the local radio ownership rules. Prior to the 1996 Act, the largest number of radio stations one firm could own in any market was four -- two AM and two FM stations.[111] As modified by the 1996 Act, however, our rules now allow one party to own up to 8 commercial radio stations in radio markets with 45 or more commercial radio stations. One party can own up to 7 commercial radio stations in radio markets with 30-44 commercial radio stations and as many as 6 commercial radio stations in radio markets with 15-29 commercial radio stations. For radio markets with 14 or fewer commercial radio stations, one party can own up to 5 commercial radio stations (provided that no party may own, operate or control more than 50% of the stations in the market).[112]

63. We consider the recent statutory changes to the local radio ownership rules to be significant enough to warrant further comment on our radio-television cross-ownership rule proposals outlined in the *TV Ownership Further Notice*. First, can the rule be eliminated based on a finding that radio and television stations are not substitutes? Thus far, several commenters advocated eliminating the rule because they asserted that radio and television were not substitutes and did not compete in the same markets.[113] Citicasters cited the difference in the demographics of the audiences, peak listening times and the selling of advertising.[114] However, studies by Economists Inc. and NERA asserted that radio and television and other media were economic substitutes in the local advertising and in the delivered programming markets.[115] We find the record is currently unclear regarding the appropriate relevant product market definition with respect to our competition and diversity concerns so we do not propose to repeal the radio-television cross-ownership rule at this time. We welcome, however, additional comment and any available empirical evidence on this issue.

64. Second, even if we eventually consider television and radio stations substitutes, can the rule be eliminated because the respective radio and television ownership rules alone can be relied upon to ensure sufficient diversity and competition in the local market? Citicasters and

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[111] 47 C.F.R. § 73.3555(a)(1)(ii) (1995).

[112] *See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996, Order*, 61 Fed. Reg. 10689.

[113] *See* Capital Cities/ABC Comments at 26; Citicasters Comments at 7-8; Jet Comments at 6; Viacom Reply Comments at 9.

[114] Citicasters Comments at 7-8.

[115] NERA Study at 2; EI Study at 89; *see also* Hill Radio Comments at 1.

Capital Cities/ABC supported elimination of the rule on this basis.[116] We solicit additional comment on this issue given that, as described above, the local radio ownership rules have been substantially revised with the passage of the 1996 Act.

65. We also seek to update the record on options for modifying, but not eliminating, the radio-television cross ownership rule. Accordingly, we invite comment on whether any easing of the cross-ownership rule should take the form of modifying the rule itself or modifying our presumptive waiver policy.

66. Consistent with Section 202(d) of the 1996 Act, we propose, at a minimum, to extend the Top 25 market/30 voice waiver policy to the Top 50 markets. The 30 independently owned voices test has proven effective in safeguarding our diversity and competition objectives in the Top 25 markets. Our experience in processing waiver requests beyond these markets further indicates that application of the 30 independently owned voices test to the Top 50 markets should also be sufficient to safeguard diversity and competition in markets 26-50. We consequently tentatively conclude that extending this test to the Top 50 markets would be consistent with the public interest, convenience and necessity. Thus, an applicant would be presumptively entitled to a waiver to obtain one AM, one FM, and one television station in a Top 50 market as long as 30 independently owned voices remained after the merger. The *TV Ownership Further Notice* made a similar proposal and most parties were in apparent agreement with at least taking this step.[117] We regard this as a minor change in our rules because the independently owned 30 voice requirement would remain the primary restraint on radio-television mergers.

67. We also invite comment, however, on the following four options -- most of which were discussed in the previous *Notice* -- to change the rule beyond that contemplated by the 1996 Act. First, should we extend the presumptive waiver policy to any television market that satisfies the minimum independent voice test? Second, should we extend the presumptive waiver policy to entities that seek to own more than one FM and/or AM radio station? Third, should we reduce the number of required independently owned voices that must remain after a transaction? And fourth, should our "five factors" test be changed or refined to be more effective in protecting competition and diversity? To assist our consideration of these alternatives, we seek comment on the effects of waivers we have granted in the past on competition in local markets and on viewpoint and program diversity. We request that commenters provide as specific data as possible in describing their conclusions.

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[116] Citicasters' Comments at 1; Capital Cities/ABC Comments at 25.

[117] Indeed, many commenters were in favor of eliminating the rule altogether. Citicasters argued that if its suggestion for elimination of the rule is rejected, the Commission should at least extend its Top 25 waiver standard to all markets.

68. Initially, we ask whether the Top 25 market/30 voice presumptive waiver policy should be extended to *any* television market with the required minimum number of independently owned voices, effectively converting the existing market and remaining independently owned voices test into simply a remaining independently owned voices standard. Previously, Citicasters supported extending the presumptive waiver policy to all television markets.[118] Citicasters argued that the public interest would be served by waivers of the radio-television cross-ownership rule in virtually all cases.[119] Hill Radio, BCFM, AFTRA-National, and AFTRA-Pittsburgh opposed any modification to the rule.[120]

69. In addition, we question whether the presumptive waiver policy should be extended to apply not only to entities that seek to own one AM, one FM, and one television station, but to entities that seek to own one television station and more than one FM and/or more than one AM radio station. In 1992 we deferred consideration of whether a television licensee could, under our presumptive waiver policy, acquire more than one radio station in a community in the same service preferring instead to address the issue in our television ownership proceeding.[121] More recently, the D.C. Circuit, in dicta, questioned whether there is a sufficient public interest rationale for not applying the presumptive waiver policy to proposed radio-television combinations involving more than one radio station in the same service where the combination would otherwise satisfy the Top 25 market/30 voice test.[122]

70. In light of the court's observation and the new radio station ownership limits, which permit a radio station licensee to own up to eight commercial radio stations in one market, we seek comment on whether we should amend the radio-television cross-ownership rule or our presumptive waiver policy to permit joint ownership of a television station and more than one commercial radio station in the same service in a market. If so, should there be any limit on the number of radio stations that can be approved under such an approach? In modifying the local radio limits, Congress found it beneficial to allow greater concentration in local radio ownership, at least when a cross-ownership situation is not involved. We ask whether these

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[118] Citicasters, however, also advocated reducing the number of independently owned voices in conjunction with the extension. Citicasters Comments at 9-10.

[119] *Id.* at 5-6.

[120] BCFM Comments at 40; AFTRA-New York Comments at 6; and AFTRA-Pittsburgh Comments at 1; *see also* Hill Radio Comments at 2.

[121] *See* Revision of Radio Rules and Policies, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, MM Docket No. 91-140, 7 FCC Rcd 6387, 6394 n.40 (1992). Since that time, we have processed such requests under our five-factor, case-by-case waiver policy. *Id.*

[122] *See WSB v. FCC*, 85 F.3d 695, 701 (D.C. Cir. 1996).

benefits also extend to the situation where an entity that already owns a television station in the market also seeks to acquire the full complement of radio stations that would otherwise be allowed under the new radio limits.[123]

71. We further ask whether we should revise the minimum required number of independently owned voices that must remain after a proposed transaction. The *TV Ownership Further Notice* proposed to allow radio-television combinations in markets which had a sufficient number of alternative suppliers/outlets remaining to ensure diversity and competition.[124] We received several comments supporting a reduction in the number of independently owned voices that should remain after a proposed transaction. CBS asserted that the efficiencies that result from co-ownership are passed on to the public and should be broadly available in markets with at least 15 outlets because the market would not be highly concentrated. Therefore, CBS recommended reducing the number of minimum independently owned voices remaining in a market to 15 instead of 30.[125] Cedar Rapids and Citicasters observed that the public's access to alternative providers as a result in the growth in media supported a reduction in the required number of independently owned voices to 20.[126]

72. Although these comments support a reduction in the required number of independently owned voices, we must determine what media should be counted towards meeting the required number of independently owned voices. In the *TV Ownership Further Notice*, we tentatively concluded that cable should be counted but that other electronic media such as Multipoint Multichannel Distribution Service (MMDS), videocassette recorders (VCRs), and Open Video Systems (OVS) should not be counted in our diversity analysis.[127] We invite further comment on this view and on the manner in which multichannel video providers should be counted, if at all, for these purposes. In addition, even if we eventually conclude that radio and television are substitutes, should we consider each radio station as the equivalent of a broadcast television station for purposes of counting the independently owned voices?[128] Thus, we invite comments concerning not only what should be counted to reach the required number of independently owned voices, but how counting of those independently owned voices should take

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[123] CBS advocated this position before enactment of the 1996 Act and the resulting changes to our local radio ownership rules. CBS Comments at 63

[124] *TV Ownership Further Notice* at 3581.

[125] CBS Comments at 63 (also advocated extending the waiver policy beyond the Top 25 markets).

[126] Cedar Rapids Comments at 10; Citicasters Comments at 10-11.

[127] *TV Ownership Further Notice* at 3556-3558.

[128] *See TV Ownership Further Notice* at 3558 and *supra* para. 63.

place. We further seek comment on the treatment of television LMAs in assessing the number of independent voices in one-to-a-market cases. In the event television LMAs are deemed attributable in our attribution proceeding, we believe that both the brokering and brokered stations in an LMA arrangement would be counted as a single voice. We would expect this to be the case whether or not the LMA arrangement is grandfathered.[129] We invite comment on these issues.

73. Finally, we ask whether the "five factors" should be changed or refined to be more effective in protecting our competition and diversity concerns. Under this standard, we make a public interest determination on a case-by-case basis currently using the following five criteria: 1) the potential public service benefits of common ownership of the facilities, such as the economies of scale, cost savings and programming and service benefits; 2) the types of facilities involved; 3) the number of media outlets already owned by the applicant in the relevant market; 4) any financial difficulties involving the stations(s); and 5) issues pertaining to the level of diversity and competition within the affected market.

74. We note that since these factors were articulated in 1989, many significant changes have taken place in the broadcast marketplace and regulatory environment. For example, the local ownership rules for radio have been liberalized substantially; new radio and television (full-power and low power) stations have gone on the air; and there have been changes in capital markets. As a result, the market for television and radio stations has been extremely active and ownership patterns are changing. Competitive media are increasing with the advent of DBS and MMDS; and there may have been changes in the broadcast advertising markets, as well.

75. We seek comment on whether we should use different criteria in lieu of or in addition to the current five factors to help us determine whether a particular application serves the public interest. Specifically, what kinds of factors should be weighed in evaluating the effect of a proposed change on the public? Should we continue to weigh each of the factors currently used?

76. Are there other, new factors that would help us evaluate changes to market concentration resulting from the proposed transaction and to determine whether it raises anti-competitive or diversity concerns? One possibility would be to examine audience shares and advertising shares that an entity would obtain if its transaction were approved. We ask for comment on whether audience share information is useful and appropriate for our analysis of diversity. Is there a way we can define independent "voices" that would make our diversity analysis more accurate? For example, should we require that only those "voices" be counted

[129] *See infra* Section IV.

that overlap, to a significant extent, the service area of the proposed combination? If so, how would we measure such an overlap area in a way that ensures an accurate reflection of the local market?

77. To the extent the Commission finds that it is necessary to consider market share information in reviewing matters of common ownership, we also ask for comment on how to establish the appropriate definition of the relevant advertising market for our consideration. For example, we seek comment on whether we should view the relevant market as focusing on advertising in radio and television. Alternatively, is the relevant market in this context more appropriately defined as local advertising media for radio, television, newspaper, cable, and others, or should certain media segments be excluded? In this regard, we also seek comment on the level of data on market shares that firms should be required to provide in order to demonstrate that common ownership would meet market share criteria. In particular, should they provide market share of radio and television local revenue independently, as well as the combined share of all advertising?

78. We seek comment on the above options as well as other possible means of revising the radio-television cross ownership rule, particularly in light of the changes resulting from the 1996 Act. We seek to safeguard our competition and diversity goals while at the same time allowing parties to take advantage of the efficiencies that may result from permitting cross ownership of radio and television stations in the same market. As to the latter, we urge parties to provide more detailed evidence of these efficiencies. Can the same level of efficiencies be achieved in the cross-ownership situation as when the common ownership involves stations within the same service? Do these efficiencies diminish as the number of commonly owned stations increases?

79. We note that our current radio-television cross-ownership rule will remain in place pending the resolution of this proceeding. Waiver requests submitted in the interim will be processed pursuant to our current criteria for evaluating such requests. The Chief of the Mass Media Bureau will continue to have delegated authority to rule on uncontested one-to-a-market waiver requests that involve stations in the Top 100 television markets that are clearly consistent with prior Commission precedent, *i.e.*, which present no new or novel issues.[130] One-to-a-market waiver requests not falling in this category will be referred to the Commission. We expect that waivers falling in this latter category that are granted by the Commission will be conditioned on the outcome of this proceeding.

[130] *Louis D. DeArias*, 11 FCC Rcd 3662, 3667 (1996) (setting forth delegated authority in one-to-a-market cases, and granting permanent, unconditional waiver to allow common ownership of one television station, two FM stations, and two AM stations in the 78th largest television market).

IV. Television Local Marketing Agreements

80. A television local marketing agreement ("LMA") is a type of contract in which the licensee leases blocks of its broadcast time to a broker who then supplies the programming to fill that time and sells the commercial spot announcements to support the programming.[131] Currently, the Commission does not attribute television LMAs for local and national ownership purposes and so these relationships are not subject to our ownership rules. However, in the radio context, radio station ownership is attributed to any radio licensee who enters into an LMA with another radio station in the same market if the agreement involves the brokering of more than 15% of the station's weekly broadcast hours.[132]

81. In the previous notice, the Commission suggested that guidelines similar to those governing radio LMAs may be necessary with regard to television LMAs.[133] We also determined that such agreements, subject to some general Commission guidelines, can provide competitive and diversity benefits to both the brokering parties and to the public.[134] We tentatively proposed to treat LMAs involving television stations in the same basic manner as we did for radio stations.[135] That is, time brokerage of another television station in the same market for more than 15% of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limits.[136] Further, television LMAs would be required to be filed with the Commission in addition to the existing requirement that they be kept at the stations involved in an LMA.[137] Finally, we indicated that our television LMA guidelines would allow for "grandfathering" television LMAs entered into before the adoption date of the *TV Ownership Further Notice*, subject to renewability and transferability guidelines similar to those governing radio LMAs[138] as described more fully below in paragraphs 90 and 91.

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[131] *Id.* at 3581.

[132] *Revision of Radio Rules and Policies, Report and Order*, MM Docket No. 91-140, 7 FCC Rcd 2755, 2784 (1992), *clarified*, 7 FCC Rcd 6387 (1992), *further clarified*, 9 FCC Rcd 7183 (1994).

[133] *TV Ownership Further Notice* at 3583.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 3583-3584.

[138] *Id.* at 3584.

82. These proposed guidelines primarily concern the circumstances under which a television LMA should be attributed to the brokering entity for purposes of the broadcast ownership rules. We will consequently incorporate the issue of whether to adopt these guidelines, or some variation of them, into our companion proceeding regarding our broadcast attribution rules. In our companion *Attribution Further Notice*, we tentatively conclude that we should treat time brokerage of another television station in the same market for more than 15 percent of the brokered station's weekly broadcast hours as being attributable, and therefore as counting toward the brokered licensee's multiple ownership limits.

83. We will, however, decide in this proceeding how to treat *existing* television LMAs under any guidelines that are adopted that would attribute television LMAs to the brokering station. These television LMA grandfathering and transition issues will be especially significant issues if we do not modify our duopoly rules, because such an attribution provision would preclude television LMAs in any market where the time broker owns or has an attributable interest in another television station.[139]

84. In this regard, Section 202(g) of the 1996 Act states that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission." We interpret this provision as clearly stating no more than that Section 202 of the 1996 Act shall not be construed to prohibit any television LMA that is in compliance with the Commission's rules. We do not regard Section 202(g) as limiting our ability to promulgate attribution rules under Title I and Title III affecting the status of television LMAs.[140] As a result, we do not see Section 202(g) of the 1996 Act as posing a legal restraint on our questions in the *TV Ownership Further Notice* as to 1) whether television LMAs in which a broker obtains the ability to program 15% or more of a broadcast television station's weekly broadcast output should be deemed an attributable interest (which will be decided in the attribution proceeding); and 2) whether grandfathering existing television LMAs from any applicable ownership rules that would follow from that attribution decision is appropriate.[141]

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[139] *Id.*

[140] Section 310(d) of the Communications Act requires the Commission to find that any "transfer of control" of any broadcast station serve the "public interest, convenience and necessity." 47 U.S.C. § 310(d). Section 4(i) of the Communications Act allows the Commission to "make such rules and regulations . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Therefore, our authority to promulgate broadcast attribution criteria -- which essentially define "control" -- stems from these statutory provisions rather than Section 202 of the 1996 Act.

[141] *TV Ownership Further Notice* at 3583-84.

85. We recognize, however, that the language in the *Conference Report* to the 1996 Act appears to interpret Section 202(g) of the 1996 Act in a different manner with regard to television LMAs that predate February 8, 1996, the date of enactment of this legislation. The *Conference Report* states --

> [Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.[142]

The *Conference Report* suggests that the conferees intended to "grandfather" existing television LMAs. Although we do not interpret the statute as requiring that outcome, we believe that existing television LMAs entered into on reliance of the Commission's current policy should not be disrupted during the remainder of the current contract term. Indeed, we had a similar concern at the time of the *TV Ownership Further Notice* and so asked a series of questions as to whether television LMAs entered into before the adoption date of the *TV Ownership Further Notice* should be grandfathered with respect to ownership regulations.[143]

86. Most commenters who responded to our television LMA grandfathering queries supported grandfathering the agreements to some extent.[144] CCA supports grandfathering all existing agreements,[145] while Texas Television, Golden Orange and Louisiana Television maintain that television LMAs entered into before the effective date of applicable rules should be grandfathered.[146] MAC, Malrite and Brooks Broadcasting agreed with the Commission's proposal to grandfather television LMAs entered into before the adoption date of the *TV*

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[142] *Conference Report* at 164.

[143] *TV Ownership Further Notice* at 3584.

[144] *See* Golden Orange Comments at 2; Louisiana Television Comments at 3, 12-14; MAC Comments at 13-14; Texas Television Comments at 3, 12-14; Lee Enterprises Comments at 10; Jet Comments at 11; Malrite Comments at ii, 49-50; CCA Comments at ii, 31; Big Horn Comments at 8; Brooks Broadcasting Reply Comments at 8-9.

[145] *See* CCA Comments at 31.

[146] Texas Television Comments at 2, 12-14; Golden Orange Comments at 2; Louisiana Television Comments at 3, 12-14.

Ownership Further Notice.[147] Centennial advocated the grandfathering of all television LMAs that were entered into within 90 days of the adoption of the *TV Ownership Further Notice*.[148] Centennial further advocated a one-year sunset provision for these television LMAs that would result in the termination of the LMAs one year after the adoption date of the *TV Ownership Further Notice*.[149] Post-Newsweek completely opposed grandfathering existing television LMAs.[150]

87. We wish to provide an additional opportunity for comment on these grandfathering and transition issues. In particular, in order to devise a fair and efficient method to bring licensees into compliance with our ownership rules, in the event television LMAs are attributable, we request specific comments concerning the number of television LMAs that are in effect on the date of the adoption of this *Notice*, the market that each LMA covers, the length of the contractual relationship, and any other data concerning television LMA relationships that would have a bearing on bringing parties to an LMA into compliance with our ownership rules. This data will allow us to assess the need for grandfathering existing LMAs in the event they are deemed attributable, and the form this grandfathering should take. We wish to minimize undue and inequitable disruption to existing contractual relationships, and consequently seek comment on allowing television stations to come into compliance with our ownership rules within a reasonable period of time.

88. We note that such a transition would not involve grandfathering permanent ownership arrangements that would violate our rules given that LMAs typically involve, by their nature, more temporary relationships that have set contractual terms. We thus are inclined to institute a grandfathering policy to provide that in the event television LMAs become attributable pursuant to the broadcast attribution proceeding, television LMAs entered into prior to a specific date, and that are otherwise in compliance with applicable rules and policies, would be permitted to continue in force without disruption until the original term in the LMA expires. However, if a grandfathered television LMA results in violation of any Commission ownership rule, a party would be required to seek a waiver from the Commission prior to transferring the station or renewing the grandfathered television LMA. By specifying this date at this time, we provide notice that television LMAs entered into after the grandfathering date will not be grandfathered if television LMAs are ultimately found to be attributable. Additionally, we hope to provide certainty to television licensees who wish to make business decisions concerning television

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[147] MAC Comments at 13-14; Malrite Comments at 49-50; Brooks Broadcasting Reply Comments at 8-9.

[148] Centennial Comments at 2.

[149] *Id.*

[150] Post-Newsweek Comments at 1, 8.

LMAs until the attribution issue is resolved. We consequently believe this grandfathering approach would be appropriate. We reserve the right, however, to invalidate an otherwise grandfathered LMA in circumstances that raise particular competition and diversity concerns, such as those that might be presented in very small markets.

89. With respect to specifying a particular grandfathering date in the event we determine television LMAs should be attributable under our local ownership rules, we are inclined to grandfather all television LMAs entered into *before* the adoption date of this *Notice* for purposes of compliance with our ownership rules. Thus, such television LMAs will not be disturbed during the pendency of the original term of the LMA in the event the cognizability of the LMA would result in violation of an ownership rule. However, television LMAs entered into *on or after* the adoption date of this *Notice* would be entered into at the risk of the contracting parties. Consequently, if these latter television LMAs result in violation of any Commission ownership rule, they would not be grandfathered and would be accorded only a brief period in which to terminate.

90. In the *TV Ownership Further Notice*, we also sought comment concerning the transferability and renewal of television LMAs that were grandfathered under our rules.[151] In the radio local ownership rules, we limited the transfer and renewal of LMAs that violated our rules at the time of the transfer or renewal. In transfer situations, we permitted the new station owner to retain the LMA for the duration of the initial term of the LMA if the LMA would not create a new violation or exacerbate an existing violation of our local radio ownership rules.[152] Likewise, in the renewal context, we declined to permit renewal or extension of an LMA if, at the expiration date of the initial agreement, the LMA would be barred by our rules.[153]

91. We similarly propose to limit the transferability and renewability of grandfathered television LMAs. In transfer situations wherein the television LMA was entered into *before* the grandfather date, we generally propose to permit the new station owner to retain the LMA for the duration of the initial term of the television LMA even if it would otherwise violate our local ownership rules, under our new attribution criteria for television LMAs. We invite comment, however, as to whether there should be some absolute limit, such as three years, on such grandfathering. In transfer situations wherein the television LMA was entered into *on or after* the grandfather date, we propose to allow the new station owner a minimum amount of time to terminate the contractual relationship. In the television LMA renewal context, we propose to

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[151] *TV Ownership Further Notice* at 3584.

[152] *Revision of Radio Rules and Policies, Second Memorandum Opinion and Order*, MM Docket No. 91-140, 9 FCC Rcd 7183, 7192-7193 (1994).

[153] *Id.* at 7193.

permit renewal or extension of television LMAs only if the extension or renewal took place *before* the relevant grandfathering date. We seek comments on these proposals.

V. Conclusion

92. In conclusion, this *Second Further Notice* seeks comment on a number of critical issues relating to our local television ownership policy. In particular, parties are asked to:

- Comment on our tentative conclusion that the current Grade B contour overlap rule for local television ownership be replaced with a DMA/Grade A rule;
- Consider and discuss the various local television ownership rule waiver policies proposed in Section II;
- Analyze the 1996 Act's impact upon our radio-television cross-ownership rule, discuss our proposal to extend our Top 25 market presumptive waiver policy to the Top 50 markets, and discuss whether the rule should be further modified or eliminated;
- Comment on the factors we should use in weighing the requests for one-to-a-market waivers that are not presumptively granted; and
- Discuss our proposal to grandfather from attribution certain television LMAs if in the companion proceeding we ultimately decide that LMAs should be attributable.

93. Through this *Notice*, we seek to ensure that our ownership rules promote competition and program and viewpoint diversity. The proposals and discussion of the relevant issues in this *Notice* are guided by these objectives, and we hope they encourage the development of a robust record that will guide us in resolving these important matters.

VI. Administrative Matters

94. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before February 7, 1997 and reply comments on or before March 7, 1997. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a copy of your comments, you must file an original plus nine copies. If you want to file identical documents in more than one docketed rulemaking proceeding, you must file two additional copies of any such document for each additional docket. You should send comments and reply comments to Office of the

Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

95. Written comments by the public on the proposed and/or modified information collections are due February 7, 1997. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections within 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

96. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

97. Additional Information: For additional information on this proceeding, please contact Alan Baughcum (202) 418-2070 or Charles Logan (202) 418-2130 of the Policy and Rules Division, Mass Media Bureau.

VII. Initial Paperwork Reduction Act of 1995 Analysis

98. The rules proposed in this *Second Further Notice of Proposed Rulemaking* have been analyzed with respect to the Paperwork Reduction Act of 1995 and contain no changes from our earlier proposals in this rule-making proceeding related to new or modified form, information collection and/or record keeping, labeling, disclosure or record retention requirements. These proposed rules would not increase or decrease burden hours imposed on the public.

VIII. Initial Regulatory Flexibility Analysis

99. With respect to this *Second Further Notice*, an Initial Regulatory Flexibility Analysis (IRFA) is contained in the Appendix. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the radio and television broadcasting industries.

Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Second Further Notice*, but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this *Second Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.[154]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[154] Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981), as amended.

APPENDIX A: Initial Regulatory Flexibility Analysis Regulatory Flexibility Act

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission is incorporating an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and proposals in this *Second Further Notice*.[155] Written public comments concerning the effect of the proposals in the *Second Further Notice*, including the IRFA, on small businesses are requested. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice* provided in Paragraph 94. The Secretary shall send a copy of this *Second Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.[156]

Reason and Objectives for *Second Further Notice*: After the issuance of the *Television Ownership Further Notice* in this docket, the Telecommunications Act of 1996 ("1996 Act")[157] was signed into law. The *Second Further Notice* seeks to update the record in this proceeding on the effect of the 1996 Act and to review other aspects of our local ownership rules which were also the subject of the *Television Ownership Further Notice.*

First, this *Second Further Notice* proposes to modify the geographic scope of the duopoly rule to eliminate the Grade B contour overlap standard and replace it with a DMA/Grade A contour standard. Second, this *Notice* proposes to modify the radio-television cross ownership rule to conform to Section 202 of the 1996 Act. Accordingly, we propose to extend our 30 voices waiver policy to the Top 50 markets. We also seek comment on a number of other options for revising the radio-television cross-ownership rule and the waiver policy for this rule. Finally, this *Notice* proposes to institute a grandfathering policy in the event television LMAs become attributable pursuant to the accompanying broadcast attribution proceeding.

Legal Basis: Authority for the actions proposed in this *Second Further Notice* may be found in Sections 4(i), 303(r), and 307(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r) and 307(a) and Sections 202(c)(2), 202(d), 202(g) and 257 of the Telecommunications Act of 1996.[158]

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[155] An IRFA pursuant to Pub. L. No. 96-354, § 603, 94 Stat. 1165 (1980) was incorporated into both the *Notice of Proposed Rule Making*, 7 FCC Rcd 4111 (1992) and *Further Notice of Proposed Rule Making*, 10 FCC Rcd 3524 (1995) in MM Docket Nos. 91-221 and 87-8.

[156] 5 U.S.C. § 603(a).

[157] Pub. L. No. 104-104, 101 Stat. 56 (1996).

[158] *Id.*

Description and Estimate of the Number of Small Entities to which the Proposed Rule will Apply: The proposed rules and policies will concern full power television broadcasting licensees, radio broadcasting licensees and potential licensees of either service. The Small Business Administration (SBA) defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business.[159] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[160] Included in this industry are commercial, religious, educational, and other television stations.[161] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[162] Separate establishments primarily engaged in producing taped television program materials are classified in Services, Industry 7812.[163] There were 1,509 television stations operating in the nation in 1992.[164] That number has remained fairly constant as indicated by the approximately 1,550 operating television broadcasting stations in the nation at the end of August 1996.[165] For 1992[166] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[167]

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[159] 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996). For purposes of this *Second Further Notice*, we utilize the SBA's definition in determining the number of small businesses to which the proposed rules would 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 number of small entities that are radio and television broadcasters in the future. *See Policies and Rules Concerning Children's Television Programming, Report and Order*, MM Docket No. 93-48, 11 FCC Rcd 10660, 10737 (1996) (citing 5 U.S.C. § 601(3)).

[160] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 7, Appendix A-9.

[165] FCC News Release No. 64958, Sep. 6, 1996.

[166] Census for Communications' establishments are performed every five year;each census year ends with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, III.

[167] The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

Additionally, the SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[168] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[169] Included in this industry are commercial, religious, educational, and other radio stations.[170] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[171] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified in Services, Industry 7922.[172] The 1992 Census indicates that 96% (5,861 of 6,127) radio station establishments produced less than $5 million in revenue in 1992.[173] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[174] For 1996, official Commission records indicate that 12,088 radio stations were operating.[175]

Thus, the proposed rules will affect approximately 1,550 television stations, approximately 1,194 of those stations are considered small businesses.[176] Additionally, the proposed rules will affect 12,088 radio stations, approximately 11,605 are small businesses.[177] These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies. We recognize that the proposed rules may also impact minority and women owned

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[168] 13 C.F.R. § 121.201, SIC 4832.

[169] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, Appendix A-9.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

[174] FCC News Release No. 31327, Jan. 13, 1993.

[175] FCC News Release No. 64958, Sep. 6, 1996.

[176] We use the 77% figure of television stations that were operating with less than $10 million in 1992 and apply it to the 1996 total of 1550 television stations to arrive at 1,194 television stations categorized as small businesses.

[177] We use the 96% figure of radio station establishments with less than $5 million revenue from the Census data and apply it to the 12,088 individual station count to arrive at 11,605 individual stations categorized as small businesses.

stations, some of which may be small entities. In 1995, minorities owned and controlled 37 (3.0%) of 1,221 commercial television stations and 293 (2.9%) of the commercial radio stations in the United States.[178] According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial and non-commercial television stations and 394 (3.8%) of 10,244 commercial and non-commercial radio stations in the United States.[179] We recognize that the numbers of minority and women broadcast owners may have changed due to an increase in license transfers and assignments since the passage of the 1996 Act. We seek comment on the current numbers of minority and women owned broadcast properties and the numbers of these that qualify as small entities. To assist us with our responsibilities under the amended Regulatory Flexibility Act, we specifically request comments concerning our assessment of the number of small businesses that will be impacted by this rule making proceeding, the type or form of impact, and the advantages and disadvantages of the impact.

In addition to owners of operating radio and television stations, any entity who seeks or desires to obtain a television or radio broadcast license may be affected by the proposals contained in this item. The number of entities that may seek to obtain a television or radio broadcast license is unknown. We invite comment as to such number.

Description of Projected Recording, Recordkeeping, and Other Compliance Requirements: No new recording, recordkeeping or other compliance requirements are noted in this *Second Further Notice of Proposed Rulemaking*.

Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules. The Commission's broadcast-newspaper, television broadcast-cable, local radio ownership, and national television ownership rules also promote the same goals as the rules discussed in this item, however, they do not overlap, duplicate or conflict with the proposed rules.

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[178] *Minority Commercial Broadcast Ownership in the United States*, U.S. Dep't of Commerce, National Telecommunications and Information Administration, The Minority Telecommunications Development Program (MTDP)(April 1996). MTDP considers minority ownership as ownership of more than 50% of a broadcast corporation's stock, have voting control in a broadcast partnership, or own a broadcasting property as an individual proprietor. *Id.* The minority groups included in this report are Black, Hispanic, Asian, and Native American.

[179] *See* Comments of American Women in Radio and Television, Inc. in MM Docket No. 94-149 and MM Docket No. 91-140, at 4 n.4 (filed May 17, 1995), citing 1987 Economic Censuses, *Women-Owned Business*, WB87-1, U.S. Dep't of Commerce, Bureau of the Census, August 1990 (based on 1987 Census). After the 1987 Census report, the Census Bureau did not provide data by particular communications services (four-digit Standard Industrial Classification (SIC) Code), but rather by the general two-digit SIC Code for communications (#48). Consequently, since 1987, the U.S. Census Bureau has not updated data on ownership of broadcast facilities by women, nor does the FCC collect such data. However, we sought comment on whether the Annual Ownership Report Form 323 should be amended to include information on the gender and race of broadcast license owners. *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rulemaking*, 10 FCC Rcd 2788, 2797 (1995).

Significant Alternatives to the Proposed Rule which Minimizes the Significant Economic Impact on Small Entities and Accomplish the Stated Objectives: The Commission seeks to minimize the impact of any changes in the television local ownership rules upon small entities while preserving competition and diversity in our local markets. Any significant alternatives consistent with the stated objectives presented in the comments will be considered. We urge parties to support their proposals with specific evidence and analysis.

Local Ownership Rule: In this *Noticc* we tentatively conclude that a combination of the DMA and Grade A signal contours may be a better measure of the geographic scope of the duopoly rule.[180] We also seek comment on whether to grandfather existing common ownership combinations that conform to our current grade B test[181] and whether we should permit television duopolies in certain circumstances by rule or wavier.[182]

Radio-Television Cross-Ownership rule: In the *Television Ownership Further Notice*, we received a large array of comments recommending a variety of positions ranging from repeal, to relaxation, to retention of the rule.[183] We request comment and specific data to support the commenters positions concerning: 1) extending the presumptive waiver policy to any television market that satisfies the minimum independent voice test; 2) extending the presumptive waiver policy to entities that seek to own more than one FM and/or AM radio station; 3) reducing the number of required independently owned voices that must remain after a transaction; and 4) whether the "five factor" waiver policy should be changed or refined to be more effective in protecting competition and diversity.[184]

Television Local Marketing Agreements: To minimize undue and inequitable disruption to existing contractual relationships, we propose a grandfathering policy which allows television stations to come into compliance with our ownership rules within a reasonable period of time.[185]

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[180] *See supra* ¶¶ 12 - 25

[181] *See supra* ¶ 28.

[182] *See supra* ¶¶ 29 - 55 (addressing UHF/VHF Stations, Satellite Stations, Failed Stations, Vacant and New Channel Allotments and Small Market Share/Minimum of Voices and other possible waiver criteria).

[183] *See* ¶ 61, notes 102 - 104.

[184] *See supra* ¶¶ 67 - 78.

[185] *See supra* ¶ 88 - 91.

We seek comment concerning the significant economic impact of each of the above mentioned proposals on a substantial number of small stations.

Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: There were no comments submitted specifically in response to the IRFA that was included in the *Television Ownership Further Notice*. We have, however, taken into account all issues raised by the public in response to the proposals raised in this proceeding.

We received conflicting comments concerning the impact of joint ownership on broadcast stations. Several commenters advocated the modification or elimination of the local ownership rules in order to permit station owners to take advantage of the economies of scale that will result from joint ownership.[186] On the other side, several commenters argued that the ability of station owners to take advantage of the economies of scale resulting from joint ownership will drive up the price of stations which will make it more difficult for new entrants, including minorities and women, to finance the purchase of stations.[187]

[186] Big Horn Comments at 1-2; LSOC Comments at 23; LSOC Reply Comments at 9; Cedar Rapids Comments at 9-10; Broad Street Comments at 9.

[187] AFTRA-NY Comments at 6; AFTRA-LA Comments at 2; *See* NABOB at 13; MMTC Reply Comments at 2.

APPENDIX B: List of Commenting Parties

The following is a list of parties that filed comments on or before the applicable deadlines for filing comments and reply comments to the TV Ownership Further Notice.[188]

Commenters

AFLAC Broadcast Group, Inc.	AFLAC
American Federation of Television and Radio Artists Los Angeles Local	AFTRA-LA
American Federation of Television and Radio Artists New York Local	AFTRA-NY
American Federation of Television and Radio Artists National	AFTRA-National
American Federation of Television and Radio Artists Pittsburgh	AFTRA-Pittsburgh
Association of Independent Television Stations, Inc.	ALTV[189]
Big Horn Communications, Inc.	Big Horn
Black Citizens for a Fair Media, et. al.	BCFM
Broad Street Television, L.P.	Broad Street
Capital Cities/ABC, Inc.	Capital Cities/ABC
Capitol Broadcasting Company, Inc.	Capitol Broadcasting
CBS, Inc.	CBS
Cedar Rapids Television Co.	Cedar Rapids
Centennial Communications, Inc.	Centennial
Citicasters Co.	Citicasters
Clear Channel Television, Inc.	Clear Channel
Communications Corporation of America	CCA
Cook Inlet Region, Inc.	Cook Inlet
Dispatch Broadcast Group	Dispatch
Ellis Communications, Inc.	Ellis
Erickson, Larry	Erickson

[188] The *Television Ownership Further Notice* was released on January 17, 1995. The Commission set April 17, 1995 and May 17, 1995 as the Comment and Reply Comment Dates, respectively. On April 7, 1995, the Mass Media Bureau extended the time to file comments to May 17, 1995 and the time to file reply comments to June 19, 1995. By order released June 15, 1995, the Mass Media Bureau further extended the time to file reply comments to June 30, 1995. Finally, by order released June 16, 1995, the Mass Media Bureau extended the reply comment deadline to July 10, 1995.

[189] Now the Association of Local Television Stations (ALTV).

Fox Television Stations, Inc.	Fox
Freedom of Expression Foundation, Inc.	FOE
Golden Orange Broadcasting Co.	Golden Orange
Hill Radio, Inc., et. al.	Hill Radio
Jet Broadcasting Co., Inc., The	Jet
Kentuckiana Broadcasting, Inc.	Kentuckiana
Lee Enterprises, Inc.	Lee Enterprises
Local Station Ownership Coalition	Local Station Ownership
Louisiana Television Broadcasting Corp.	Louisiana Television
Malrite Communications Group	Malrite
Media America Corp.	Media America
Media Institute, The	Media Institute
Mostek, Raymond	Mostek
National Association of Black Owned Broadcasters	NABOB
National Broadcasting Co., Inc.	NBC
Network Affiliated Stations Alliance	NASA
New World Communications Group, Inc.	New World
Post-Newsweek Stations, Inc.	Post-Newsweek
Press Broadcasting Co., Inc.	Press Broadcasting
Pulitzer Broadcasting Co.	Pulitzer
Silver King Communications, Inc.	Silver King
Sinclair Broadcasting Group, Inc.	Sinclair
Smith, Thomas C.	Smith
Spectrum Detroit	Spectrum Detroit
Television Operators Caucus, Inc.	Television Operators
Texas Television, Inc.	Texas Television
Tribune Broadcasting, Co.	Tribune
Westinghouse Broadcasting Co. (Group W)	Group W
WYDO-TV	WYDO-TV
Young Broadcasting, Inc.	Young Broadcasting

Reply Commenters

AFLAC Broadcast Group, Inc.	AFLAC
Allbritton Communications, Co.	Allbritton
Black Citizens for a Fair Media	BCFM
Brooks Broadcasting, LLC	Brooks Broadcasting[190]
Capital Cities/ABC, Inc.	Capital Cities/ABC

[190] Although titled "comments", Brooks Broadcasting Comments were received after the comment deadline and as such are considered as reply comments.

CBS, Inc.	CBS
Centennial Communications, Inc.	Centennial
Fox Television Stations, Inc.	Fox
LIN Television Corp.	LIN
Local Station Ownership Coalition	Local Station Ownership
Malrite Communications Group	Malrite
Meyer Broadcasting	Meyer
Midcontinent Television of South Dakota, Inc.	Midcontinent Television
Minority Media and Telecommunications Council	MMTC
National Broadcasting Co, Inc.	NBC
Network Affiliated Stations Alliance	NASA
Northern Television, Inc.	Northern Television
Pappas Stations Partnership	Pappas Stations
Silver King Communications, Inc.	Silver King
Smith Broadcasting Group, Inc.	Smith Broadcasting
Tribune Broadcasting Co.	Tribune
Viacom, Inc.	Viacom

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: **Review of the Commission's Regulations Governing Television Broadcasting; ("Local Ownership"), Second Further Notice of Proposed Rulemaking**

Broadcast Television National Ownership Rules and Review of the Commission's Regulations Governing Television Broadcasting ("National Ownership"), Notice of Proposed Rulemaking

Review of the Commission's Regulations Governing Attribution of Broadcast Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy ("Attribution"), Further Notice of Proposed Rulemaking

Today the Commission has adopted three notices seeking further comment on various aspects of its television ownership rules, specifically focusing on rules pertaining to local ownership issues, national ownership issues, and the attribution of broadcast interests. I believe that these three notices identify appropriate questions in a relatively neutral manner, and I write separately in this statement to highlight issues from each item that I consider of particular importance.

The Commission's local ownership rules currently prohibit a person or entity from having interests in two television stations whose Grade B signal contours overlap. It is significant that today's Second Further Notice seeks comment on a potential change to a new standard for authorizing common ownership of television stations that are in separate DMAs (Nielsen's Designated Market Area) and whose Grade A contours do not overlap. While I am interested in seeing the response of commenters on this issue, I believe that the proposal is potentially useful to the extent that it applies a definition of a broadcasting market commonly used for advertising purposes. In this regard, the combination of the DMA and Grade A information could yield a more actual reflection of a "local market", including the unique market characteristics east and west of the Mississippi River, as well as the influence of cable carriage upon actual viewing practices. I also am pleased that the local ownership item enables the Commission to move forward, during the interim period pending the outcome of this proceeding, in processing pending assignment or transfer applications, conditioned on the stations' compliance with the outcome of the proceeding.

I would also note that the DMA/Grade A proposal is intended as an analytically reasonable step in defining local markets for broadcasting purposes, and is not intended to be applied so as to become a more restrictive standard. Accordingly, I am hopeful that commenters will identify any specific instances where particular markets or counties might experience unintended consequences under the new standard.

As another local ownership issue, the radio-television cross-ownership rule, or the one-to-a-market rule, generally prohibits joint ownership of a radio and television station in the same local market. With respect to the Commission's waiver policy for this rule, the Second Further Notice seeks comment on potential changes to the "five factors" typically evaluated in order to foster competition and diversity. In this context, to the extent that the Commission finds it is necessary to consider market share information in reviewing requests for waivers. I believe it is important for the Commission to analyze the appropriate definition of the relevant advertising market, as well as the necessary level of data that firms should be required to provide in order to demonstrate that common ownership would meet market share criteria. It is useful to point out that since the passage of the 1996 Telecommunications Act, the radio marketplace continues to demonstrate increases in the number of stations with a slight trend toward moderate decreases in the number of owners.[1] As a result, I previously have stated that to the extent media outlets are increasing rapidly and becoming more closely related to other communications services, we must carefully weigh the longer term impact of finding markets to be "concentrated" based solely on radio advertising, as opposed to all advertising, sources in a community. [2]

Concerning national ownership issues, I take special interest in the treatment of the discount attributed to UHF stations in calculating a broadcasting network's national audience reach. I believe it is appropriate, at this time, for the Commission to defer consideration of the issue of the UHF discount until the Commission's biennial review of the broadcast ownership rules that will be conducted in 1998 pursuant to the 1996 Act. In addition to varying station valuations between UHF and VHF stations as well as the evolving role of UHF stations in emerging networks, I believe that it is necessary to wait in order to assess more carefully the impact of digital allocations on the role of UHF stations in the video marketplace.

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[1] Since March 1996, the number of commercial stations in the top 50 markets has increased nearly 2%, while the total number of owners of commercial stations in the top 50 markets have decreased over the same period by approximately 3.7%. See BIA MasterAccess Database; BIA Publications Inc., Chantilly, VA, 22021.

[2] See Jacor Communications, Inc., FCC 96-380 (released September 17, 1996), Statement of Commissioner James H. Quello, Concurring in Part.

Finally, concerning attribution of broadcast ownership interests, I am interested in the impact of the proposal to include debt and equity held by a program supplier. In particular, I question whether certain debt or equity issues, even with the limitation to those held by program suppliers, would not be conducive to establishing "control". I also am concerned that our definitions in this area must be sufficiently precise in order to avoid causing disruptions in institutional investment, or other productive ventures.

SEPARATE STATEMENT
of
COMMISSIONER SUSAN NESS

Re: Review of the Commission's Regulations Governing Television Broadcasting; ("Local Ownership"), Second Further Notice of Proposed Rulemaking; Broadcast Television National Ownership Rules and Review of the Commission's Regulations Governing Television Broadcasting ("National Ownership"), Notice of Proposed Rulemaking; Review of the Commission's Regulations Governing Attribution of Broadcast Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy ("Attribution"), Further Notice of Proposed Rulemaking; et al.

Today we advance towards our goal of issuing clear, simplified, and fair rules regarding broadcast media ownership.

The Telecommunications Act of 1996 expanded radio and television ownership opportunities nationwide and significantly liberalized local radio ownership rules. We had initiated these proceedings before Congress took action last winter because we recognized that the media markets are changing. In view of the changes mandated by Congress and to elicit comment on more specific proposals than those previously described, we now ask the public for further comment.

I am pleased to support these items for three reasons:

First, I prefer to change FCC policies or set standards by rulemaking rather than through ad hoc decisions. We shouldn't delay making decisions on license transfers and other transactions that come before us, but those individual cases do not give the kind of guidance that rulemakings do. A rule is clear, is predictable, and is fair to all. When we complete a rulemaking, everyone knows what the rules of the game will be. Through rulemaking, we have the benefit of hearing from all who are interested, including experts and others who may point out unintended consequences of our proposals. And best of all, transactions can then be expedited.

Second, I prefer to expand market opportunities by raising ownership limits as Congress has done, not through unattributable interests and other "all-but-ownership" activities. In our attribution proposals, we are striking a balance between the goal of precisely defining

"ownership" and the equally significant goal of not impeding capital flow. The proposals we put out for comment today are intended to be narrowly tailored to close loopholes, even as we liberalize direct ownership limits.

Third, the three items include several specific concepts that further our goal of making FCC rules realistic, such as the "Grade A/DMA" duopoly proposal and the "debt and equity plus" attribution proposal. We are also asking for comments on how we might improve the "five factors" we weigh in evaluating certain one-to-a-market waiver applications. These proposals, I believe, should help refine and expedite a more market-based review process.

The challenge of making decisions that are in the "public interest, convenience, and necessity" has never been more difficult in the broadcasting area than it is today. I join Commissioner Chong in saying, "we should adopt new rules precisely calibrated to achieve our goals of encouraging competition and diversity in broadcasting without unduly restraining broadcast commerce." I hope that the comments we receive provide us with the strong factual basis we need to achieve these goals.

STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: *Review of the Commission's Regulations Governing Television Broadcasting; ("Local Ownership"), Second Further Notice of Proposed Rulemaking, MM Docket No. 91-221; Broadcast Television National Ownership Rules and Review of the Commission's Regulations Governing Television Broadcasting ("National Ownership"), Notice of Proposed Rulemaking, MM Docket No. 96-222; Review of the Commission's Regulations Governing Attribution of Broadcast Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy ("Attribution"), Further Notice of Proposed Rulemaking, MM Docket No. 94-150; et al.*

Last year, we undertook a reevaluation of our television ownership and broadcast attribution rules in light of current market conditions. We recognized that the video programming market is becoming more and more competitive with each passing month. Cable channels are proliferating. In addition, there is new competition from Direct Broadcast Satellite services, MMDS providers, on-line services and, soon, Open Video Systems offered by the local telephone companies.

In this increasingly competitive environment, broadcasters, including TV licensees, need greater ownership flexibility so that they can have a fair chance to compete. Congress recognized this fact in the 1996 Telecommunications Act by directing us to eliminate the national ownership cap and reexamine our local television ownership rules. In my view, the 1996 Act evinces Congress' clear intention that we loosen our regulatory grip on the broadcast medium. Congress signalled to us that it is time to adjust our rules to fit the new reality of the video programming marketplace.

In these further NPRMs, we seek to update our record in light of the 1996 Act and other changes in the market. In my mind, our goal here is to fine tune our ownership and attribution rules. We should adopt new rules precisely calibrated to achieve our goals of encouraging competition and diversity in broadcasting without unduly restraining broadcast commerce. I encourage all commenters to examine the proposals set forth in these items and tell us how we can best reach our goal.