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

In the Matter of	)	
	)	
2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 14-50
	)	
2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 09-182
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294
	)	
Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets	)	MB Docket No. 04-256
	)	

SECOND REPORT AND ORDER

Adopted: August 10, 2016 **Released: August 25, 2016**

By the Commission: Commissioner Clyburn issuing a statement; Commissioners Pai and O'Rielly dissenting and issuing separate statements.

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INTRODUCTION

1. With this Second Report and Order (Order), we bring to a close the 2010 and 2014 Quadrennial Review proceedings.[1] In this Order, we maintain strong media ownership rules, take steps to help promote small business participation in the broadcast industry, and adopt rules that will help to promote transparency in local television markets. The Commission has built a substantial record that evidences both the existence of a dynamic media marketplace and the continuing importance of traditional media outlets in their local communities. We recognize that broadband Internet and other technological advances have changed the ways in which many consumers access entertainment, news, and information programming. Traditional media outlets, however, are still of vital importance to their local communities and essential to achieving the Commission's goals of competition, localism, and viewpoint diversity. This is particularly true with respect to local news and public interest programming, with traditional media outlets continuing to serve as the primary sources on which consumers rely.

2. Moreover, for television broadcasters, theirs is an industry on the precipice of great change. The ongoing voluntary incentive auction of broadcast television spectrum, which is critically important to the Commission's efforts to unleash the full transformative potential of broadband Internet, provides television broadcasters with a new and unique financial opportunity. We anticipate that the auction will both free up significant spectrum for mobile broadband and result in an even healthier broadcast industry. While the auction may have a dramatic impact on the television landscape in many local markets, based on our assessment of the record and the ongoing nature of the auction, we find that it is too soon to quantify this impact; accordingly, it would be premature to change our media ownership rules in anticipation of the incentive auction's impact at this time.[2] We will soon commence our evaluation of the broadcast marketplace post-auction, and we expect that these issues will feature prominently in future media ownership reviews.

3. Based on our careful review of the record, we find that the public interest is best served by retaining our existing rules, with some minor modifications. These rules promote competition and a diversity of viewpoints in local markets, thereby enriching local communities through the promotion of distinct and antagonistic voices. Ideally, our media landscape should be diverse because our population is diverse, and retaining the existing media ownership rules is one way in which the Commission can help to promote such diversity. The record in this proceeding leads us to conclude that retaining the existing rules is the best way to promote our policy goals in local markets at this time. In addition, following the Third Circuit's decision in *Prometheus III*, we are readopting the Television Joint Sales Agreement (JSA) Attribution Rule adopted in the *Report and Order* in this proceeding.[3]

4. We also address in this Order the Third Circuit's remand in *Prometheus II* of certain aspects of the Commission's 2008 *Diversity Order*.[4] Specifically, we reinstate the revenue-based eligible entity

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[1] *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371 (2014) (*FNPRM* and *Report and Order*); *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 09-182, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011) (*NPRM*); *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Notice of Inquiry, 25 FCC Rcd 6086 (2010) (*NOI*).

[2] For additional discussion of the incentive auction, see paragraphs 79-81, *infra*.

[3] *See infra* para. 15.

[4] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011) (*Prometheus II*); *see also Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed

standard, as well as the associated measures to promote the Commission's goal of encouraging small business participation in the broadcast industry, which we believe will cultivate innovation and enhance viewpoint diversity. Also, as directed by the court, we have considered the socially and economically disadvantaged business definition as a possible basis for favorable regulatory treatment, as well as other possible definitions that would expressly recognize the race and ethnicity of applicants.[5] However, we find that the demanding legal standards the courts have said must be met before the Government may implement preferences based on such race- or gender-conscious definitions have not been satisfied.

5. Finally, we take steps to address concerns about the use of a variety of sharing agreements between independently owned commercial television stations. Specifically, we adopt a definition of Shared Service Agreements (SSAs) and require commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file. This action will lead to more comprehensive information about the prevalence and content of SSAs between television stations, which will improve the Commission's and the public's ability to assess the potential impact of these agreements on the Commission's rules and policies.

BACKGROUND

6. The media ownership rules subject to this Quadrennial Review are the Local Television Ownership Rule, the Local Radio Ownership Rule, the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, and the Dual Network Rule.[1] Congress requires the Commission to review these rules every four years to determine whether they "are necessary in the public interest as the result of competition" and to "repeal or modify any regulation [the Commission] determines to be no longer in the public interest."[2] The Third Circuit has instructed that "necessary in the public interest" is a '"plain public interest' standard under which 'necessary' means 'convenient,' 'useful,' or 'helpful,' not 'essential' or 'indispensable.'"[3] There is no "presumption in favor of repealing or modifying the ownership rules."[4] Rather, the Commission has the discretion "to make [the rules] more or less stringent."[5] This review focuses on determining whether there is a reasoned basis for retaining, repealing, or modifying each rule consistent with the public interest.[6]

7. The Commission began the 2010 proceeding with a series of workshops held between November 2009 and May 2010. Participants in the workshops discussed the scope and content of the review process. Thereafter the Commission released a *Notice of Inquiry* (*NOI*) on May 25, 2010, seeking comment on a wide range of issues to help determine whether the current media ownership rules continue

Rulemaking, 23 FCC Rcd 5922 (2008) (*Diversity Order* and *Diversity Third FNPRM*).

[5] *Prometheus II*, 652 F.3d at 471-73.

[1] These rules are found, respectively, at 47 CFR §§ 73.3555(b), (a), (d), and (c) and 47 CFR § 73.658(g).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (1996 Act); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (Appropriations Act) (amending Sections 202(c) and 202(h) of the 1996 Act). In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. *See* Appropriations Act § 629, 118 Stat. at 100.

[3] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 394 (3d Cir. 2004) (*Prometheus I*). The court also concluded that the Commission is required "to take a fresh look at its regulations periodically in order to ensure that they remain 'necessary in the public interest.'" *Id.* at 391.

[4] CBS Corp. NPRM Comments at 3 (CBS) (citing *Fox Television Stations v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (*Sinclair*)). The court in *Prometheus I* determined that Section 202(h) does not carry a presumption in favor of deregulation. *See Prometheus I*, 373 F.3d at 395 (rejecting the "misguided" findings in *Fox* and *Sinclair* regarding a "deregulatory presumption" in Section 202(h)); *see also Prometheus II*, 652 F.3d at 444-45 (confirming the standard of review under Section 202(h) adopted in *Prometheus I*).

[5] *Prometheus I*, 372 F.3d at 395; *see also Prometheus II*, 652 F.3d at 445.

[6] *See Prometheus I*, 373 F.3d at 395; *Prometheus II*, 652 F.3d at 445.

to serve the Commission's policy goals.[7] Subsequently, the Commission commissioned 11 economic studies, conducted by outside researchers and Commission staff, which were peer reviewed and then released to the public for comment, in order to provide data on the impact of market structure on the Commission's policy goals of competition, localism, and diversity.[8]

8. After the release of the *NOI*, the Court of Appeals for the Third Circuit issued its opinion in *Prometheus II*, which considered appeals from the Commission's review of the media ownership rules in the *2006 Quadrennial Review Order*.[9] The court affirmed the Commission's decision to retain the Local Television and Radio Rules in order to protect competition in local media markets.[10] The court also affirmed the Commission's retention of the Dual Network Rule based on potential harm to competition that would result from mergers among the top four networks.[11] In addition, the court affirmed the Commission's conclusion to retain the Radio/Television Cross-Ownership Rule based on its contribution to the Commission's diversity goal.[12] The Third Circuit vacated and remanded the Newspaper/Broadcast Cross-Ownership Rule as modified by the Commission in the *2006 Quadrennial Review Order* on procedural grounds, concluding that the Commission had failed to comply with the notice and comment provisions of the Administrative Procedure Act (APA).[13] Finally, the court vacated and remanded a number of measures adopted in the Commission's 2008 *Diversity Order*.[14] Specifically, the court vacated and remanded measures adopted in the *Diversity Order* that were designed to increase ownership opportunities for "eligible entities," including minority- and women-owned entities, because it determined that the Commission's revenue-based eligible entity definition was arbitrary and capricious.[15] The court directed the Commission to address this issue in the course of the 2010 Quadrennial Review.

9. On December 22, 2011, the Commission released the *Notice of Proposed Rulemaking* (*NPRM*), in which the Commission proposed modest, incremental changes to the broadcast ownership rules and sought comment on those changes. The Commission also sought comment in the *NPRM* on the

[7] *See NOI*, 25 FCC Rcd at 6086.

[8] *Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding*, Public Notice, 25 FCC Rcd 7514 (MB 2010); *FCC Releases Five Research Studies on Media Ownership and Adopts Procedures For Public Access to Underlying Data Sets*, Public Notice, 26 FCC Rcd 8472 (MB 2011); *FCC Releases Three Additional Research Studies on Media Ownership*, Public Notice, 26 FCC Rcd 10240 (MB 2011); *FCC Releases the Final Three Research Studies on Media Ownership*, Public Notice, 26 FCC Rcd 10380 (MB 2011). The media ownership studies for the 2010 Quadrennial Review proceeding are available at http://www.fcc.gov/encyclopedia/2010-media-ownership-studies. In the *NPRM*, the Commission sought formal comment on the studies. *NPRM*, 26 FCC Rcd at 17556-64, paras. 171-93. Few commenters to the *NPRM* provided specific criticisms of individual studies, though the University of Southern California Annenberg School for Communications & Journalism (USC) provided an all-around critique of the studies. University of Southern California Annenberg School for Communications & Journalism NPRM Comments at 5 (submitted on behalf of the Communication Policy Research Network) (USC). Overall, we find that the studies provide useful data and analysis regarding the impact of market structure on the Commission's policy goals, and we will discuss the studies in the context of the relevant rule sections below.

[9] *Prometheus II*, 652 F.3d at 431; *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2016-17, para. 9 (2008) (*2006 Quadrennial Review Order*).

[10] *Prometheus II*, 652 F.3d at 460-61, 462-63. The local radio rule was also retained, in part, to help promote the Commission's diversity goal. *See id*. at 462-63 (affirming the Commission's decision to retain the local radio ownership rule).

[11] *Id.* at 463-64.

[12] *Id.* at 456-58.

[13] *Id.* at 453. The court did not address the substantive modifications to the rule.

[14] *Id.* at 471.

[15] *Id*.

aspects of the Commission's 2008 *Diversity Order* that the Third Circuit had remanded in *Prometheus II*, as well as other actions that the Commission might take to increase the level of broadcast station ownership by minorities and women. Finally, the Commission sought comment on various attribution issues that define which interests in a licensee must be counted in applying the broadcast ownership rules. In particular, the Commission sought comment on the impact of certain programming or other sharing agreements between stations and whether it should modify the broadcast attribution rules to account for such agreements or adopt disclosure requirements. In doing so, the Commission referenced its pending proceeding regarding the potential attribution of television JSAs.[16] In that proceeding, the Commission had tentatively concluded that television JSAs have the same effects in local television markets that radio JSAs do in local radio markets and that the Commission should therefore attribute television JSAs.

10. On November 14, 2012, the Media Bureau released a report on the ownership of commercial broadcast stations (*2012 323 Report*).[17] Consistent with other data and extensive comment already in the record, the *2012 323 Report* confirmed low levels of broadcast station ownership by women and minorities—a situation long recognized by the Commission.[18] On December 3, 2012, the Commission granted the request of several parties for "an additional, formal opportunity to comment on the [*2012 323 Report*]."[19] On May 30, 2013, the Multicultural Media, Telecom and Internet Council (MMTC) submitted a study titled "The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations" (MMTC Cross-Ownership Study).[20] The Commission sought comment on this study during the summer of 2013.[21]

11. On April 15, 2014, the Commission released the *Further Notice of Proposed Rulemaking* (*FNPRM*) (adopted March 31, 2014), which, building upon the record collected in the 2010 Quadrennial Review proceeding, initiated the 2014 Quadrennial Review proceeding.[22] The *FNPRM* incorporated the existing 2010 record into the 2014 proceeding; proposed rules that were formulated based on evaluation of that existing record; and sought new and additional information and data on market conditions and competitive indicators. As part of the same item, the Commission released the *Report and Order*, which

[16] *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 (2004).

[17] *See 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Report on Ownership of Commercial Broadcast Stations, 27 FCC Rcd 13814 (MB 2012) (*2012 323 Report*). The *2012 323 Report* is based on ownership information, as of November 1, 2009, and October 1, 2011, submitted by broadcasters in their biennial Form 323 filings. *See* FCC, Form 323, Ownership Report for Commercial Broadcast Stations, http://transition.fcc.gov/Forms/Form323/323.pdf; *see also* 47 CFR § 73.3615.

[18] *See, e.g.*, *Diversity Order*, 23 FCC Rcd at 5924, para. 1 (noting that "minority- and women-owned businesses" historically have not been "well-represented in the broadcasting industry"); *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Notice of Proposed Rulemaking, 10 FCC Rcd 2788, 2789, para. 5 (1995) ("[D]espite the Commission's efforts to increase minority ownership of broadcast and cable facilities, minorities today remain significantly underrepresented among mass media owners.").

[19] *See Commission Seeks Comment on Broadcast Ownership Report et al.*, Public Notice, 27 FCC Rcd 15036 (MB 2012).

[20] Letter from David Honig, President, Multicultural Media, Telecom and Internet Council (MMTC), to Chairwoman Mignon Clyburn, Commissioner Ajit Pai, and Commissioner Jessica Rosenworcel, FCC (May 30, 2013) (MMTC May 30, 2013 *Ex Parte* Letter) (attaching Mark Fratrik, BIA/Kelsey, The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations (May 30, 2013) (MMTC Cross-Ownership Study)).

[21] *Media Bureau Invites Comments on Study Submitted by the Minority Media and Telecommunications Council in 2010 Quadrennial Review of Broadcast Ownership Rules et al.*, Public Notice, 28 FCC Rcd 8244 (MB 2013).

[22] *FNPRM*, 29 FCC Rcd 4371. Prior to the release of the *FNPRM*, an Order was circulated by the Commission that would have resolved the 2010 Quadrennial Review Proceeding. That Order, however, did not achieve a majority and was removed from consideration.

adopted attribution rules for certain television JSAs.[23]

12. In May 2014, multiple parties (Petitioners) sought appellate review of the *FNPRM* and *Report and Order* in both the D.C. Circuit and the Third Circuit.[24] Petitioners challenged the JSA Attribution Rule and the agency's decision to defer resolution of certain issues concerning its media ownership rules until it updates the record in this proceeding. In addition, Prometheus Radio Project asserted that the Commission failed to comply with the Third Circuit's order to justify or modify the Commission's method of boosting minority ownership or to propose new measures to do so. The D.C. Circuit was originally selected to hear the cases, but transferred the consolidated proceeding to the Third Circuit. Oral arguments in the Third Circuit were held on April 19, 2016.

13. On June 27, 2014, the Media Bureau released a further report on the ownership of commercial broadcast stations (*2014 323 Report*).[25] Consistent with the *2012 323 Report* and other data and extensive comment in the record, the *2014 323 Report* confirmed low—and generally stable—levels of broadcast station ownership by women and minorities. Also on June 27, 2014, the Media Bureau released an *Order* in this proceeding extending the comment and reply deadlines on the *FNPRM*, which also provided interested parties with an opportunity to provide comment on "any facts, information, or positions that are implicated by the content of the *2014 323 Report*."[26]

14. On May 12, 2016, the Media Bureau and the Office of Strategic Planning and Policy Analysis released and sought public comment on the *Hispanic Television Study* (as well as the associated peer review report), a Commission study designed to examine the nexus between ownership, programming, and viewing, in order to expand the discussion and understanding of these interrelationships, particularly among Hispanic television station owners and Hispanic audiences.[27] Initially, comments were due on May 26, 2016, and replies on June 3, 2016; however, the Commission subsequently extended the deadlines to June 2, 2016, and June 9, 2016, respectively.[28]

15. On May 25, 2016, the Third Circuit issued a decision (*Prometheus III*) addressing the various challenges to the *FNPRM* and *Report and Order.* The court remanded the eligible entity issues to the Commission and ordered the Commission and certain public interest petitioners to engage in mediation to set a timetable for reaching final agency action on the eligible entity definition. The court also vacated the Television JSA Attribution Rule—adopted in the *Report and Order*—finding that the Rule was adopted prematurely because the Commission had not yet determined whether the Local Television Ownership Rule remains necessary pursuant to Section 202(h). The court stated that the Rule could be readopted if the Commission were to conclude, following completion of its Section 202(h) review, that

[23] *Report and Order*, 29 FCC Rcd at 4527-45, paras. 340-72.

[24] *See, e.g.*, Petition for Review of Final Order on Television Joint Sales Agreements, *Howard Stirk Holdings, LLC v. FCC*, No. 14-1090 (D.C. Cir. May 30, 2014).

[25] *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Report on Ownership of Commercial Broadcast Stations, 29 FCC Rcd 7835 (MB 2014) (*2014 323 Report*). The *2014 323 Report* is based on ownership information, as October 1, 2013, submitted by broadcasters in their biennial Form 323 filings. *See* FCC Form 323, Ownership Report for Commercial Broadcast Stations, http://transition.fcc.gov/Forms/Form323/323.pdf; *see also* 47 CFR § 73.3615.

[26] *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order, 29 FCC Rcd 7911 (MB 2014).

[27] *Media Bureau Seeks Comment on* Hispanic Television Study *as Part of Quadrennial Review of Media Ownership Rules and Diversity of Ownership of Broadcast Stations*, Public Notice, DA 16-534 (OSP/MB May 12, 2016). Prior to peer review, the study was posted on the Commission's website. Press Release, FCC, FCC Posts Hispanic Television Study for Review (Apr. 28, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-339106A1.pdf.

[28] *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order, DA 16-586 (MB May 26, 2016).

the existing Local Television Ownership Rule should be retained or replaced with a new rule.[29]

16. *Policy Goals*. We continue to find that the longstanding policy goals of competition, localism, and diversity represent the appropriate framework within which to evaluate our media ownership rules. Accordingly, we reject suggestions in the record that the Commission should adopt any additional or different policy goals.[30] While those proposals generally represent worthwhile pursuits, we do not believe that they can be meaningfully promoted through the structural ownership rules and/or are outside the Commission's statutory authority.

III. MEDIA OWNERSHIP RULES

A. Local Television Ownership Rule

1. Introduction

17. The current Local Television Ownership Rule allows an entity to own two television stations in the same Nielsen Designated Market Area (DMA) only if there is no Grade B contour overlap between the commonly owned stations, or at least one of the commonly owned stations is not ranked among the top-four stations in the market (top-four prohibition) and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined (eight-voices test). Based on the record that was compiled for the 2010 and 2014 Quadrennial Review proceedings, we find that the current Local Television Ownership Rule, with a limited contour modification, remains necessary in the public interest.[1] As discussed below, we find that the Local Television Ownership Rule remains necessary to promote competition and that this competition-based rule will continue to promote viewpoint diversity by helping to ensure the presence of independently owned broadcast television stations in local markets and is consistent with our localism goal as competition also incentivizes television stations to select programming responsive to the interests and needs of the local community. In addition, we find that the Local Television Ownership Rule continues to be consistent with our goal of promoting minority and female ownership of broadcast television stations. Moreover, we find that a limited modification of the rule—replacing the Grade B contour overlap test with a digital noise limited service contour (NLSC) overlap test—will better promote competition and reflect the current television marketplace, and that the benefits of this approach outweigh any burdens, which will be minimized by our decision to grandfather existing combinations as described below. In addition, we retain the existing failed/failing station waiver policy. Finally, we clarify the application of the top-four prohibition to "affiliation swaps" that would result in a single entity obtaining control over two of the top-four-rated stations in a market. Overall, we find that the benefits of the rule we adopt today outweigh any burdens.

18. Under our revised Local Television Ownership Rule, an entity may own up to two television stations in the same DMA if: (1) the digital NLSCs of the stations (as determined by Section 73.622(e) of the Commission's rules) do not overlap; or (2) at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned television stations would remain in the

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[29] *See generally Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*). The court also rejected the argument that the Commission acted "arbitrarily and capriciously by not attributing all . . . SSAs" in the *Report and Order*, crediting the Commission's argument that it needed to study SSAs more closely before making an attribution decision. *Id*. at 60 n.18.

[30] *See, e.g.*, Diversity and Competition Supporters NPRM Comments at 5 (DCS) (proposing that the Commission adopt the goals of remedying the present effects of past discrimination and preventing future discrimination); Don Schellhardt NPRM Comments at 6 (urging the Commission to [promote/add] "robust employment" as a policy goal); Writers Guild of America, East, AFL-CIO NPRM Comments at 2-3(WGAE) (asserting that the Commission must add the goal of increasing the resources devoted to diverse local news programming in order to effectively promote the core policy goals of competition, localism, and diversity). We note that remedying past discrimination is discussed in Section IV.C.2.b., *infra*.

[1] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); *NPRM*, 26 FCC Rcd at 17498, para. 26; *FNPRM*, 29 FCC Rcd at 4377, para. 15; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2060, para. 87.

DMA following the combination.[2] In calculating the number of stations that would remain post-transaction, only those stations whose digital NLSCs overlap with the digital NLSC of at least one of the stations in the proposed combination will be considered.

2. Background

19. In the *FNPRM*, the Commission proposed to retain the existing Local Television Ownership Rule, but with a single modification—replacing the analog Grade B contour overlap provision (i.e., the test for determining whether to apply the top-four prohibition and the eight-voices test) with a digital NLSC overlap test.[3] The Commission proposed to retain the remainder of the rule, specifically, the top-four prohibition, the eight-voices test, and the numerical limits.[4] In addition, the *FNPRM* sought comment on: the application of the top-four prohibition to transactions commonly referred to as "affiliation swaps"; potential modifications to the failed/failing station waiver criteria; the impact of multicasting (including dual affiliations via multicasting) on local markets; and the impact of the proposed rule on minority and female ownership.[5]

20. Broadcast commenters generally oppose the retention of the Local Television Ownership Rule on the basis of its effect on small market television stations.[6] In particular, Nexstar Broadcasting, Inc. (Nexstar) argues that the rule serves only to prevent television broadcasters in medium and small markets from effectively competing with other integrated, multi-platform video programming distributors.[7] Broadcasters state that the rules do more harm than good in smaller markets by preventing stations from realizing the benefits of joint ownership and sharing arrangements.[8] The National Association of Broadcasters (NAB) also argues that the ownership rules do not promote the independent production of local news programming.[9]

21. Other commenters support the Commission's proposal to retain the rules because of the continuing need to prevent excessive consolidation of television stations.[10] Commenters supporting retention of the rule cite the increase in television consolidation both at the local and national levels that has adversely affected programming diversity.[11] Free Press states that television consolidation results in the same company owning multiple media outlets in the same community such that changing the channel brings the same content from the same company, packaged with slightly different graphics and sometimes delivered by a different reporter.[12] Free Press argues that the public interest in ensuring programming diversity should outweigh any efficiencies broadcasters claim are gained through consolidation and points out that broadcast television has an obligation to serve the public interest because of its use of the public

[2] *See* Appendix A; *see also* 47 CFR § 73.622(e).

[3] *FNPRM*, 29 FCC Rcd at 4383-84, paras. 26-29.

[4] *Id.* at 4386-94, paras. 35-55.

[5] *Id.* at 4390-93, 4395-4401, paras. 45-50, 56-73.

[6] Nexstar Broadcasting, Inc. FNPRM Comments at 17 (Nexstar); Stainless Broadcasting, L.P. et al., FNPRM Comments at 2-3, 5-6 (Broadcast Licensees). In addition, LIN and the Broadcast Licensees argue that as more video is delivered over wireless spectrum, there should be regulatory parity between the wireless and broadcast industries. LIN Television Corp. d/b/a LIN Media FNPRM Comments at 6 (LIN); Broadcast Licensees FNPRM Comments at 3.

[7] Nexstar FNPRM Comments at 17.

[8] Coalition of Smaller Market Television Stations FNPRM Comments at 4 (Smaller Market Coalition); *see also* National Association of Broadcasters FNPRM Comments at 39 (NAB).

[9] NAB FNPRM Comments at 9-10.

[10] Free Press FNPRM Comments at 9-10; Block Communications, Inc. FNPRM Comments at 3 (Block); Morgan Wick FNPRM Comments at 8 (Wick).

[11] Free Press FNPRM Comments at 10; Block FNPRM Comments at 3.

[12] Free Press FNPRM Comments at 9.

airwaves and thus is not a purely commercial endeavor.[13] It also questions broadcasters' arguments that efficiencies lead to public interest benefits such as additional local news programming.[14]

3. Discussion

22. Section 202(h) of the 1996 Act requires the Commission to review whether the Local Television Ownership Rule continues to be "necessary in the public interest as a result of competition."[15] For the reasons discussed below, we conclude that the current rule, with the modifications and clarifications adopted herein, meets that standard. We also conclude that it is appropriate to maintain the current television market definition and numerical limits on television ownership based on our examination of the record before us. We modify the existing contour approach for application of the Local Television Ownership Rule by replacing the analog Grade B contour with the digital NLSC, while grandfathering any existing ownership combinations that exceed the numerical limits as a result of the change of methodology. We retain the top-four prohibition and clarify that transactions involving changes of network affiliation must comply with the top-four prohibition. We also retain the eight-voices test and the existing waiver standard. Finally, we decline to regulate dual network affiliations via multicast at this time.

23. *Market*. The *FNPRM* tentatively found that the Local Television Ownership Rule continues to be necessary to promote competition among broadcast television stations in local television viewing markets.[16] We also tentatively found that the video programming market remained distinct from the radio listening market and declined to expand the market definition to include all forms of media.[17] We sought comment on these tentative conclusions.

24. The Writers Guild of America, West, Inc. (WGAW) asserts that online video offerings are not yet meaningful substitutes for local broadcast television. WGAW states that broadcast television continues to dominate in terms of total viewing hours and advertising revenue. WGAW cites Pew's State of the Media Report which found that broadcast television remains the primary news source for the majority of consumers.[18] WGAW also argues that television remains the dominant platform for advertisers, representing $72 billion in revenue in 2013, while advertisers spent only approximately $3 billion on online video advertising.[19]

25. By contrast, several broadcast commenters argue that our market definition is outdated and that the video marketplace has expanded greatly to include online, cable, and direct-broadcast satellite (DBS) video offerings.[20] Given the options that consumers have today compared to when the rules were last updated, Nexstar argues that the Commission should adopt a rule that ensures that local broadcasters, especially those in smaller markets, are governed by a rational rule that affords them the opportunity to compete effectively with all of the other video content providers.[21] NAB argues that competition for audiences and advertisers from other sources of video—such as from multichannel video programming distributors (MVPDs) and from Internet and mobile video providers—creates adequate competitive pressures so that the harms associated with consolidation do not occur, especially in smaller markets.[22] Additionally, NAB objects to our proposed market definition and, in support of this opposition, submits a

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[13] Free Press FNPRM Reply at 8.

[14] *Id*. at 8-9.

[15] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

[16] *FNPRM*, 29 FCC Rcd at 4379-83, paras. 20-25.

[17] *Id*. at 4380, para. 21.

[18] Writers Guild of America, West, Inc. FNPRM Comments at 6 (WGAW).

[19] *Id*. at 6-7.

[20] Nexstar FNPRM Comments at 6, 9-10; NAB FNPRM Comments at 41; Broadcast Licensees FNPRM Comments at 2.

[21] Nexstar FNPRM Comments at 7.

study that challenges the market definition used by the Department of Justice (DOJ) in its antitrust review by purporting to demonstrate that joint sales agreements and duopoly ownership arrangements have not resulted in increased advertising prices (the Singer/Caves study).[23]

26. As discussed below, we find that the record supports the conclusion that non-broadcast video offerings still do not serve as meaningful substitutes for local broadcast television.[24] Accordingly, our analysis regarding the Local Television Ownership Rule must continue to focus on promoting competition among broadcast television stations in local television viewing markets. Competition within a local market motivates a broadcast television station to invest in better programming and to provide programming tailored to the needs and interests of the local community in order to gain market share.[25] By thus strengthening its position in the local market, a television broadcaster also strengthens its ability to compete for advertising revenue and retransmission consent fees, an increasingly important source of revenue for many stations. As a result, viewers in the local market benefit from such competition among numerous strong rivals in the form of higher quality programming.

27. While we recognize the popularity of video programming delivered via MVPDs, the Internet, and mobile devices, we find that competition from such video programming providers remains of limited relevance for the purposes of our analysis. Video programming delivered by MVPDs such as cable and DBS is generally uniform across all markets, as is online video programming content. Unlike local broadcast stations, such programming providers are not likely to make programming decisions based on conditions or preferences in local markets. No commenter in this proceeding offered evidence of non-broadcast video programmers modifying their programming decisions based on the competitive conditions in a particular local market. This strengthens our determination that, while non-broadcast video programming may offer consumers additional programming options in general, they do not serve as a meaningful substitute in local markets due to their national focus. Unlike broadcast television stations, national programmers are not responsive to the specific needs and interests of local markets, and as the Commission has previously stated, competition among local rivals most benefits consumers and serves the public interest.[26]

28. In addition, we find that broadcast television's strong position in the local advertising market supports our view that non-broadcast video programming distributors are not meaningful substitutes in local television markets. NAB argues that advertisers no longer distinguish local broadcast television from non-broadcast sources of video programming when choosing how to allocate spending for local advertising.[27] The current data do not support this claim, as advertising revenues for broadcast television stations remain strong and are projected to grow through 2019.[28] While advertising revenues on cable,

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[22] NAB FNPRM Comments at 47-50; NAB FNPRM Reply at 3. *See also* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (June 6, 2016) (NAB June 6 *Ex Parte*).

[23] NAB FNPRM Comments at 42; NAB FNPRM Reply at 2. The Singer/Caves study is provided at Attachment A of NAB's FNPRM comments.

[24] *See infra* paras. 27-28, 30.

[25] Community-tailored programming, which includes local news and public interest programming, is largely limited to broadcast television as online video and cable network programming is largely national in scope.

[26] *See FNPRM*, 29 FCC Rcd at 4405, para. 83 (citing *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13716, para. 246 (2003) (*2002 Biennial Review Order*)).

[27] NAB FNPRM Comments at 47-50.

[28] *See* Pew Research Center, State of the News Media 2015 at 46 (2015), http://www.journalism.org/files/2015/04/FINAL-STATE-OF-THE-NEWS-MEDIA1.pdf (Pew State of the News Media 2015) ("In 2014 total on-air ad revenue for local stations reached $20 billion, according to consulting firm BIA/Kelsey, up 7 percent from the year before and down 3 percent compared with 2012, the last election year."); *see also FNPRM*, 29 FCC Rcd at

satellite, and digital platforms have risen, those gains do not appear to be at the expense of broadcast television stations.[29] We find that broadcast television continues to play a significant role in the local advertising market, particularly when it comes to political advertising.[30]

29. With regard to the Singer/Caves study, we do not find the study relevant or informative in this proceeding for multiple reasons. First, we find significant issues with the statistical methods employed within the study and with the interpretation of those results. For example, based on our analysis, the cross-sectional regression analyses are likely to suffer from missing variable bias that could reverse the results on which the authors rely. The fixed effects regression analyses (which may mitigate these statistical issues) merely show a lack of statistical significance, which can result from measurement issues or a lack of variation in the relevant variable, as opposed to a lack of a relationship, as the authors' interpret it. Also, their measure of JSAs/SSAs is admittedly imprecise (except in one regression that shows a lack of statistical significance), and this kind of mismeasurement can lead to a host of statistical problems so that a regression based on imprecisely-measured data cannot be relied on. In addition, the study critiques the local broadcast television market relied on by DOJ in its merger reviews pursuant to Section 7 of the Clayton Act—which focuses solely on the impact of the transaction in the local advertising market—and not the market definition relied on by the Commission for analyzing its Local Television Ownership Rule pursuant to Section 202(h), as discussed herein. While the Commission's market definition for purposes of the Local Television Ownership Rule is similar to the market definition used by DOJ when evaluating broadcast television mergers, in that the scope of our rule is limited to broadcasters, DOJ focuses on competition for advertising, whereas our rule is premised on multiple factors, including audience share.[31] Therefore, we find that the Singer/Caves study does not inform the current proceeding.

30. Based on the record in this proceeding, we conclude that broadcast television stations continue to play a unique and vital role in local communities that is not meaningfully duplicated by non-broadcast sources of video programming. In addition to providing viewers with the majority of the most popular programming on television, broadcast television stations remain the primary source of local news and public interest programming.[32] Moreover, 34 million Americans, or 10 percent of the United States population, lack broadband access at speeds sufficient to stream or download video programming available via the Internet.[33] Accordingly, we conclude that, for purposes of determining whether our local

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4381-82, para. 24. We note that the slight decline from 2012 to 2014 is likely attributed to the fact that 2012 was a presidential election year, in which political ad spending is generally higher than non-presidential election cycles. *See* Pew State of the News Media 2015 at 46.

[29] *See* Pew State of the News Media 2015 at 46 (finding that "[l]ocal TV stations continued to fare well economically"); *FNPRM*, 29 FCC Rcd at 4381-82, para. 24 (noting that from 2008 through 2011, local broadcast television's advertising revenue market share actually increased and achieved the highest levels since 2004). Broadcast stations receive considerable revenue from political advertising every other year, which further highlights broadcast television's unparalleled value to advertisers for reaching local markets. *See* Pew State of the News Media 2015 at 46.

[30] *See* Pew State of the News Media 2015 at 46 ("[Political advertising spending] seems to guarantee windfalls to local TV stations in even-numbered years. In 2014 total on-air ad revenue for local stations reached $20 billion, according to consulting firm BIA/Kelsey….").

[31] *See, e.g.*, *FNPRM*, 29 FCC Rcd at 4383, para. 25 n.62 (noting the similar market definitions).

[32] *See id.* at 4426, para. 130 & n.344; Pew State of the News Media 2015 at 44 (providing viewership numbers for local television news and noting that viewership for local television stations increased slightly in 2014); *see also infra* para. 148 (discussing the role of local broadcast television stations in providing local news in the context of the NBCO Rule).

[33] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 31 FCC Rcd 699, 731-32, para. 79 (2016) (*2016 Broadband Progress Report*) (finding that approximately 34 million (10 percent of) Americans lack

TV rule remains necessary in the public interest, the relevant product market is the delivery of local broadcast television service. Next, we evaluate whether the rule remains necessary in the public interest.

31. *Contour Overlap/Grandfathering Existing Ownership Combinations*. The *FNPRM* proposed to retain the existing DMA and contour overlap approach for application of the Local Television Ownership Rule, as opposed to the DMA-only approach detailed in the *NPRM*.[34] In addition, the *FNPRM* proposed to replace the analog Grade B contour with the digital NLSC and proposed to grandfather existing ownership combinations that would exceed the numerical limits under the revised approach.[35] No comments were submitted on this issue.

32. Consistent with our tentative conclusions in the *FNPRM*, we decline to adopt the DMA-only approach.[36] Instead, we will retain the existing DMA and contour overlap approach but replace the analog Grade B contour with the digital NLSC, which the Commission has treated as the functional equivalent of the Grade B contour in previous proceedings.[37] We find that this modified approach accurately reflects current digital service areas while minimizing any potential disruptive impact. In addition, consistent with previous Commission decisions, we find that retaining the DMA and contour overlap approach serves the public interest by promoting local television service in rural areas.[38] That is, such an approach

access to fixed broadband meeting the 25 Mbps/3 Mbps speed benchmark adopted by the Commission). While we do not take the position that broadband deployment and adoption must be universal before we will consider Internet-delivered video to be included in the market for the Local Television Ownership Rule, we find that the current level of penetration of broadband service remains relevant when considering the extent to which online platforms may be meaningful substitutes for local broadcast television stations. The Report also found that, with regard to mobile broadband access, that 1.7 million (one percent of) Americans do not have access to a mobile provider using LTE technology, and that 171.5 million (53 percent of) Americans do not have access to mobile service provider with a LTE technology service with a minimum advertised speed of 10 Mbps/1 Mbps. *See id.* at 734-35.

[34] *FNPRM*, 29 FCC Rcd at 4383, para. 26; *see also NPRM*, 26 FCC Rcd at 17502, para. 37.

[35] *FNPRM*, 29 FCC Rcd at 4383, 4384-85, paras. 26, 30.

[36] No commenter advocated for the DMA-only approach.

[37] *See, e.g.*, *Stephen Diaz Gavin, Esq.*, Letter, 25 FCC Rcd 1851, 1857-58 (MB 2010); *Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rulemaking, 22 FCC Rcd 15581 (2007) (discussion of "DTV Power" in DTV Table Appendix B treats the Grade B and NLSC contours as comparable by using the Grade B contour for stations that did not have a DTV channel); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 17278, 17292, para. 31 (2005); *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18311, para. 72 (2004); *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 5946, 5956, para. 22 (2001). By contrast, there is no digital counterpart to a station's analog city grade contour, which is an aspect of the Commission's satellite station inquiry. Accordingly, consistent with case law developed after the digital transition, we continue to evaluate all future requests for new or continued satellite status on an ad hoc basis. *See, e.g.*, *Television Satellite Stations Review of Policy and Rules*, Report and Order, 6 FCC Rcd 4212, 4213, paras. 3-4 (1991) (defining satellite stations and explaining how satellite stations are generally exempt from the ownership restrictions set forth in Section 73.3555 (a)–(d) of the Commission's rules) (subsequent history omitted) (*Television Satellite Stations)*; *HBK NV LLC*, Memorandum Opinion and Order, 25 FCC Rcd 2354 (MB 2010); *see also Television Satellite Stations*, 6 FCC Rcd at 4215.

[38] *See Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12928-29, paras. 51-53 (1999) (*1999 Ownership Order*); *2006 Quadrennial Review Order*, 23 FCC Rcd at 2067-68, para. 104. In the *2002 Biennial Review Order*, in which the Local Television Ownership Rule was relaxed, the Commission eliminated the contour overlap provision and relied solely on DMAs. *2002 Biennial Review Order*, 18 FCC Rcd at 13691-92, paras. 185-87. However, in recognition of the unique circumstances involving stations without Grade B contour overlap, the Commission adopted waiver criteria that would permit common ownership if the applicant could demonstrate "that the stations have no Grade B overlap and that the stations are not carried by any MVPD to the same geographic area." *Id.* at 13692, para. 187. The revised rule adopted in the *2002 Biennial Review Order* was overturned on appeal for reasons unrelated to the waiver criteria. *Prometheus I*, 373 F.3d at 418-

continues to allow station owners in rural areas to build or purchase an additional station in remote portions of the DMA, so long as there is no digital NLSC overlap.[39]

33. We confirm that the digital NLSC is an accurate measure of a station's current service area and thus is an appropriate standard. It is important that the Local Television Ownership Rule take into account the current digital service area of a station. Thus, we continue to define the geographic dimensions of the local television market by referring to DMAs under the modified rule we adopt today but replace the analog Grade B contour with the digital NLSC, with the effect that within a DMA an entity may own or operate two stations in a market if the digital NLSCs of those stations do not overlap.[40] Where digital NLSC overlap exists, the combination will be permitted only if it satisfies the top-four prohibition and the eight-voices test.

34. We also adopt the proposal to grandfather existing ownership combinations that would exceed the numerical limits by virtue of the revised contour approach instead of requiring divestiture.[41] Under these circumstances, we do not believe that compulsory divestiture is appropriate.[42] We continue to believe that the disruption to the marketplace and hardship for individual owners resulting from forced divestiture of stations would outweigh any benefits of forced divestiture to our policy goals, including promoting ownership diversity. Furthermore, we note that the replacing the Grade B contour with the digital NLSC—given the similarity in the contours—effectively maintains the status quo for most, if not all, owners of duopolies formed as a result of the previous Grade B contour overlap provision.

35. However, we conclude that where grandfathered combinations are sold, the ownership rule governing television stations in effect at the time of the sale must be complied with. If the digital NLSC of two stations in the same DMA overlap, then the stations serve the same area, even if there was no Grade B contour overlap prior to the digital transition. Accordingly, requiring that a grandfathered combination be brought into compliance with the new standard at the time of sale is consistent with our rationale for adopting the digital NLSC-based standard and does not cause hardship by requiring premature divestiture. Consistent with Commission precedent, we find that the public interest would not be served by allowing grandfathered combinations to be freely transferable in perpetuity where a combination does not comply with the ownership rules at the time of transfer or assignment.[43]

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21. Because the waiver criteria were necessitated previously by the absence of a contour-overlap component in the rule and because we retain the existing DMA and contour overlap approach, we find that those criteria are unnecessary and therefore decline to consider or adopt such waiver criteria. Furthermore, no commenter advocated for this alternate approach.

[39] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2068, para. 104.

[40] The Commission previously determined that the DMA is the most appropriate definition of the geographic dimensions of the local television market, and we do not disturb that finding. *1999 Ownership Order*, 14 FCC Rcd at 12926, para. 47. The approach we adopt in this Order is consistent with our approach under the prior Local Television Ownership Rule.

[41] *FNPRM*, 29 FCC Rcd at 4385, para. 33.

[42] In the Local Radio Ownership Rule section, we confirm the disruptive impact of compulsory divestitures but determine that divestitures would be appropriate if we tightened the local radio ownership limits. *Infra* para. 106. In adopting the digital NLSC standard, we are not reducing the number of stations that can be commonly owned by all licensees; rather, we are adopting a technical change that may result in a small number of station combinations no longer complying with the criteria necessary to permit such common ownership. Accordingly, compulsory divestiture is not appropriate in these circumstances.

[43] *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1076, para. 103 (1975) (*1975 Second Report and Order*); *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13809-10, para. 487 (finding that allowing grandfathered combinations to be freely transferable "would hinder [the Commission's] effort to promote and ensure competitive markets" and that "[g]randfathered combinations, by definition, exceed the numerical limits that . . . promote the public interest as related to competition"). Under our adopted approach, we continue to allow grandfathered combinations to survive *pro forma* changes in ownership and involuntary changes

36. *Numerical Limits*. The *FNRPM* tentatively found that the current numerical limits permitting the ownership of up to two stations in a market, or a "duopoly," serves the public interest by allowing for efficiencies through owning more than one station while also promoting competition and diversity.[44] We sought comment on whether to retain the existing numerical limits subject to the other requirements proposed in the *FNPRM*.[45]

37. Free Press supports retention of the rule's numerical limits but would prefer a return to the one station per market rule (or, single license rule) that was in effect prior to the relaxation of the Local Television Ownership Rule in 1999, which it asserts would free up stations for purchase by new entrants.[46] Free Press contends that duopolies "have all but wiped out" diverse ownership in the large urban markets where they are currently permitted.[47] Also, Free Press argues that multicasting eliminates the need to acquire an additional television station and that a single license rule would encourage a station to make more efficient use of its broadcast spectrum.[48] In the absence of a return to the single license rule, Free Press urges the Commission not to relax the local television rule further, especially as local television remains a top source for news.[49]

38. We conclude that the local television marketplace has not changed sufficiently to justify tightening the current numerical limits of the rule and returning to a single-license television rule.[50] The data demonstrate that the duopolies permitted subject to the restrictions of the current rule have created tangible public interest benefits for viewers in local television markets that offset any potential harms that are associated with common ownership.[51] Such benefits include substantial operating efficiencies, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community.[52] Moreover, as discussed in greater detail in the paragraphs below on multicasting, we believe that the ability to multicast is not a substitute for common ownership of multiple stations and therefore does not justify tightening the existing numerical limits.

39. Likewise, we do not find that there have been sufficient changes in the local television marketplace to justify ownership of a third in-market station. Commenters in favor of loosening the Local Television Ownership Rule cite growing competition from non-broadcast alternatives and the economic efficiencies of owning multiple stations as the reasons why the Commission should permit

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of ownership due to death or legal disability of the licensee. *1975 Second Report and Order*, 50 FCC 2d at 1076, para. 103.

[44] *FNPRM*, 29 FCC Rcd at 4387-88, para. 39-40.

[45] *Id.* at 4386, para. 35.

[46] Free Press FNPRM Comments at 9.

[47] *Id*. at 8.

[48] Free Press FNPRM Reply at 9.

[49] Free Press FNPRM Comments at 8. According to studies cited by Free Press, more people look to their local television news station, either live on-air or online, than any other news source. *Id*. at 9.

[50] *FNPRM*, 29 FCC Rcd at 4387-88, para. 39 (tentatively finding that the record established evidence of public interest benefits arising from duopolies permitted under the current rule).

[51] *See, e.g.*, Belo Corp. NOI Comments at 6-9 (Belo) (providing evidence of increased local news and information programming, including increased news staff in certain markets, that Belo asserted are the result of efficiencies gained from common ownership); LIN NPRM Comments at 17-19, Attach. 1 (providing evidence of increased local news and public interest programming, including locally produced local sports programming, and niche programming that LIN asserted are the result of efficiencies gained from common ownership); Nexstar NPRM Comments at 15, 18, 23-24 (providing evidence of increased local news and information programming that Nexstar asserted are the result of efficiencies gained from common ownership); *see also* NAB NPRM Reply at 7-8; Smaller Market Coalition NPRM Reply at 5-7.

[52] *FNPRM*, 29 FCC Rcd at 4387-88, para. 39.

ownership of more than two stations. As discussed above in connection with our decision to define the relevant product market as broadcast television, we conclude that it is not appropriate to consider competition from non-broadcast sources in evaluating whether the rule remains necessary.[53] Despite the aforementioned benefits that duopolies can create, excessive consolidation remains likely to threaten the Commission's competition and diversity goals by jeopardizing small and mid-sized broadcasters. Without significant evidence of the public interest benefits that could result from the ownership of three stations in a local market that are not already available from the ownership of two stations, we do not believe that there is adequate justification at this time for increasing the numerical limits.

40. *Top-Four Prohibition*. The *FNRPM* proposed to retain the top-four prohibition, which prohibits mergers involving two top-four rated stations in a market, and it tentatively concluded that affiliation swaps should be subject to the top-four prohibition.[54] We tentatively found that the top-four prohibition remains necessary to promote competition in the local television marketplace, as mergers involving two of the top-four stations in a market would be the most deleterious to competition.[55] In addition, we tentatively found that scenarios whereby a licensee could obtain control over two top-four stations in a market through a transaction or series of transactions, referred to as "affiliation swaps," should be subject to the top-four prohibition, as these transactions would otherwise circumvent the intent of the top-four prohibition rule and are not in the public interest.[56] We sought comment on the tentative decisions both to retain the existing prohibition and to apply the prohibition to affiliation swaps.[57]

41. The American Cable Association (ACA), United Church of Christ (UCC) et al., and WGAW support the Commission's conclusion that the top-four prohibition remains necessary to preserve competition in local television markets.[58] ACA states that mergers involving two top-four stations in a market would minimize competition between the commonly owned stations, and thereby reduce the incentives for each station to improve its programming.[59] UCC et al. likewise argue that mergers between two top-four stations would result in a reduction of viewpoint diversity, competition, and localism by eliminating an important independent source of local news.[60] WGAW states that television mergers and acquisitions in 2013 totaled $12.4 billion alone, compared to the total volume ($13.2 billion) over the last five years, and that these transactions have concentrated ownership among the largest broadcast group owners, such as Sinclair, Gray, and Nexstar.[61] WGAW asserts that the Commission's station ownership limits likely serve as the only measure preventing further concentration that would harm competition and, therefore, the public interest.[62]

42. Broadcast commenters, on the other hand, oppose retention of the top-four prohibition. NAB submits revenue data in support of its assertion that no significant break exists between the fourth and fifth ranked stations in a market.[63] NAB argues that its data demonstrate the arbitrary nature of the top-four restriction and that a combination of two top-four stations would not harm competition in a local

[53] *See supra* paras. 27-28, 30.

[54] *FNPRM*, 29 FCC Rcd at 4388, 4390, paras. 41, 45.

[55] *Id.* at 4388-89, paras. 41, 44.

[56] *FNPRM*, 29 FCC Rcd at 4390, para. 45.

[57] *Id.*

[58] American Cable Association FNPRM Comments at 6 (ACA); Office of Communication, Inc. of the United Church of Christ, Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation, Media Council Hawai`i, Prometheus Radio Project, and Media Mobilizing Project FNPRM Comments at 27 (UCC et al.); WGAW FNPRM Comments at 2, 7.

[59] ACA FNPRM Comments at 6.

[60] UCC et al. FNPRM Comments at 27.

[61] WGAW FNPRM Comments at 7.

[62] *Id*. at 2, 7.

market.[64] NAB argues that allowing two top-four stations to combine would enhance competition, especially in medium and small markets, by permitting the creation of a more viable competitor to higher ranked stations.[65] Nexstar argues that common ownership leads to investment in better programming by maximizing owners' revenues from advertising and retransmission consent; therefore, the top-four prohibition is detrimental to promoting the public interest.[66] According to Nexstar, the top-four restriction rests on the Commission's outdated findings and flawed assumptions regarding the incentives of commonly owned stations.[67]

43. We conclude that the top-four prohibition remains necessary to promote competition in the local television marketplace; accordingly, we retain the top-four prohibition in the Local Television Ownership Rule. First, we continue to find that audience share is the appropriate metric for purposes of the top-four prohibition, and the record does not offer persuasive reason to depart from this determination.[68] Second, we find that there typically remains a significant "cushion" of audience share points that separates the top-four stations in a market from the fifth-ranked station.[69] We are not persuaded by NAB's assertions regarding the revenue of fourth- and fifth-ranked stations in a market. As we noted in the *FNPRM*, NAB's analysis evaluates revenue share and does not sufficiently examine audience share, which the Commission has utilized when evaluating the need for the top-four prohibition.[70] We continue to find that it is the ability to attract mass audiences that distinguishes the top ranked stations in local television markets, which is why it is appropriate that ratings serve as the basis for

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[63] NAB FNPRM Comments at 51; *see also* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 5-6 (June 21, 2016) (NAB June 21 *Ex Parte*); Letter from Rick Kaplan, General Counsel and Executive Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, at 2 (June 14, 2016) (NAB June 14 *Ex Parte*).

[64] *Id*. at 51-54.

[65] *Id*. at 54.

[66] Nexstar FNPRM Comments at 11. For example, Nexstar claims that its second stations in the Champaign and Little Rock DMAs were only able to add local news and sports programming because of Nexstar's ownership of more than one station in each market. *Id*. at 13.

[67] *Id*. at 11-12. Nexstar points out that a significant portion of a station's programming is provided by its affiliated network, which competes aggressively against other networks for the highest network ratings and advertising revenues. Nexstar argues that even commonly owned stations in the same market would be similarly motivated to air different programming so as to attain the highest viewership of local news for the stations collectively. *Id*. at 12-13.

[68] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13692, para. 188 ("The public is best served when numerous rivals compete for viewing audiences. [R]ivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing viewers."); *Prometheus I*, 373 F.3d at 417-18 (upholding the Commission's top-four restriction).

[69] *FNPRM*, 29 FCC Rcd at 4390, para. 44 (citing Staff analysis of Nielsen audience share data that found a significant cushion between the fourth- and fifth-rated broadcast television stations in each DMA with at least five full-power television stations)). Further, the court has twice upheld the Commission's rationale for retaining the top-four prohibition. *Prometheus II,* 652 F.3d at 460-61; *Prometheus I*, 373 F.3d at 417-18. We note that the Commission has never based the top-four prohibition solely on the existence of the ratings cushion in every market. In the *2002 Biennial Review Order*, the Commission determined that the cushion existed in two-thirds of the markets with five or more full-power commercial television stations. 18 FCC Rcd at 13694-95, para. 195. The court in *Prometheus I* cited specifically to this finding as evidence to support the Commission's line-drawing decision. 373 F.3d at 418. Therefore, we find unconvincing any claim that the top-four prohibition cannot be supported because the ratings cushion is not present in every market. The cushion continues to exist in most markets and, as such, it continues to support our decision to retain the top-four prohibition. *See FNPRM*, 29 FCC Rcd at 4390, para. 44.

[70] *FNRPM*, 29 FCC Rcd at 4389, para. 43 n.103.

the top-four prohibition.[71] Therefore, NAB's evidence does not disturb the Commission's previous determinations that the relevant metric for purposes of the top-four prohibition is audience share and does not rebut the evidence in this proceeding that a cushion still exists between the fourth- and fifth-ranked stations in most markets.[72]

44. We reaffirm our belief that top-four combinations would generally result in a single firm obtaining a significantly larger market share than other firms in the market and that such combinations would create welfare harms.[73] Top-four combinations reduce incentives for local stations to improve their programming by giving once strong rivals incentives to coordinate their programming in order to minimize competition between the commonly owned stations.[74] We are not persuaded by Nexstar's assertions that commonly owned stations have no incentive to coordinate their programming based solely on anecdotal showings from Nexstar-owned stations in two DMAs.[75] While we recognize that duopolies permitted subject to the restrictions of the current rule can create operating efficiencies, which allow the commonly owned stations to invest in news and other local programming, we find that this potential benefit is outweighed by the harm to competition where a single firm obtains a significantly larger market share through a combination of two top-four stations.[76] Accordingly, we find that the public interest is best served by retaining the top-four prohibition.[77]

45. *Affiliation Swaps*. ACA, Block Communications, Inc. (Block), and UCC et al. support application of the top-four prohibition to affiliation swaps. ACA states that affiliation swaps result in the identical harm the top-four prohibition is meant to prevent.[78] ACA states that the Commission should prohibit affiliation swaps that result in an entity holding an attributable interest in two top-four stations in a local television market.[79] Otherwise, ACA explains, an owner of a top-four station and a non-top-four ranked station can create a prohibited duopoly by swapping the affiliation of its previously non-top-four ranked station for a top-four network affiliation, thus, turning the second station into a top-four station in a market without opportunity for Commission review.[80]

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[71] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13695, paras. 195-96. The only data NAB offers regarding audience share relate to the shares of the third and fourth ranked stations in comparison to the top ranked station in Nielsen markets, but do not compare them to the fifth ranked station in the market. *See* NAB FNPRM Comments at 52. We note that the court in *Prometheus I* rejected a similar argument when upholding the Commission's decision to retain the top-four prohibition. 373 F.3d at 417-18; *see also Prometheus II*, 652 F.3d at 461-62 (upholding, again, the Commission's decision to retain the top-four prohibition).

[72] *See FNPRM*, 30 FCC Rcd at para. 44 (providing a staff analysis of Nielsen ratings data to confirm the continued existence of a cushion between the fourth- and fifth-rated stations in most markets); *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13695, para. 195 (finding a 60 percent drop in audience share between the fourth-ranked and the fifth-ranked national networks and noting that such a gap represents a significant breakpoint upon which we base our rule).

[73] *FNRPM*, 29 FCC Rcd at 4389-90, para. 44

[74] *See* ACA FNPRM Comments at 6.

[75] *See* Nexstar FNPRM Comments at 13.

[76] *See 2006 Quadrennial Review Order,* 23 FCC Rcd at 2067 ("The top four prohibition minimizes the likelihood that the market share of two merged stations will significantly overtake the market share of the largest station in a local market, which, as discussed in the *2002 Biennial Review Order*, could create welfare harms.") (citation omitted); *Prometheus II*, 652 F.3d at 460-61 (upholding the Commission's retention of the top-four restriction).

[77] *See* WGAW FNPRM Comments 7-10 ("The Commission's station ownership limits, including the Top-Four Prohibition and the Eight-Voices Test, remain vital to promoting competition and localism."); UCC et al. FNPRM Comments at 27-28 ("The Commission should retain the top-four prohibition because mergers between two top-four stations would result in a reduction of viewpoint diversity, competition and localism by eliminating an independent source of local news.").

[78] ACA FNPRM Comments at 3.

[79] *Id*. at 4.

46. Raycom Media, Inc. (Raycom) and LIN Television Corporation d/b/a LIN Media (LIN) oppose application of the top-four prohibition to affiliation swaps. Raycom characterizes the Commission's proposed action as reversing course and asserts that it would constitute an unlawful interference in the network affiliation marketplace.[81] Raycom characterizes the proposal described in the *FNPRM* as amounting to content regulation since it would potentially prevent a non-top-four ranked station in a duopoly from obtaining certain content—namely content from the network affiliate of a top-four ranked station.[82] As support for its opposition to extending the top-four prohibition, Raycom cites the Commission's statement in the *1999 Ownership Order* that any entity acquiring a duopoly while complying with the top-four prohibition at the time of transaction would not be required to divest if the two merged stations both become ranked among the top-four stations in the market subsequent the transaction.[83] In addition, LIN asserts that support by MVPDs for the application of the top-four prohibition to affiliation swaps is part of an ongoing effort by MVPDs to degrade the quality and variety of free, over-the-air programming.[84] LIN argues that MVPDs naturally would be better served if broadcasters, which provide a free alternative to MVPDs, are limited to broadcasting less popular programming.[85] LIN warns that, if the Commission permits MVPDs to degrade the quality and variety of programming available on free, over-the-air television, more content will move to behind the paywalls of MVPDs and wireless providers.[86]

47. We find that application of the top-four prohibition to affiliation swaps is consistent with previous Commission action and policy; we are merely closing a potential loophole and preventing circumvention of the Commission's rules.[87] In the *1999 Ownership Order* that adopted the top-four prohibition, the Commission did not make a statement regarding its authority to require divestiture if two merged stations both became ranked among the top-four rated stations in the market; it stated only that it would refrain from doing so in order to further certain, specific public interest benefits.[88] By allowing combinations between a large station and a small station, the Commission sought to enable the smaller

[80] *Id*. at 5.

[81] Raycom Media, Inc. FNPRM Comments at 4 (Raycom).

[82] *Id*.

[83] *Id*. at 2-3.

[84] LIN FNPRM Comments at 7.

[85] *Id*. at 8.

[86] *Id*. We find LIN's assertions unpersuasive because preventing affiliation swaps in the circumstances proposed would not impact the quality of network programming but merely require a different licensee to air the programming.

[87] Raycom states that the Commission has no explicit statutory authority to regulate affiliation swaps. *See* Raycom NPRM Comments at 1-2. However, parties can achieve through an affiliation swap the same result as a transfer of control or assignment of license, which would be subject to Commission review and be required to comply with the Local Television Ownership Rule. *See FNRPM*, 29 FCC Rcd at 4391, para. 47. Accordingly, absent our action today, parties could utilize affiliation swaps to achieve a result otherwise prohibited by the Local Television Ownership Rule. Therefore, we find that our statutory authority to extend the Local Television Ownership Rule to include affiliation swaps derives from the same general rulemaking authority that supports all of our broadcast ownership rules, as the Supreme Court has repeatedly held. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978) (holding that Section 303(r) and Section 4(i) of the Communications Act, 47 CFR §§ 153(i), 303(r), provide authority for ownership rules restricting same-service ownership as well as newspaper-broadcast cross-ownership); *id.* at 796 ("[S]o long as the regulations are not an unreasonable means for seeking to achieve these [public interest] goals, they fall within the general rulemaking authority recognized in the *Storer Broadcasting* and *National Broadcasting* cases."); *see also United States v. Storer Broad. Co.*, 351 U.S. 192, 202-03 (1956) ("The challenged [multiple ownership] Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r), 47 U.S.C.A. §§ 154(i), 303(r), grant general rulemaking power not inconsistent with the Act or law."); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943) ("In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.").

station to improve its operations and local program offerings.[89] The Commission wanted to avoid penalizing a station whose operations improved to the point that it became a top-four station. By contrast, the Commission was concerned that mergers involving top-four stations would harm competition and viewpoint diversity.[90] Affiliation swaps, by their design, implicate the specific harms to public interest that led the Commission to adopt the top-four prohibition.[91]

48. Moreover, the Commission cautioned in 1999 that future transactions, such as license transfers, that do not satisfy the top-four prohibition may not be granted.[92] This demonstrates that the Commission sought to distinguish instances where a station organically becomes a top-four station through station improvement from situations where a station actively transacts to become a top-four station via an ownership transfer or assignment.[93] While it said that the top-four determination would be made at the time of the initial transaction, the Commission signaled its intent to review future transactions involving assignments or transfers of ownership resulting in a single entity owning two top-four stations in the same market.[94] Although the Commission decided in 1999 not to prohibit licensees from owning two top-four stations when a station's top-four status resulted from organic growth, transactions involving the sale or swap of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations serve as the functional equivalent of a transfer of control or assignment of license.[95] Therefore, affiliation swaps undermine the purpose of the top-four prohibition

[88] *See 1999 Ownership Order*, 14 FCC Rcd at 12933-34, paras. 64-66.

[89] *Id*. at 12933-34, paras. 65-66.

[90] *Id*. at 12933, para. 66.

[91] *Id*. ("The 'top four ranked station' component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition."). Aside from the assignment/transfer of a station license, an affiliation swap is essentially indistinguishable in its effect on the policy underlying our duopoly rule from a top-four merger described by the Commission in the *1999 Ownership Order*. *See FNPRM*, 29 FCC Rcd at 4391, para. 47 ("In general, national network affiliation is a significant driver of a station's audience share. . . . Accordingly, an affiliation swap involving a top-four station and a non-top-four station will nearly always result in the non-top-four station becoming a top-four station after the swap."). If there is compelling evidence that an affiliation swap involving a top-four station and a non-top-four station would not result in the non-top-four station becoming a top-four station after the swap (e.g., a station's top-four ratings are driven by non-network programming that is unaffected by the affiliation swap), the parties are free to seek a waiver of this prohibition under Section 1.3 of the Commission's rules. 47 CFR § 1.3.

[92] *1999 Ownership Order*, 14 FCC Rcd at 12933, para. 64 ("[A] duopoly may not automatically be transferred to a new owner if the market does not satisfy the eight voice/top four-ranked standard.").

[93] *See id.* As we said in the *FNPRM*, acquiring control over a second in-market top-four station through affiliation swap transactions can be distinguished easily from other, legitimate actions a station may undertake to increase ratings at the expense of a competitor, such as producing higher quality or more extensive local programming or acquiring higher quality syndicated programming. *See FNRPM*, 29 FCC Rcd at 4392, para. 50 n.126. Moreover, the extension of the top-four prohibition we adopt today would not apply in situations where a network offers an existing duopoly owner (one top-four station and one station ranked outside the top four) a top-four-rated affiliation for the lower-rated station, perhaps because the network is no longer satisfied with the existing affiliate station and the duopoly owner has demonstrated superior station operation (i.e., earned the affiliation on merit). Such a circumstance represents organic growth of the station and not a transaction that is the functional equivalent of an assignment or transfer of control.

[94] A contrary conclusion would greatly diminish the effectiveness of the top-four prohibition, as an entity could essentially transact to acquire a top-four station through an affiliation swap as soon as the Commission approved the initial duopoly. *See* UCC et al. FNPRM Reply at 16 ("It would be irrational to interpret [the *1999 Ownership Order*] as endorsing affiliation swaps given that they accomplish the exact same end that the top-four prohibition was intended to prevent.").

[95] *See FNPRM*, 29 FCC Rcd at 4391, 4394, paras. 47, 50 n.127 ("The approach we propose today would clarify that the top-four prohibition would apply to certain agreements that are the *functional equivalent* of a transfer of control

and the Local Television Ownership Rule as a whole. Application of the top-four prohibition to affiliation swaps is necessary to prevent circumvention of the Local Television Ownership Rule.

49. We disagree with commenters that argue that extending the top-four prohibition to affiliation swaps amounts to impermissible content regulation and is subject to strict scrutiny. The clarifying amendment adopted today does not regulate content any more than the top-four prohibition and the media ownership rules that consistently have been upheld by the courts, and it is therefore subject to rational basis review. The decision to prohibit affiliation swaps involving two top-four stations, as described herein, does not consider content but rather the content's ratings only. In that regard, the extension of the top-four prohibition to affiliation swaps operates exactly as the existing top-four prohibition does. The rule is predicated entirely on content-neutral objectives, primarily the public interest goal of promoting competition in local markets. The rule does not limit a licensee's discretion to air the content of its choice but rather limits the number of stations in a single market that a licensee may own if common ownership would result in significantly reduced competition.

50. The *Prometheus II* court found under the rational basis standard of review that the media ownership rules do not violate the First Amendment "because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity."[96] The court rejected broadcasters' claims that the rules "are impermissible attempts by the FCC to manipulate content" and rejected Sinclair's argument that the Local Television Ownership Rule "violates the First Amendment because it 'singles out television stations.'"[97] Instead, the court recognized that "[t]hese rules apply regardless of the content of the programming."[98] The extension of the top-four prohibition that we adopt today merely clarifies that the top-four prohibition applies to agreements that are the functional equivalent of a transfer of control or assignment of license from the standpoint of our Local Television Ownership Rule.[99] Accordingly, this application of the top-four prohibition remains subject to the same constitutional analysis, and the amended rule is rationally related to the substantial government interests in promoting competition and diversity. Pursuant to that constitutional analysis, courts repeatedly have found that the Local Television Ownership Rule, which includes the top-four prohibition, does not violate the First Amendment.[100]

51. We also disagree that extension of the top-four prohibition constitutes unlawful interference in the network affiliation marketplace. Raycom argues that extending the top-four prohibition to affiliation swaps would prevent a non-top-four ranked station in a duopoly from negotiating to obtain packages of content from other in-market stations merely because the content sought is too popular.[101] We do not believe that our action is likely to have a significant impact on the marketplace, as affiliation swaps are, at this point, rare.[102] Evidence in the record demonstrates that the negotiation of affiliation agreements typically does not involve affiliation swaps; therefore, most negotiations will be unaffected by our amendment clarifying the top-four prohibition.[103] While affiliation swaps have not occurred often to date, given the potential of such transactions to undermine the Local Television Ownership Rule, we find

or assignment of license.") (emphasis added).

[96] *Prometheus II*, 652 F.3d at 464.

[97] *Id.* at 465; *see also Sinclair*, 284 F.3d at 168-69 (finding that the Local Television Ownership Rule does not violate the First Amendment under the rational basis review standard and rejecting arguments that the rule should be subject to either intermediate or strict scrutiny).

[98] *Prometheus II*, 652 F.3d at 465.

[99] The Commission noted in the *1999 Ownership Order* that "a duopoly may not automatically be transferred to a new owner if the market does not satisfy the eight voice/top four-ranked standard." *1999 Ownership Order*, 14 FCC Rcd at 12933, para. 64.

[100] *Prometheus II*, 652 F.3d at 465; *see also Prometheus I*, 373 F.3d at 402; *Sinclair*, 284 F.3d at 168-69.

[101] Raycom FNPRM Comments at 4.

[102] Indeed, the record demonstrates only a single instance of an affiliation swap that would be subject to the rule we adopt herein. *See FNPRM*, 29 FCC Rcd at 4391-92, para. 48.

that the application of the top-four prohibition to such transactions is necessary to ensure the continued effectiveness of that rule.[104] Such action is necessary because we do not believe there is a reliable marketplace solution that would restrain the future use of affiliation swaps to evade the top-four prohibition should we now decline to extend the top-four prohibition to affiliation swaps, nor is there a less restrictive means to accomplish our goal.[105]

52. Accordingly, in order to close this loophole, we find that affiliation swaps must comply with the top-four prohibition at the time the agreement is executed. Specifically, an entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the "new affiliate") acquires the network affiliation of another station (the "previous affiliate"), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement.[106] We will find any party that directly or indirectly owns, operates, or controls two top-four stations in the same DMA as a result of such transactions to be in violation of the top-four prohibition and subject to enforcement action.[107]

53. *Eight-Voices Test*. In the *FNRPM*, we proposed to retain the eight-voices test. We tentatively concluded that a merger between two in-market stations with overlapping contours should continue to be prohibited unless at least eight independently owned commercial and noncommercial television stations remain in the market post-transaction, and at least one station involved in the transaction is not a top-four station.[108] We sought comment on this proposal.

54. UCC et al. and WGAW support retention of the eight-voices test as part of their support for retaining the existing ownership rules. UCC et al. assert that in markets with eight or fewer independent owners the loss of one or more stations would present serious harms to competition and diversity.[109] WGAW states that ongoing consolidation in the broadcast station market makes the Commission's limits on station ownership increasingly relevant.[110]

55. NAB, Sinclair Broadcast Group, Inc. (Sinclair), and Nexstar oppose retention of the eight-voices test. For example, NAB argues that many small markets do not have stations affiliated with all four major networks, let alone any additional stations, and that even some stations affiliated with major networks often struggle to maintain profitability.[111] NAB states that the eight-voices test prevents stations

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[103] *FNRPM*, 29 FCC Rcd at 4392, para. 50 n.126; *see also* Sinclair Broad. Grp. NPRM Comments at 17-18 (Sinclair). We confirm that extension of the top-four prohibition to affiliation swaps would not prevent a station from obtaining an affiliation through negotiating with a national network outside the context of an affiliation swap.

[104] *FNRPM*, 29 FCC Rcd at 4392, para. 50 n.126.

[105] *Id*. No commenter proposed a less restrictive means. *See* Raycom FNPRM Comments at 5 (stating only that the Commission should carry out its regulations in the least restrictive means necessary to promote a compelling state interest but offering no examples of a less restrictive means).

[106] 47 CFR § 73.3555(b)(1)(i). In addition, for purposes of making this determination, the new affiliate's post-consummation ranking will be the ranking of the previous affiliate at the time the agreement is executed, determined in accordance with Section 73.3555(b)(1)(i) of the Commission's rules. *Id.*

[107] Application of this rule to affiliation swaps is prospective; therefore, all future transactions will be required to comply with the Commission's rules then in effect. Parties that acquired control over a second in-market top-four station by engaging in affiliation swaps prior to the release date of this Order will not be subject to divestiture or enforcement action.

[108] *FNRPM*, 29 FCC Rcd at 4393, para. 51.

[109] UCC et al. FNPRM Comments at 28.

[110] WGAW FNPRM Comments at 7.

[111] NAB FNPRM Comments at 55-56.

in smaller markets from forming efficient, profitable ownership structures.[112] Sinclair asserts that, because not all markets have at least eight stations and the Commission has not allotted at least eight stations in all markets, no harm can come from having fewer than eight independent television voices in certain other markets.[113]

56. We do not find that there have been any changes in the local television marketplace that would warrant modification of the eight-voices test at this time.[114] Nearly every market with eight or more full-power television stations—absent a waiver of the Local Television Ownership Rule or unique circumstances—continues to be served by each of the Big Four networks and at least four independent competitors unaffiliated with a Big Four network.[115] Competition among these independently owned stations serves an important function by motivating both the major network stations and the independent

[112] *Id*.; *see also* NAB June 21 *Ex Parte* at 4-5; NAB June 14 *Ex Parte* at 2. On July 19, 2016, NAB submitted an economic study—commissioned from the same authors of the Singer/Caves Study—offering a new argument for elimination of the eight-voices test. Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 2, Attach. at 3 (July 19, 2016). In response, UCC et al. argue that the study should not be considered in this proceeding as it constitutes a substantive comment filed well after the comment period had closed. Letter from Andrew Jay Schwartzman et al., Counsel, UCC et al., to Marlene H. Dortch, Secretary, FCC, at 1-2 (July 22, 2016) (citing 47 C.F.R. §1.415(d) ("No additional comments may be filed [after the close of the comment period] unless specifically requested or authorized by the Commission.")); *see also id.* at 3 (arguing that even if considered by the Commission, cursory review of the study shows that it fails to undermine the Commission's public interest justification for the eight-voices test). UCC et al. add that NAB's belated submission on July 19, 2016, is especially inappropriate given that the Commission had publicly committed (as far back as early 2014) to circulating a draft order in this proceeding by June 30, 2016, and had, in fact, circulated a draft order on June 27, 2016. *Id.* at 2 (noting that "NAB is one of the parties appealing the FCC's failure to complete the 2010 Quadrennial Review"). UCC et al. further assert that consideration of the study at this point would require a reasonable period for review and comment by interested parties, which would result in an unreasonable delay in the completion of this proceeding. *Id.* at 4. NAB responds that its economic submission is not a new substantive argument but rather supports statements NAB has previously made. Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 1-2 (July 28, 2016) (NAB July 28 *Ex Parte* Letter). We agree with UCC et al. that it would be inappropriate to consider NAB's late-filed study in this proceeding. While the Commission has an obligation to respond to all significant comments filed during the comment period, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203, 191 L. Ed. 2d 186 (2015), it is not obligated to consider late-filed comments. *Verizon v. FCC*, 770 F.3d 961, 968 (D.C. Cir. 2014); *see also Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009) (Commission lacked "fair opportunity" to pass on new argument raised on the same day an order was adopted). Here, NAB submits a complex econometric study that would require significant Commission resources and time to properly evaluate, as well as a reasonable opportunity for interested parties to comment. NAB has not provided an adequate justification for submitting this study so egregiously late—indeed, after it knew the Report and Order had already been circulated and after there were reports that three Commissioners had voted for the item. While NAB states that the study "took longer to complete, given the extensive data acquisition from multiple sources needed to conduct the study," we note that the study could have been conducted at any time during the proceeding, and NAB has not explained why it initiated the study at such a late stage. *See* NAB July 28 *Ex Parte* Letter at 2. Nor has NAB explained how further delaying this proceeding is consistent with its own criticisms that the Commission has failed to resolve this proceeding in a timely manner. Ultimately, we find that consideration of this extremely late-filed study would cause undue delay and would be contrary to the Third Circuit's expectation that the Commission will move quickly to resolve this proceeding and the Commission's commitment to do so. *See Prometheus III*, 824 F.3d at 53-54. Therefore, we decline to consider it.

[113] Sinclair FNPRM Comments at 8.

[114] Commenters generally have asserted only that competition from non-broadcast programming has changed. *See supra* para. 25. As discussed above, we do not find it appropriate to consider competition from non-broadcast sources for the purposes of evaluating whether the Local Television Ownership Rule remain necessary. *See supra* para. 30.

[115] *See FNRPM*, 29 FCC Rcd at 4394, para. 54.

stations to improve their programming, including increased local news and public interest programming.[116] This competition is especially valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations' communities.

57. We continue to believe the minimum threshold maintained by the eight-voices test helps to ensure robust competition among local television stations in the markets where common ownership is permitted under the rule. The eight-voices test increases the likelihood that markets with common ownership will continue to be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks.[117] Also, because a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets—demonstrating the dominant position of the top-four-rated stations in the market—we continue to believe that it is appropriate to retain the eight-voices test, which helps to promote at least four independent competitors for the top-four stations before common ownership is allowed.[118] Accordingly, we retain the eight-voices test.

58. We also sought comment on whether the *Sinclair* opinion compels us to include other voices in addition to full-power television stations in the eight-voices test.[119] We find that it does not. In *Sinclair*, the court rejected the eight-voices test, finding that the Commission had failed to justify its decision to define voices differently in the radio-television cross-ownership rule and the Local Television Ownership Rule.[120] As stated above, the primary purpose of the Local Television Ownership Rule and the eight-voices test is to promote competition among broadcast television stations in local television viewing markets.[121] By contrast, the primary purpose of the radio-television cross-ownership rule is to promote viewpoint diversity;[122] therefore, it is appropriate to consider a broader range of voices there than in the context of the Local Television Ownership Rule. Accordingly, we continue to include only full-power television stations in the voice count for purposes of the Local Television Ownership Rule.

59. We note that our conclusion adheres to *Prometheus II*, where the court upheld the Commission's rationale in the 2006 Quadrennial Review proceeding for limiting voices in the Local Television Ownership Rule to full-power television stations. The Commission had determined in that proceeding that the primary goal of the Local Television Ownership Rule was to promote competition among local television stations, and not to foster viewpoint diversity because there were other outlets for diversity of viewpoint in local markets. Therefore, although other types of media contribute to viewpoint diversity, the Commission determined that they should not be counted as voices under the Local Television Ownership Rule.[123] The court agreed and upheld the Commission's decision.[124]

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[116] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2065, para. 99.

[117] *Id.* at 2044-45, 2065, paras. 60, 99 (providing the rationale for selecting the number eight as the appropriate benchmark for the major media voice count). In addition, we disagree with Sinclair's interpretation that the eight-voices test implies that at least "eight competing over-the-air TV stations are the minimum necessary to ensure competition" and so each market must have at least eight independent stations. *See* Sinclair FNPRM Comments at 8. The eight-voices test only establishes the minimum level necessary to permit common ownership of stations in a market, subject to the other requirements in the rule. Therefore, markets with fewer than eight independent stations can still maintain a significant level of competition given the absence of duopolies in these markets.

[118] *FNRPM*, 29 FCC Rcd at 4394, para. 54.

[119] *Id.* at 4394-95, para. 55.

[120] *Sinclair*, 284 F.3d at 162-65 (holding that the Commission did not demonstrate why exclusion of non-broadcast media from the eight-voices test served the public interest under § 202(h) of the Act)

[121] *See supra* paras. 17, 57; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2066, para. 100.

[122] *See infra* para. 142; *see also FNRPM*, 29 FCC Rcd at 4465, para. 211.

[123] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2066, para. 100.

[124] *Prometheus II*, 652 F.3d at 460.

60. *Attribution of Television JSAs*. In the *Report and Order*, we adopted a rule that attributed television JSAs under which a television station (the broker) sold more than 15 percent of the weekly advertising time for another same-market television station (the brokered station). Pursuant to the new rule, in such circumstances, the brokering station was deemed to hold an attributable interest in the brokered station. Among other implications associated with attribution, this resulted in counting the brokered station toward the brokering station's permissible ownership totals.[125] In addition, we provided a two-year period from the effective date of the *Report and Order* (March 31, 2014) for parties to existing, same-market television JSAs whose attribution resulted in a violation of the ownership limits to terminate or amend those JSAs or otherwise come into compliance with the ownership rules.[126] Following the adoption of the *Report and Order*, Congress twice extended this compliance period, ultimately extending the relief through September 30, 2025.[127]

61. The Third Circuit vacated the Television JSA Attribution Rule in *Prometheus III*, finding that the adoption of the rule was procedurally invalid as a result of the Commission's failure to also determine that the Local Television Ownership Rule served the public interest.[128] The court stated that the Commission could readopt the rule if it was able to justify readopting the ownership rules to which television JSA attribution applies or to adopt new ownership rules.[129] The court specifically noted that it "offer[ed] no opinion" on substantive challenges to the Television JSA Attribution Rule.[130]

62. Consistent with *Prometheus III*, having concluded that the Local Television Ownership Rule (with minor modifications) continues to serve the public interest, we now readopt the Television JSA Attribution Rule first adopted in the *Report and Order*.[131] In so doing, we incorporate by reference the rationale articulated in the *Report and Order* for the adoption and application of the rule.[132] We continue to find that it is appropriate to attribute certain television JSAs under the Commission's attribution standards.[133] We find that readopting the rule serves the public interest by ensuring compliance with our broadcast ownership rules, and there is anecdotal evidence to suggest that the attribution of television

[125] *Report and Order*, 29 FCC Rcd at 4527, para. 340. While one purpose of the attribution rules is to determine compliance with the Commission's various broadcast ownership rules, including the Local Television Ownership Rule, we note that the Commission's attribution rules are relevant in many other contexts, as well (e.g., Form 323 ownership reporting, auctions, retransmission consent negotiations, and foreign ownership). *But see Prometheus III*, 824 F.3d at 59 (asserting that if there were no ownership caps, the Commission would not need to have attribution rules). Accordingly, even if the Commission were to eliminate all its ownership caps, the attribution rules would remain relevant in connection with a large number of other rules. As such, it is important that the Commission retain the ability to update its attribution rules, as appropriate.

[126] *Report and Order*, 29 FCC Rcd at 4542, para. 367.

[127] Consolidated Appropriations Act, 2016, § 628, P.L. 114-113 (2015).

[128] *Prometheus III*, 824 F.3d at 60.

[129] *Id.* at 55.

[130] *Id*.

[131] We note that television JSA attribution is also relevant in the other broadcast ownership rules we adopt today that involve ownership of a broadcast television station.

[132] *See Report and Order*, 29 FCC Rcd at 4527-45, paras. 340-72.

[133] *See* Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Secretary, FCC (filed July 20, 2016) (supporting JSA attribution) (UCC July 20, 2016 *Ex Parte* Letter); Letter from James L. Winston, President, NABOB, to Marlene H. Dortch, Secretary, FCC, at 1 (filed July 11, 2016) (supporting JSA attribution) (NABOB July 11, 2016 *Ex Parte* Letter). *But see* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (filed July 29, 2016) (arguing that JSA attribution is arbitrary and capricious as well as not in the public interest). Upon the effective date of this Order, the following rules, which were not modified or removed from the CFR, shall again be effective as they relate to television JSAs: 47 CFR § 73.3555, Note 2(k)(2)-(3) and 47 CFR § 73.3613(d)(2).

JSAs has helped promote minority and female ownership opportunities.[134]

63. In addition, we are adopting different transition procedures than those adopted in the *Report and Order*. Specifically, we retain the previous effective date for application of the grandfathering relief —March 31, 2014—and we will extend the compliance period through September 30, 2025.[135] Until that time, such grandfathered agreements will not be counted as attributable, and parties will be permitted to transfer or assign these agreements to other parties without terminating the grandfathering relief.[136] While we note that this grandfathering relief is not typical of the relief normally provided by the Commission—generally grandfathered combinations cannot be assigned or transferred unless they comply with the ownership rules in effect at the time[137]—we believe that the relief is warranted given the various expressions of Congressional will in this regard.[138]

64. In addition to readopting the Television JSA Attribution Rule, we find that such attribution does not change our determination here that the existing Local Television Ownership Rule should be retained, with a minor contour modification.[139] The analysis underlying the various components of the Local Television Ownership Rule (e.g., the numerical limits, the top-four prohibition, and the eight-voices test) assumes that independently owned and operating stations are just that—independent. The Commission's attribution rules are designed to help to ensure that independence, or, stated differently, to reflect a determination of when stations are not truly independent, because of common ownership or other relationships that provide the ability to exercise influence or control over another station's core operating functions.[140] The attribution of certain television JSAs, which prevents those agreements from being used

[134] *See* Chairman Tom Wheeler & Commissioner Mignon Clyburn, Making Good on the Promise of Independent Minority Ownership of Television Stations (Dec. 4, 2014), https://www.fcc.gov/newsevents/blog/2014/12/04/making-good-promise-independent-minority-ownership-television-stations. For additional discussion of television JSAs in the diversity context, see paragraph 238, *infra*.

[135] Any television JSAs adopted or revised following the Third Circuit's decision to vacate the Television JSA Attribution Rule are not provided any transition relief and must immediately be brought into compliance with the Commission's rules. This is consistent with the treatment of television JSAs executed after the release of the *Report and Order*, which were not provided any transition period. *FNPRM*, 29 FCC Rcd at 4542, para. 367 n.1130. We believe that it is reasonable to adopt a similar measure here given that parties were on notice following *Prometheus III* that the Commission could readopt the Television JSA Attribution Rule if the Commission were to conclude, following completion of its Section 202(h) review, that the existing Local Television Ownership Rule should be retained or replaced with a new rule—which we have done herein. *See Prometheus III*, 824 F.3d at 60.

[136] In addition, any television JSA that previously lost grandfathering relief as a result of a condition imposed by the Commission in the approval of a transaction may seek to have the condition rescinded. Upon request of the transferee or assignee of the station license, we will rescind the condition and permit the licensees of the stations whose advertising was jointly sold pursuant to such agreement to enter into a new JSA—to the extent that both parties wish to enter into the agreement—on substantially similar terms and conditions as the prior agreement. We delegate authority to the Media Bureau to review these requests and grant relief, as appropriate.

[137] *See supra* note Error: Reference source not found and accompanying text.

[138] *See, e.g.*, Consolidated Appropriations Act, 2016, § 628, P.L. 114-113 (2015); Letter from Roy Blunt et al., United States Senator, to Tom Wheeler, Chairman, FCC, OLA Docket No. 16-9, at 1 (filed Mar. 15, 2016).

[139] *Report and Order*, 29 FCC Rcd at 4527-45, paras. 340-72.

[140] The Local Television Ownership Rule is a bright-line rule designed to promote competition. Accordingly, our analysis focuses on concepts that are generally applicable across all markets. In response to the *NOI*, broadcast commenters expressed support for this approach, noting that a bright-line rule provides transaction participants with greater certainty and predictability, which in turn reduces transaction costs and expedites the Commission's review process. *See* NAB NOI Comments at 91; Hearst NOI Comments at 6-7. The bright-line approach, however, precludes full "consideration of changing economic conditions within a particular local market or all of the variations that may exist across markets." *NOI*, 25 FCC Rcd at 6114, para. 92. To take account of such considerations, the Commission would need to adopt a case-by-case approach. However, such an approach provides less certainty to the market, imposes higher administrative burdens on the Commission than the bright-line approach, and may delay Commission decision-making, which could ultimately chill marketplace activity. *Id.* at

to circumvent the ownership limits by compromising the independence of a same-market station, helps to ensure that the goals of the Local Television Ownership Rule are realized.[141] The Commission's responsibility under Section 202(h) is to ensure that the Local Television Ownership Rule continues to serve the public interest, not to manipulate the rule to counterbalance the attribution of television JSAs. As discussed in this section, we find that the rule we adopt here serves the public interest.

65. *Waiver Policy*. The *FNPRM* proposed to keep the existing failing/failed station waiver test and sought comment on whether to relax the criteria or to establish additional grounds for waiver.[142] We tentatively concluded that a market size waiver standard is not necessary. Instead, we found that retention of the existing failed/failing station waiver policy would serve the public interest.[143] Under this policy, to obtain a waiver of the local television rule, an applicant must demonstrate that one of the broadcast television stations involved in the proposed transaction is either failed or failing and that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; and selling the station to an out-of-market buyer would result in an artificially depressed price.[144] A station is considered to be "failed" if it has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application; a television station is considered to be "failing" if it has an all-day audience share of no more than four percent and it has had negative cash flow for three consecutive years immediately prior to the application.[145] We sought further comment on whether we should relax the waiver criteria or establish additional grounds for waiver.[146]

66. NAB opposes retention of the current failed/failing station waiver criteria. NAB proposes that the Commission change the waiver test by: (1) eliminating the four percent audience share standard and basing waiver eligibility on financial factors, (2) requiring a showing of only one year of negative cash flow, and (3) adopting a 180-day shot clock for waiver request reviews.[147] However, UCC et al. argue that NAB's proposal for a one-year negative cash flow requirement would not sufficiently demonstrate that a station is failing due to the cyclical nature of the broadcast industry.[148] UCC et al. therefore supports retention of the current waiver criteria.[149]

67. Waiver of our rules is meant to be exceptional relief, and we find that the existing waiver criteria effectively establish when relief from the rule is appropriate. We remain concerned that loosening

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6115, paras. 93-94. We do not find any support in the record for such an approach. Accordingly, arguments that the Commission's analysis regarding the Local Television Ownership Rule and/or television JSAs fails to account for market-by-market differences are unavailing, as an approach that takes those differences into account would be inconsistent with the bright-line rule favored by broadcasters.

[141] We note that this applies to any circumstances in which an individual or entity has an attributable interest in more than one station in a market. The arguments that television JSAs should not be attributed because they produce public interest benefits are essentially indistinguishable from arguments that the ownership limits should be relaxed because common ownership produces public interest benefits. We acknowledge and address these arguments throughout; however, we have ultimately determined that the Local Television Ownership Rule should be retained, with a minor modification to the contour standard.

[142] *FNRPM*, 29 FCC Rcd at 4395, para. 56.

[143] *Id.*

[144] 47 CFR § 73.3555, Note 7.

[145] *Id*. Under the failing station standard, the applicants must also demonstrate that "consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity." *Id.*

[146] *FNRPM*, 29 FCC Rcd at 4396, para. 60.

[147] NAB FNPRM Comments at 60-61.

[148] UCC et al. FNPRM Reply at 17.

[149] *Id*.

the existing failed/failing station waiver criteria—such as by eliminating the four percent audience share requirement or by reducing the negative cash flow period from three years to one—would result in a waiver standard that is more vulnerable to manipulation by parties seeking to obtain a waiver. Also, such changes may not be rationally related to improving the Commission's ability to evaluate the viability of a station subject to the waiver request. For example, we agree that examination of a station's cash flow for only one year does not adequately account for the cyclical nature of broadcast television and would not necessarily indicate that a station is failing.[150] A petitioner thus would increase the likelihood of a waiver petition being granted simply by timing the waiver petition to coincide with a station's cyclical downturn. We anticipate that adopting the waiver standard proposed by NAB would significantly expand the circumstances in which a waiver of the Local Television Ownership Rule would be granted, without sufficiently demonstrating that the stations could not effectively compete in the market. Such relaxation of the waiver standard would be inconsistent with our determination that the public interest is best served by retaining the existing television ownership limits in order to promote competition. Therefore, we conclude that the existing waiver standard is not unduly restrictive and that it provides appropriate relief in all television markets.[151]

68. *Multicasting*. We tentatively concluded in the *FNPRM* that the ability to multicast multiple program streams on a digital broadcast television signal does not justify imposition of a ban on owning more than one station in a market. In addition, the *FNPRM* tentatively declined to regulate dual affiliations via multicast at this time.[152] The *FNPRM* sought comment on these tentative decisions and on any new developments that would require re-evaluation of our conclusions.[153]

69. LIN and Sinclair support the Commission's proposal not to regulate dual affiliations via multicast. LIN characterizes MVPD support for Commission action to restrict broadcasters' ability to choose programming as an effort to degrade the quality and variety of free, over-the-air programming.[154] Sinclair states that the Commission has approved of its multicasting practices and questions why the Commission permits multicasting but restricts ownership of multiple stations.[155]

70. ACA, Block, and Free Press oppose the Commission's tentative conclusions. ACA and Block concede that benefits can accrue from dual affiliations in smaller markets or markets with unique characteristics that leave them unable to carry all Big Four networks on separate full-power television stations. However, they nevertheless argue that the potential harm of dual Big Four affiliations in larger markets warrants Commission action.[156] ACA and Block state that dual affiliation through multicasting,

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[150] According to recent research, many stations receive a windfall during election years that could more than offset any negative cash flow in other years. Pew State of the News Media 2015 at 46 (finding that political advertising spending "seems to guarantee windfalls to local TV stations in even-numbered years").

[151] We also decline to adopt a 180-day shot clock for waiver request reviews. *See* NAB FNPRM Comments at 60-61. NAB does not provide any evidence that waiver requests are subject to undue delay; on the contrary, we believe that the current process works effectively and that applications are processed in a timely and efficient manner. In addition, we note that the Commission currently endeavors to complete action on assignment and transfer of control applications (including those requesting a failed/failing station waiver) within 180 days of the public notice accepting the applications. Routine applications are typically decided within the 180-day mark, and all applications are processed expeditiously as possible consistent with the Commission's regulatory responsibilities. However, several factors could cause the Commission's review of a particular application to exceed 180 days. *See* FCC, Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers, https://www.fcc.gov/general/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or. Certain cases will present difficult issues that require additional consideration, and we do not believe that it is appropriate to artificially constrain our review.

[152] *FNRPM*, 29 FCC Rcd at 4398, para. 66.

[153] *Id.* at 4396, 4398, paras. 61, 66.

[154] LIN FNPRM Comments at 7.

[155] Sinclair FNPRM Comments at 9.

[156] ACA FNPRM Comments at 12; Block FNPRM Comments at 11.

especially of two top-four network affiliates, creates the same harm that the duopoly prohibition aims to prevent and that control over multiple Big Four networks via multicasting could result in higher retransmission consent fees, which would harm consumers.[157] ACA proposes that the Commission prohibit dual affiliations via multicast of two top-four networks unless there is an insufficient number of full-power commercial television broadcast stations in a DMA to affiliate with each of the top four networks separately.[158] Free Press cites Sinclair's argument as an implicit concession that multicasting is practically the same as dual ownership.[159]

71. We find that the ability to multicast does not justify tightening the current numerical limits. Based on evidence in the record, broadcasting on a multicast stream does not typically produce the cost savings and additional revenue streams that can be achieved by owning a second in-market station.[160] Therefore, tightening the numerical limits might prevent those broadcasters in markets where common ownership is permitted under the existing rule from achieving the efficiencies and related public interest benefits associated with common ownership. Accordingly, our view, based on the most recent record, is that it is not appropriate to adjust the numerical limits as a result of stations' multicasting capability.

72. As proposed in the *FNPRM*, we decline to regulate dual affiliations via multicast, including dual affiliation with more than one Big Four network, at this time. A significant benefit of the multicast capability is the ability to bring more local network affiliates to smaller markets, thereby increasing access to popular network programming and local news and public interest programming tailored to the specific needs and interests of the local community. We find that the strongest public interest concerns posed by dual affiliations via multicasting involve affiliations between two Big Four networks. However, based on the record, dual affiliations involving two Big Four networks via multicasting are generally limited to smaller markets where there are not enough full-power commercial television stations to accommodate each Big Four network or where there are other unique marketplace factors responsible for creating the dual affiliation.[161] Marketplace incentives, at present, appear to limit the occurrence of dual affiliations via multicasting involving multiple Big Four networks largely to these smaller markets.[162] Therefore, we conclude that the nature of the local television market supports our decision to decline regulation of dual affiliations via multicasting at this time.[163] However, we will continue to monitor this issue and take action in the future, if appropriate; moreover, we note that the Commission has the ability to consider issues that impact the Commission's policy goals in the context of individual transactions such as transfers of control or assignments of licenses.[164]

73. *Minority and Female Ownership*. The *FNPRM* tentatively concluded that the proposed Local Television Ownership Rule was consistent with the Commission's goal to promote minority and female

[157] ACA FNPRM Comments at 12; Block FNPRM Comments at 11.

[158] ACA FNPRM Comments at 13.

[159] Free Press FNPRM Reply at 10.

[160] *FNRPM*, 29 FCC Rcd at 4397, para. 64.

[161] *Id.* at 4399-4400, para. 69.

[162] *Id.* at 4400, para. 69.

[163] The factors that justify our decision not to restrict dual affiliations via multicast are not present in circumstances involving affiliation swaps, discussed above. Dual affiliations via multicasting do not result in an entity owning two television stations rated in the top four in the market in violation of the Local Television Ownership Rule, which is the case with affiliation swaps now subject to the top-four prohibition, and there are no marketplace forces that would limit affiliation swaps absent our action today. Indeed, considering the marketplace conditions that tend to give rise to dual affiliations, prohibiting dual affiliation with more than one Big Four network could result in some Big Four networks becoming unavailable over the air in certain markets because there are not enough commercial television stations to accommodate each Big Four network in these markets. Prohibiting affiliation swaps would not create such a result since affiliation swaps, by definition, involve separate licensees affiliated with each network.

[164] *See Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16867, 16879, paras. 29-30 (MB 2013).

ownership of broadcast television stations and sought comment on the potential impact of the incentive auction on minority and female ownership and whether that impact should affect the 2014 Quadrennial Review.[165]

74. UCC et al. state that the spectrum auctions will have a negative effect on ownership opportunities for minorities and women because of the loss of spectrum for low power television (LPTV) stations.[166] UCC et al. do not believe that retaining the existing ownership rules is enough to safeguard minority and female ownership from broadcast consolidation.[167] The Smaller Market Coalition argues that more flexible ownership and operating arrangements (e.g., JSAs and SSAs) would increase minority and female ownership,[168] a contention that has been much disputed in the record.[169]

75. We affirm our tentative conclusion that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast television stations. While we retain the existing Local Television Ownership Rule for the reasons stated above, to promote competition among broadcast television stations in local markets, and not with the purpose of preserving or creating specific amounts of minority and female ownership, we find that retaining the existing rule nevertheless promotes opportunities for diversity in local television ownership.[170] The competition-based rule helps to ensure the presence of independently owned broadcast television stations in the local market, thereby indirectly increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants.[171]

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[165] *FNRPM*, 29 FCC Rcd at 4400, 4401-02, paras. 70, 73.

[166] UCC et al. FNPRM Comments at 28.

[167] *Id*. at 30.

[168] Smaller Market Coalition FNPRM Comments at 13-14.

[169] *See, e.g.*, Letter from Bob Butler, President, National Association of Black Journalists, to Tom Wheeler, Chairman, FCC (filed Mar. 10, 2014); Letter from Andrew Jay Schwartzman, Institute of Public Representation, to Marlene H. Dortch, Secretary, FCC (filed Mar. 21, 2014) (recounting support of National Association of Broadcast Employees and Technicians-CWA, and Communications Workers of America, AFL-CIO, for attribution of JSAs and arguing that enforcement of attribution rules will promote diversity); Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Secretary, FCC (filed Mar. 21, 2014) (joining National Hispanic Media Coalition (NHMC) in support of the attribution of JSAs, alleging harm to diversity, localism, and competition); Letter from S. Derek Turner, Research Director, Free Press, to Mignon Clyburn, Commissioner, FCC (filed Mar. 24, 2014) (supporting attribution of JSAs and refuting argument that JSAs lead to new and diverse ownership); Letter from Terry O'Neil, President, National Organization for Women, to Tom Wheeler, Chairman, FCC (filed Mar. 24, 2014) (supporting attribution of JSAs and arguing that JSAs have not created true opportunities for female ownership); Letter to Tom Wheeler, Chairman, FCC (filed Mar. 24, 2014) (letter on behalf of multiple public interest groups, including National Association of Hispanic Journalists, Center for Media Justice, UCC, Common Cause, and Media Literacy Project, urging attribution of JSAs and other related agreements in order to promote greater diversity of voices in the broadcast television industry).

[170] We note also that we retain without modification the current failed/failing station waiver policy, including the requirement that the waiver applicant attempt to first solicit an out-of-market buyer, which promotes possible new entry in a market by ensuring that out-of-market entities interested in purchasing a station are aware of station sale opportunities. *See 1999 Ownership Order*, 14 FCC Rcd at 12937, para. 74.

[171] *See* Media Ownership Study 9, A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied 2-3, by Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie (2011) (Media Ownership Study 9) (finding, based on theoretical analysis, that the presence of more independently owned outlets can increase viewpoint diversity in a market). Premised on the reasonable assumption that more than one viewpoint exists on many issues, Media Ownership Study 9 supports the related conclusion that competition among firms with similar viewpoints improves information transmission. *Id.* at 26-27. Similarly, Media Ownership Study 2 examines the effects of media market structure on consumer demand and welfare, finding that "the representative consumer values different viewpoints in the reporting of information on news and current affairs, more information on community news, and more information that reflects the interests of women and minorities." Media Ownership Study 2, Consumer Valuation of Media as a Function of Local Market Structure 0, by Scott J. Savage and Donald

76. We are unconvinced by the Smaller Market Coalition's argument that sharing agreements, such as JSAs and SSAs, promote minority and female ownership.[172] While the record demonstrates that some stations that are owned by minorities and women participate in JSAs, the record also indicates that many such stations do not.[173] Moreover, there is no evidence that current minority or female station owners utilized such agreements to acquire those stations. To the contrary, anecdotal evidence suggests that JSAs, in particular, have been used by large station owners to foreclose entry into markets and that the Commission's decision to attribute JSAs has actually led to greater ownership diversity[174]—a proposition supported by multiple commenters throughout this proceeding.[175] As discussed in Section V, many joint operating agreements are not attributable under the Commission's current rules, allowing for a meaningful level of cooperation for cost-saving purposes so long as the independence of the brokered station is preserved. Therefore, the Commission's rules do not prevent minority- and women-owned entities or other small business owners or new entrants from utilizing such agreements to facilitate station ownership, to the extent that such agreements are beneficial and do not result in ownership rule violations.

77. Additionally, we find the claim that tightening the Local Television Ownership Rule will promote increased opportunities for minority and female ownership to be both speculative and unsupported by existing ownership data.[176] The National Telecommunications and Information Administration (NTIA) ownership data from 1990-2000 identified 32 minority-owned full power television stations in 1998 (racial and ethnic minorities)—the year before the Commission relaxed the former rule that had restricted ownership to a single television station in a market.[177] Following a decline in the 1999/2000 NTIA data to 23 stations,[178] the Commission's recent Form 323 ownership data demonstrate that minority ownership has grown since that rule was eliminated: 60 stations in 2009; 70

M. Waldman (2011) (Media Ownership Study 2). It finds, using simulation techniques, that any negative effects on diversity associated with common ownership of television stations in a market are smaller in markets with multiple independent television voices. *See* Media Ownership Study 2 at 49.

[172] We discuss sharing agreements in Section V.

[173] *See* Smaller Market Coalition FNPRM Comments at 13-14. The Smaller Market Coalition provides statistics regarding only full power television stations owned by women and African Americans. By their own data, the majority of stations owned by women do not participate in JSAs; moreover, they do not offer any statistics for stations owned by other minority groups, which make up the largest portion of minority station owners. *See 2014 323 Report*.

[174] *See supra* note Error: Reference source not found.

[175] *See supra* note Error: Reference source not found.

[176] *See, e.g.*, National Hispanic Media Coalition et al. NPRM Comments at 3-5 (NHMC et al.); UCC et al. NPRM Comments at 24; *see also* Free Press NPRM Comments at 44 (asserting that tightening the television ownership limits could promote ownership diversity by creating ownership opportunities for new entrants); Free Press NPRM Reply at 19. We note that combining older data with more recent data from FCC Form 323 biennial ownership reports (beginning in 2009) introduces potential variation from differences in the way the data were collected rather than actual changes in the marketplace. However, in the absence of a continuous, unified data source, the Commission must rely on the available data, and our findings herein are consistent with the data.

[177] U.S. Dep't of Commerce, Nat'l Telecomms and Info. Admin., Changes, Challenges, and Charting new Courses: Minority Commercial Broadcast Ownership in the United States 39 (2001) (NTIA 2001 Minority Ownership Report); *see also 1999 Ownership Order*, 14 FCC Rcd at 12924-43, paras. 42-91. This was down from a previous peak of 38 minority-owned full-power television stations in 1995 and 1996/97. NTIA 2001 Minority Ownership Report at 39. The Commission has previously acknowledged that NTIA's data collection methodology did "not insure a complete listing of all commercial radio and television stations owned by minorities" and the data did not include separate data on female ownership. *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23096-97, para. 100 (1998). However, these are the only data from that time period that are available for purposes of comparison and evaluation of claims that relaxation of the Local Television Ownership Rule reduced minority ownership.

[178] NTIA 2001 Minority Ownership Report at 39.

stations in 2011; and 83 stations in 2013.[179] Data provided by Free Press similarly show an increase in minority ownership after the Commission relaxed the Local Television Ownership Rule in 1999.[180] No data provided in the record support a contention that the duopoly rule has reduced minority ownership or suggest that a return to the one-to-a-market rule would increase ownership opportunities for minorities and women.

78. On the other hand, while the data reflect an increase in minority ownership following relaxation of the Local Television Ownership Rule, we have no evidence in the record that would permit us to infer causation and thus we decline to loosen the rule on this basis.

79. Finally, we find that it is impossible at the present time to analyze the implications of the incentive auction for the Local Television Ownership Rule generally, or minority and female ownership specifically.[181] In the auction proceeding, the Commission has considered the effects of the auction on diversity, stating that "[v]oluntary participation in the reverse auction, via a channel sharing, ultra-high frequency (UHF)-to-very-high frequency (VHF), or high-VHF-to-low-VHF bid, offers a significant and unprecedented opportunity for these owners to raise capital that may enable them to stay in the broadcasting business and strengthen their operations."[182]

80. The broadcast television incentive auction is ongoing and its implications—including, for example, which stations will relinquish their spectrum entirely and which will relinquish their current channel in order to share a channel with another station(s)—will not be known for some time. Broadcasters interested in participating in the reverse auction filed their applications in January 2016.[183] Entities interested in bidding in the forward auction on the spectrum made available through the reverse auction filed applications in February 2016.[184] The clock round bidding for the reverse auction commenced on May 31, 2016, and concluded on June 29, 2016; the Commission announced August 16,

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[179] *See 2014 323 Report*, 29 FCC Rcd at 7838, paras. 6-7; *2012 323 Report*, 27 FCC Rcd at 13816-17, paras. 5-6 (updated in footnote 20 of the *2014 323 Report* to correct African American ownership total from 10 to 11). As stated in footnote 16 of the *2014 323 Report*, the number of minority-owned stations was temporarily increased by 14 stations because an Asian individual indirectly held a majority interest in these stations while the entity that owned the stations was in bankruptcy. This individual's interest was terminated in November 2013, which eliminated the temporary increase. Even discounting those 14 stations, there were 69 minority-owned stations in 2013 based on the 323 data, which is more than double the number in 1998.

[180] *See, e.g.*, S. Derek Turner & Mark Cooper, Out of the Picture 2007: Minority & Female TV Station Ownership in the United States (Oct. 2007), http://www.freepress.net/sites/default/files/fp-legacy/otp2007.pdf (Turner/Cooper TV Study) (finding that minorities owned 43 commercial full-power television stations as of October 2007).

[181] The broadcast incentive auction will comprise of two separate but interdependent auctions—a reverse auction, which will determine the price at which broadcasters will voluntarily relinquish their spectrum usage rights; and a forward auction, which will determine the price companies are willing to pay for flexible use wireless licenses to deliver high-speed data services. Television stations have a number of options by which they can participate: they can choose to go off the air and relinquish their license entirely or relinquish their current channel to share a channel with another station, or they can move from their current channel to a channel in a different band. The lynchpin joining the reverse and the forward auctions is the "repacking" process. Repacking involves reassigning channels to the remaining television stations in order to create contiguous blocks of cleared spectrum suitable for flexible use.

[182] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6850, para. 695 (2014) (*Incentive Auctions Report and Order*). A licensee's participation in the reverse auction does not mean it has decided to exit the business, even if its bid is accepted. The auction provides for bid options that allow the licensee to obtain a share of auction proceeds but still remain on the air: (i) channel sharing; (ii) a UHF station could bid to move to a VHF channel; and (iii) a high VHF station (channels 7-13) could bid to move to a low VHF channel (2-6).

[183] *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, Public Notice, 30 FCC Rcd 12559 (2015).

[184] *Forward Auction Application Filing Window Opens Today at Noon After One-Day Weather Delay; FCC Form 175 Deadline Extended to February 10, 2016*, Public Notice, 31 FCC Rcd 313 (2016).

2016, as the start date for the initial stage of the forward auction.[185] Under statute, the identities of the broadcasters participating in the reverse auction are confidential.[186] After the conclusion of the auction—the date of which is unknown—the Commission will release a public notice announcing the reverse and forward auction winners, and identifying those television stations that will be reassigned to new channels (or "repacked"). Reassigned stations will have up to 39 months after release of that public notice to complete the transition to their new channels, while winning bidders who will relinquish their spectrum entirely or move to share a channel with another station must do so within a specified number of months from receipt of their incentive payment.[187]

81. In light of these factors, and due to the fact that the incentive auction is a unique event without precedent, we cannot evaluate or predict the likely impacts of the auction at this time. As noted above, we will soon commence our evaluation of the broadcast marketplace post-auction, and we expect that the Commission will address the implications of the incentive auction for the media ownership rules in the context of future quadrennial reviews. Further, the court in *Prometheus III* indicated that "the Commission should consider how the ongoing broadcast incentive auction affects minority and female ownership."[188] Consistent with this direction and our previous requests for comment on this issue, we have evaluated the record and the status of the ongoing incentive auction, and it is our determination that it is too soon to assess the impact of the auction on minority and female ownership.

B. Local Radio Ownership Rule

1. Introduction

82. Based on the record in the 2010 and 2014 Quadrennial Review proceedings, we find that the current Local Radio Ownership Rule remains necessary in the public interest and should be retained without modification.[189] We find that the rule remains necessary to promote competition and that the radio ownership limits promote viewpoint diversity "by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market."[190] Similarly, we find that a competitive local radio market helps to promote localism, as a competitive marketplace tends to lead to the selection of programming that is responsive to the needs and interests of the local community.[191] Also, we find that the Local Radio Ownership Rule is consistent with our goal of promoting minority and female ownership of broadcast television stations. We find that these benefits outweigh any burdens that may result from retaining the rule without modification. In addition, as discussed in greater detail below, we adopt certain clarifications and other actions proposed in the *FNPRM* that are designed to fulfill the intent of the revisions to the Local Radio Ownership Rule adopted

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[185] *See Broadcast Auction Scheduled to Begin March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward)*, Public Notice, 30 FCC Rcd 8975 (2015); *62 Applicants Qualified to Bid in the Forward Auction (Auction 1002) of the Broadcast Television Incentive Auction; Clock Phase Bidding to Begin on August 16, 2016*, AU Docket No. 14-252, Public Notice, DA 16-796 (July 15, 2016).

[186] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §6403(a)(3) (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (requiring "all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction . . . , including withholding the identity of such licensee until the [spectrum] reassignments and reallocations. . . become effective")

[187] *Incentive Auctions Report and Order*, 29 FCC Rcd at 6580, para. 34.

[188] *Prometheus III*, 824 F.3d at 54 n.13.

[189] 1996 Act § 202.

[190] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2077, para. 127 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13739, paras. 305-06).

[191] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2075, para. 124; *2002 Biennial Review Order*, 18 FCC Rcd at 13738, para. 304 (citing generally *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755 (1992) (*1992 Radio Ownership Order*); *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, First Report and Order, 4 FCC Rcd 1723 (1989)).

in the *2002 Biennial Review Order*.[192]

83. Accordingly, the Local Radio Ownership Rule will continue to permit the following: An entity may own (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which can be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which can be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination.[193]

2. Background

84. The *FNPRM* proposed to retain the Local Radio Ownership Rule without modification. It sought comment on that proposal and on the application of the rule, including clarification of certain aspects adopted in the *2002 Biennial Review Order*.[194] Specifically, the *FNPRM* sought comment on the relevant market for review as well as on the proper approach for determining market size and setting numerical limits based on market size tiers.[195] We also sought comment in the *FNPRM* on the retention of numerical limits in each market-sized tier, the retention of AM/FM subcaps, and the adoption of specific waiver criteria for the Local Radio Ownership Rule.[196] Finally, we sought comment on the rule's impact on minority and female ownership of local radio broadcast stations.[197]

85. Various public interest and public advocacy commenters supported the Commission's decision to retain the existing rule.[198] In addition, UCC et al. support tightening the local radio ownership limits and ending the grandfathering of existing combinations that exceed the rule's limits, which they assert would better serve the Commission's competition, diversity, and minority and female ownership goals.[199]

86. Broadcast commenters generally oppose the *FNPRM*'s proposal to retain the existing Local Radio Ownership Rule.[200] These commenters argue that the rule should be eliminated or relaxed as a result of competition from non-broadcast audio sources, such as satellite radio, Internet-based audio

[192] *See FNPRM*, 29 FCC Rcd at 4410-12, paras. 94-97.

[193] 47 CFR § 73.3555(a).

[194] *FNPRM*, 29 FCC Rcd at 4402, 4410, paras. 74-75, 94.

[195] *Id.* at 4404, 4407, paras. 79, 85.

[196] *Id.* at 4408, 4412, 4415, paras. 89, 98, 107.

[197] *Id.* at 4416, para. 108.

[198] National Association of Black Owned Broadcasters, Inc. FNPRM Comments at 3, 17 (NABOB); Thomas C. Smith FNPRM Comments at 2; UCC et al. FNPRM Comments at 30.

[199] UCC et al. FNPRM Comments at 30. The Finger Lakes Alliance for Independent Media (FLAIM), asserts that the Commission should examine and revise the interim contour-overlap methodology for non-Nielsen Audio Metro areas because the current interim methodology allows for too much consolidation in certain markets. Curt R. Dunnam FNPRM Comments at 1-2 (FLAIM). We find no basis on which to revisit the interim contour-overlap methodology here. As the Commission stated when it adopted the methodology, conducting case-by-case analysis would create significant regulatory uncertainty and adopting a "proxy" geographic market without proper consideration could produce unforeseeable distortions. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13729, para. 284 (adopting the interim contour-overlap methodology and noting that "its temporary use during the pendency of the rulemaking proceeding cannot be avoided" and that it is "well understood" and "would allow for the orderly processing of radio station applications"). We find that FLAIM has not provided adequate justification for us to depart from the Commission's previous conclusion. We also note that there is a separate open docket regarding this issue; FLAIM's concerns are more properly addressed in that proceeding. *Id.* at 13729, paras. 283-84.

[200] Connoisseur Media, LLC FNPRM Comments at 1-2 (Connoisseur); NAB FNPRM Comments at 61-66, 68.

services, and other mobile audio services.[201] NAB also questions the efficacy of the Local Radio Ownership Rule with regard to promoting localism and diversity.[202]

3. Discussion

87. Under Section 202(h), we consider whether the Local Radio Ownership Rule continues to be "necessary in the public interest as a result of competition." In determining whether the rule meets that standard, we consider whether the rule serves the public interest. For the reasons discussed below, we conclude that the current rule, without modification, meets that standard. While we believe that the competition-based Local Radio Ownership Rule is consistent with our other policy goals and may promote such goals in various ways, we do not rely on these other goals as the basis for retaining the rule.[203] Consistent with Commission precedent, upheld by the court in *Prometheus II*, we find that the Local Radio Ownership Rule continues to be necessary to protect competition, which provides a sufficient ground on which to retain the rule.[204]

88. *Market*. We tentatively concluded in the *FNPRM* that the relevant product market for review of the Local Radio Ownership Rule is the radio listening market and that it is not appropriate to include non-broadcast audio sources in that market. Public interest commenters generally support the Commission's proposal to retain the rule along with the current relevant market definition.[205]

89. Other commenters oppose the Commission's proposal to continue to exclude non-broadcast audio sources from the relevant market.[206] NAB states that online audio services are meaningful competitors to broadcast radio and that the Commission has recognized the impact online audio has on AM stations; NAB argues that this recognition should extend to FM stations as well.[207] NAB also disputes the Commission's distinction of non-broadcast audio from local radio stations as national platforms because the national platforms still have a competitive impact on broadcast radio stations with regard to audience share and advertising revenue.[208]

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[201] NAB cites a report that found that 124 million people listened to online radio in the last month, with 94 million listening weekly. NAB FNPRM Comments at 62 (citing Edison Research and Triton Digital, The Infinite Dial 2014 at 5, 7 (2014), http://www.edisonresearch.com/wp-content/uploads/2014/03/The-Infinite-Dial-2014-from-Edison-Research-and-Triton-Digital.pdf) (Infinite Dial 2014). NAB states that smartphone penetration has been growing rapidly over the last five years, which gives more consumers access to mobile/online audio services, such Pandora. *Id.* In addition, NAB states that companies such as Google, Apple, and Amazon now offer audio services, and the digital subscription service Spotify is expected to exceed 38 million subscribers in 2014. *Id.* at 62-63. In response to NAB's assertions regarding competition from non-broadcast radio, the National Academy of Recording Arts and Sciences (NARAS) asserts that radio broadcasters enjoy a financial advantage over satellite and Internet radio because broadcast radio stations do not have to pay performance rights fees. According to NARAS, this discrepancy distorts the market, and broadcasters should pay performance right fees in order to "level the playing field with other music services." National Academy of Recording Arts and Sciences FNPRM Comments at 1-2. We note that issues regarding performance rights fees are outside the scope of the Commission's media ownership rules and will not be considered in this proceeding.

[202] NAB FNPRM Comments at 66-67.

[203] *See* NAB FNPRM Comments at 66-68 (arguing that the Commission failed to establish that the current local radio ownership rule is necessary to promote localism, viewpoint diversity, or program diversity).

[204] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2069, para. 110 ("[W]e conclude that the current local radio ownership rule . . . remains 'necessary in the public interest' to protect competition in local radio markets."); *Prometheus II*, 652 F.3d at 462-63 (upholding the Commission's decision to retain the existing local radio ownership rule).

[205] UCC et al. FNPRM Comments at 30.

[206] Connoisseur FNPRM Comments at 1-2; NAB FNPRM Comments at 63-66.

[207] NAB FNPRM Comments at 63-64 (citing *Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221, 15222-23, para. 4 (2013) (*AM Radio Revitalization NPRM*)).

[208] NAB FNPRM Comments at 64-65.

90. We adopt our tentative conclusion that the radio listening market remains the relevant market for review of the Local Radio Ownership Rule and that it is not appropriate to expand the market to include non-broadcast audio. When determining the appropriate market definition for the Local Radio Ownership Rule, we must determine whether alternate audio platforms provide consumers with a meaningful substitute for local broadcast radio stations.[209] For purposes of our review, it is important to consider the nature of broadcast radio when determining whether an alternate source of audio programming provides a meaningful substitute for broadcast radio—the ability to access audio content alone is not sufficient to demonstrate substitution. Broadcast radio stations provide free, over-the-air programming tailored to the needs of the stations' local markets. In contrast, Internet radio requires either a fixed or mobile broadband Internet connection, and satellite radio requires a monthly subscription to access programming. Neither of these sources is as universally and freely available as broadcast radio, and neither typically provides programming tailored to the needs and interests of specific local markets.

91. As we noted in the *FNPRM*, despite the growing popularity of non-broadcast platforms such as satellite radio and Internet-delivered audio in the commercial audio industry, broadcast radio continues to dominate in its reach among listeners.[210] For instance, the percentage of Americans age 12 or older who listen to broadcast radio has remained constant at over 90 percent over the last decade.[211] Moreover, no commenter submitted data refuting the findings stated in the *FNPRM*, and recent data confirm that broadcast radio listenership remains essentially unchanged.[212] In addition, the vast majority of Americans prefer to use broadcast radio as their in-car audio entertainment over new technology options.[213] Lastly, we note that the growth of online radio listening likely includes audiences that are listening to streams of broadcast radio stations online instead of or in addition to listening over the air.[214] Ultimately, broadcast radio remains the most easily accessible and popular way for consumers to listen to audio programming, and the only one that focuses on the needs and interests of local markets.[215]

92. In addition, we disagree with NAB's assertion regarding the lack of significance of non-broadcast radio's national platform. The local character of broadcast radio is a significant aspect of the service that must be considered when determining whether alternate audio platforms provide a meaningful substitute. The record fails to demonstrate that non-broadcast radio programmers make

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[209] *See 2002 Biennial Review Order*, 18 FCC Rcd 13715-16, paras. 245-46.

[210] *FNPRM*, 29 FCC Rcd at 4404-05, para. 82; *see also* Pew Research Center, Audio: Spotify and Pandora Active Users (2014), http://journalismandmedia.com/media-indicators/audio-spotify-and-pandora-active-users/ (last visited June 8, 2016) (reporting that online audio services Spotify and Pandora reported 60 million and 81.5 million active users respectively in 2014); Pew State of the News Media 2015 at 57 (finding that Sirius XM, the only satellite radio platform available in the United States, reported a 7 percent growth in subscriber numbers from 2013).

[211] *FNPRM*, 29 FCC Rcd at 4405, para. 82 ("In 2012, 92 percent of Americans age 12 or older listened to broadcast radio…."); *see also* The Pew Research Center's Project for Excellence in Journalism, The State of the News Media 2013: An Annual Report on American Journalism, Audio Data (2013), http://www.stateofthemedia.org/2013/.

[212] In 2014, 91 percent of Americans ages 12 and older listened to broadcast radio. Pew State of the News Media 2015 at 57. By contrast, in 2015, 53 percent of Americans age 12 or older listened to online radio on a monthly basis, up from 47 percent the previous year. *Id.*

[213] *FNPRM*, 29 FCC Rcd at 4405, para. 82 & n.208; *see also* Infinite Dial 2014 at 29-30 (finding that AM/FM radio "dominates" in-car media and is used far more frequently than other in-car audio options); Press Release, Ipsos, Ipsos Tunes in With Americans: AM/FM Radio Continues to Make Waves in the In-Car Environment (April 9, 2015), http://www.ipsosna.com/download/pr.aspx?id=14412 (finding that, in an in-car environment, 84 percent of Americans use AM/FM radio as their audio entertainment).

[214] The data cited by NAB to establish the competitive impact of online radio define online radio as "[l]istening to AM/FM radio stations online and/or listening to streamed audio content available only on the Internet." *See* NAB FNPRM Comments at 62 (citing Infinite Dial 2014). To the extent that online audio merely allows listeners to access broadcast radio station content over the Internet rather than over the air, it may not be a true alternative to broadcast radio.

[215] Pew State of the News Media 2015 at 57.

programming decisions to respond to competitive conditions in local markets. As the Commission has stated previously, competition among local rivals most benefits consumers and serves the public interest.[216]

93. We also disagree with NAB's characterization that the Commission has recognized non-broadcast radio programming as meaningful substitutes for broadcast radio simply by virtue of the Commission's acknowledgment of the potential impact of alternate audio platforms on AM radio.[217] While the Commission has recognized that AM radio is susceptible to audience migration due to its technical shortcomings, recognition of this fact does not mean that non-broadcast audio alternatives are a meaningful substitute for AM radio, specifically, or broadcast radio, in general. As discussed earlier, non-broadcast audio alternatives do not respond to competitive conditions in local markets and are not available to all consumers in a local market to the same extent as broadcast radio, which are critical considerations when determining substitutability.[218]

94. Ultimately, we find that the record demonstrates that alternative sources of audio programming are not currently meaningful substitutes for broadcast radio stations in local markets; therefore, we decline to depart from our tentative conclusion to exclude non-broadcast sources of audio programming from the relevant market for the purposes of the Local Radio Ownership Rule.[219] We find that the Local Radio Ownership Rule should continue to focus on promoting competition among broadcast radio stations in local radio listening markets.

95. *Market Size Tiers*. We proposed in the *FNPRM* to retain the existing approach of setting numerical limits based on market size tiers and of determining the market size based on the number of commercial and noncommercial radio stations in the local market. No commenters objected to the proposal to retain the market size tiers approach.

96. As we said in the *FNPRM*, the Commission's experience in applying the Local Radio Ownership Rule supports retention of the existing framework in order to promote competition. The Commission consistently has found that setting numerical ownership limits based on market size tiers remains the most effective method for preventing the acquisition of market power in local radio

[216] *FNPRM*, 29 FCC Rcd at 4405, para. 83 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13716, para. 246).

[217] NAB Comments at 64 (citing *AM Radio Revitalization NPRM*, 28 FCC Rcd at 15222-23, para. 4).

[218] For example, a significant portion of U.S. households lack a fixed Internet connection capable of streaming Internet-delivered audio programming. *See 2016 Broadband Progress Report*, 31 FCC Rcd at 767-69, Append. F, Table 1 & Table 2 (finding that, excluding satellite services, approximately 16.080 million Americans in the United States lack access to fixed 4 Mbps/1 Mbps and that the adoption rate for the U.S. as a whole for at least fixed 4 Mbps/1 Mbps is approximately 58 percent). When satellite services are considered, the number of Americans in the United States lacking access to fixed 4 Mbps/1 Mbps drops to approximately 1.376 million, though the adoption rate also drops to 56 percent. *Id*. While we do not take the position that advanced telecommunications/broadband deployment and adoption must be universal before we will consider Internet-delivered audio programming to be a competitor in the local radio listening market, we find that the current level of penetration and adoption of broadband service remains relevant when considering the extent to which this platform is a meaningful substitute for broadcast radio stations.

[219] Our proposal to limit the relevant market to broadcast radio stations in local radio listening markets is consistent with current Department of Justice (DOJ) precedent in evaluating proposed mergers involving broadcast radio stations. *See, e.g.*, Complaint, para. 9, *United States v. Cumulus Media Inc.*, No. 1:11CV01619 (D.D.C. Sept. 8, 2011) ("The relevant markets. . . are the sale of radio advertising time to advertisers targeting listeners in two separate Nielsen Audio Metro Survey Areas ('MSAs') by radio stations in those MSAs."); *see also* Department of Justice February 20, 2014 NPRM *Ex Parte* Comments at 5, 8 (confirming that the relevant markets for antitrust review are the broadcast radio spot advertising market in the stations' specific geographic market); Timothy J. Brennan & Michael A. Crew, *Gross Substitutes vs. Marginal Substitutes: Implications for Market Definition in the Postal Sector*, *in* The Role of the Postal and Delivery Sector in a Digital Age 1-15 (2013) (arguing that the loss of customers to a new technology does not necessarily mean that the new technology should be included in the market definition of the existing technology).

markets.[220] This bright-line approach helps to keep the limited available radio spectrum from becoming "locked up" in the hands of one or a few radio station owners.[221] Furthermore, we believe that this approach benefits transaction participants by expediting the processing of assignment or transfer of control applications and by providing clear guidance on which transactions comply with the local radio ownership limits.

97. Two commenters propose alternative methodologies for determining market size tiers. Mid-West Family proposes that the Commission assign different values to stations of different classes when calculating how many stations an entity owns in a local market (e.g., Class C FM station = 1 station; Class A FM station = .5 station).[222] According to Mid-West Family, the disparity in coverage area related to station class puts owners of smaller stations at a competitive disadvantage because they cannot equal the audience reach of larger competitors.[223] Alternatively, Mid-West Family proposes a case-by-case analysis that would allow a station owner to acquire more stations than otherwise permitted under the rule in order to equalize the population coverage achieved by an in-market competitor.[224] Connoisseur proposes that acquisitions involving stations in embedded markets—smaller radio markets that are located within the boundaries of a larger radio market (parent market)—should not be required to include stations owned in other embedded markets when demonstrating compliance with the ownership limits of a parent market.[225]

98. We decline to adopt Mid-West Family's proposals. First, we disagree with Mid-West Family's contention that the *Prometheus I* decision mandates an adjustment to the rule's current methodology in the way proposed by Mid-West Family.[226] Second, as the Commission has said

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[220] *See, e.g.*, *2006 Quadrennial Review Order*, 23 FCC Rcd at 2072, para. 116; *Prometheus I*, 373 F.3d at 431-32; *2002 Biennial Review Order*, 18 FCC Rcd at 13730-34, paras. 288-91.

[221] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2072, para. 116 (finding that "numerical limits on radio station ownership help to keep the available radio spectrum from becoming 'locked up' in the hands of one or a few owners, thus helping to prevent the formation of market power in local radio markets"); *Prometheus I*, 373 F.3d at 431-32 (accepting "the Commission's rationale for employing numerical limits"); *2002 Biennial Review Order*, 18 FCC Rcd at 13730-31, para. 288 (finding that in radio markets, "barriers to entry are high because virtually all available radio spectrum has been licensed" and that the "closed entry nature of radio suggests that the extent of capacity that is available for new entry plays a significant role in determining whether market power can develop in radio broadcasting").

[222] Mid-West Family Stations FNPRM Comments at 3-7 (Mid-West Family).

[223] *Id.* at 2, 6-7.

[224] *Id.* at 7.

[225] Connoisseur FNPRM Comments at 8; Letter from David Oxenford, Counsel, Connoisseur Media, to Marlene H. Dortch, Secretary, FCC (June 16, 2016) (Connoisseur June 16 *Ex Parte*); Letter from David Oxenford, Counsel, Connoisseur Media, to Marlene H. Dortch, Secretary, FCC (June 7, 2016) (Connoisseur June 7 *Ex Parte*); *see also* Letter from David D. Oxenford, Connoisseur Media, to Marlene H. Dortch, Secretary, FCC (filed Aug. 5, 2016) (reiterating Connoisseur's initial proposal and emphasizing the need for an explicit presumption regarding embedded markets); Letter from Steven Price, Townsquare Media, to Marlene H. Dortch, Secretary, FCC (filed Aug. 10, 2016) (supporting Connoisseur's proposal); Letter from Lawrence M. Miller, Pamal Broadcasting, Ltd. to Marlene H. Dortch, Secretary, FCC (filed Aug. 10, 2016) (supporting Connoisseur's proposal).

[226] Mid-West Family contends that "[t]he Commission's approach overlooks distinctions in the size, revenue, and audience share of radio stations," and that this approach is inconsistent with the guidance provided by the court in *Prometheus I* to "consider marketplace realities in setting the ownership rules." Mid-West Family FNPRM Comments at 3-4. The language referred to by Mid-West Family from *Prometheus I* concerns one particular line of reasoning that was subsequently abandoned by the Commission in favor of a different set of rationales in the *2006 Quadrennial Review Order*, a shift in approach that the *Prometheus II* court noted and upheld. *See Prometheus II*, 652 F.3d at 462 (finding that "the FCC has demonstrated that the existing numerical limits are necessary in the public interest"); *see also Prometheus I,* 373 F.3d at 433-34 (finding that the Commission's decision to retain the numerical limits was not supported by the theory that they ensure five equal-sized competitors in most markets). The *Prometheus I* language cited by Mid-West Family is therefore inapplicable to the current approach, which was

previously, adopting Mid-West Family's approach would permit potentially significant consolidation in local radio markets, which would be inconsistent with the rationale for our retention of the existing numerical ownership limits discussed below.[227] Specifically, Mid-West Family's proposal to assign different values to stations of different classes does not account for the possibility of a relatively low power radio station potentially reaching a larger audience than a station with a larger service contour. For example, a station with a small service contour that encompasses a densely populated area may have a population reach similar to or greater than a station in the same market with a larger service contour that also covers more sparsely populated areas outside the main population center. Such a scenario would not support counting the lower powered station as half of a higher powered station.

99. Moreover, service contour (and the associated population coverage) is just one of many aspects of station operations that may impact the ability to compete in a local market. For example, experienced management, programming quality, and on-air talent, among other factors, may all impact a station's ability to compete. Each station serves as a voice in its local market, and we are not inclined to discount the value of certain voices, particularly based on criteria that may have a limited impact on a station's ability to compete. For these reasons, we decline to change the methodology for determining market size tiers, as proposed by Mid-West Family.

100. We also decline to adopt Mid-West Family's proposal for a case-by-case analysis of population coverage. As discussed above, we do not believe that population coverage alone is an appropriate basis on which to judge the competitiveness of a station (or cluster of stations) or the impact of these voices in the local market. The existing rule already provides for economies of scale that help stations compete; we do not believe it is appropriate (or even possible) to revise the rule based on population coverage in an attempt to achieve a competitive equilibrium, which is effectively what Mid-West Family seeks. Moreover, the ability to seek a waiver of the ownership limits already provides parties with an opportunity to assert that special circumstances justify deviation from the rule in a particular case.

101. We also decline to adopt Connoisseur's proposal. Under the current methodology for determining market size tiers, owners wishing to acquire a radio station in an embedded market must satisfy the numerical limits in both the embedded market and the overall parent market. Connoisseur proposes that, where a parent market encompasses multiple embedded markets, the ownership analysis for an acquisition in one embedded market should not include stations owned in other embedded markets within the same parent market.[228] Connoisseur argues that embedded markets within the same parent market may reach different populations and that stations within different embedded markets have little or no contour overlap.[229] Connoisseur provides examples of embedded markets from the San Francisco, New York, and Washington, D.C., markets, with an analysis of only the New York embedded markets.[230]

102. In the *2002 Biennial Review* that adopted the Nielsen Audio Metro (formerly Arbitron Metro) methodology for determining radio markets, the Commission specifically declined to treat embedded markets differently.[231] The Commission found that requiring proposed combinations to comply with the Local Radio Ownership Rule in each Nielsen Audio Metro implicated by the proposed

first adopted in the *2006 Quadrennial Review Order*, and which was upheld by *Prometheus II*. *Id.* Mid-West Family further argues that the *Prometheus II* decision is not controlling because no party raised the specific issue now identified by Mid-West Family, and thus the *Prometheus II* court did not address the issue in its decision. Mid-West Family FNPRM Comments at 6 n.10. We do not need to reach this argument, however, as we have considered—and rejected—Mid-West Family's proposal herein, and the rule we retain is consistent with the court's decision in *Prometheus II*. *Id.* (finding that the rule adopted was supported by reasoned analysis and the evidence before the Commission).

[227] *FNPRM*, 29 FCC Rcd at 4407, para. 88.

[228] Connoisseur FNPRM Comments at 8.

[229] *Id*. at 7.

[230] *See id*. at Attachs. A-E.

combination (i.e., in both the embedded and parent markets) "comports with our general recognition that [Nielsen Audio's] market definitions are the recognized industry standard."[232] We find that Connoisseur has not presented evidence of changes in the radio industry that would warrant an across-the-board departure from our longstanding reliance on Nielsen Audio's market analysis as reported by BIA as the basis for multiple ownership calculations for embedded and parent markets. In these situations, a station's above-the-line listing in the parent market (i.e., stations that are listed by BIA as "home" to that Metro) reflects a determination by Nielsen Audio and BIA that the station at issue competes in the parent market.[233] For this reason, all embedded market stations that are listed as "home" to the parent market, like any other above-the-line stations, must be taken into account when demonstrating multiple ownership compliance in the parent market.[234] In its comments, Connoisseur conflates the embedded and parent market analyses, suggesting that the parent market analysis erroneously introduces stations from one embedded market to another, which may have tenuous economic or listenership ties to the first. This contention misses the point that, as a separate application of our multiple ownership rules, the parent market analysis necessarily includes all stations that compete in that market, whether or not they also compete in another embedded Metro market.

103. That said, we recognize Connoisseur's concerns that Nielsen Audio and BIA's practice of designating all embedded market stations as "home" to the parent market—regardless of actual market share—could result in certain stations being counted for multiple ownership purposes in a market in which they do not actually compete. Although we do not believe that the record justifies a blanket exception to the rule, we will entertain market-specific waiver requests under Section 1.3 demonstrating that the BIA listings in a parent market do not accurately reflect competition by embedded market stations and should thus not be "counted" for multiple ownership purposes.[235] However, we decline to alter the methodology for determining market size tiers as proposed by Connoisseur.[236]

104. *Numerical Limits*. We proposed in the *FNPRM* to retain the existing numerical limits in each market-sized tier and sought comment on any data that would support changing the existing limits. No commenter provided any such data, nor did any commenter propose specific numerical limits to replace the limits proposed in the *FNPRM*. NAB argues that the Commission must justify the necessity of the numerical limits given the increasingly competitive audio marketplace.[237]

105. We conclude that the competitive conditions in the radio marketplace that supported the Commission's decision to retain the existing numerical limits in the *2006 Quadrennial Review Order* and to propose to retain the limits in the *2014 Quadrennial Review FNPRM* remain largely unchanged.[238] As demonstrated in the record, following the relaxation of the local radio ownership limits by Congress in the

[231] *2002 Biennial Review Order*, 18 FCC Rcd at 13725, para. 277 & n.583. In the *2002 Biennial Review Order*, the Commission concluded that "[Nielsen Audio's] market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete," and that "[g]iven the long-standing industry recognition of the value of [Nielsen Audio's] service,…there is strong reason to adopt a local radio market definition that is based on this established industry standard." *Id.* at 13725, para. 277.

[232] *Id.* at 13725, n.583. The Commission rejected a proposal to apply a different test for embedded markets because it concluded that the proposed scheme would be inconsistent with the general reliance on Nielsen Audio's market definition and cumbersome to administer. *Id.*

[233] *See id.* at 13727, para. 279.

[234] This principle is consistent with our treatment of stations whose communities of license are outside the geographic boundaries of a Metro but are listed by BIA as "home" to the Metro. Such stations must comply with the multiple ownership limits in both the Metro market in which they are listed as "home" and the market in which their community of license is located, because they are considered to compete in both. *See id.* at 13727-8, para. 280 & nn.595-96.

[235] *See* Connoisseur June 16 *Ex Parte* at 5; Connoisseur June 7 *Ex Parte* at 4-5.

[236] *See* Connoisseur FNPRM Comments at 8

[237] NAB FNPRM Comments at 69 n.220.

1996 Act, there was substantial consolidation of radio ownership both nationally and locally.[239] In local markets, the largest firms continue to dominate in terms of audience and revenue share.[240]

106. We also conclude that the record in this proceeding does not reflect changes in the marketplace that warrant reconsideration of the Commission's previous decision not to make the limits more restrictive. We continue to believe that tightening the restrictions would disregard the previously identified benefits of consolidation in the radio industry and would be inconsistent with the guidance provided by Congress in the 1996 Act.[241] Further, we continue to find that tightening the rule, absent grandfathering, would require divestitures that we believe would be disruptive to the radio industry and would upset the settled expectations of individual owners.[242] No commenter provided information on whether the benefits derived from tightening the limits would outweigh these countervailing considerations. For these reasons, and consistent with prior decisions, we conclude that tightening the limits would not be in the public interest.[243]

107. *Clarification of Application of Local Radio Ownership Rule*. In the *FNPRM*, we sought comment on clarifications to certain aspects of the Local Radio Ownership Rule adopted in the *2002 Biennial Review Order*. Specifically, the *FNPRM* sought comment on (1) a clarification to the exception to the two-year waiting period for certain Nielsen Audio Metro changes; (2) an exemption from the Note 4 grandfathering requirements for "intra-Metro" community of license changes; and (3) a redefinition of the Puerto Rico market.[244]

108. In the *2002 Biennial Review Order*, the Commission established safeguards to deter parties from attempting to manipulate Nielsen Audio Metro market definitions for purposes of circumventing the Local Radio Ownership Rule. Specifically, the restrictions prohibit a party from receiving the benefit of a change in Nielsen Audio Metro boundaries or "home" market designation unless that change has been in place for at least two years (or unless the station's community of license is within the Metro, in the case of a "home" designation change).[245] In general, a licensee seeking to demonstrate multiple ownership compliance may rely upon the removal of a station from BIA's list of "home" stations in a Metro, without a two-year waiting period, when the exclusion results from an FCC-approved change in the community of license from a community that is within a Metro's geographic boundaries to one that is outside the Metro.[246] In the *FNPRM*, the Commission proposed to clarify that this exception applies only where the community of license change also involves the physical relocation of the station facilities

[238] *See FNPRM*, 29 FCC Rcd at 4409, para. 92 & n.235; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2073, para. 118. We note that no commenter provided data to contradict this conclusion. *See FNPRM*, 29 FCC Rcd at 4409, para. 92 (seeking comment on "whether there are any more recent data that point to a different conclusion").

[239] *FNPRM*, 29 FCC Rcd at 4409, para. 92 & n.235; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2072-73, para. 118.

[240] *FNPRM*, 29 FCC Rcd at 4409, para. 92.

[241] *See Prometheus II,* 652 F.3d at 462 (crediting the Commission's conclusion that tightening the limits would be inconsistent with Congress's recognition that a certain level of consolidation can be efficient as well as its decision to relax the limits in the 1996 Act); *2006 Quadrennial Review Order*, 23 FCC Rcd at 2074, para. 119 (acknowledging the "benefits that consolidation has brought to the financial stability of the radio industry").

[242] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2074, paras. 119-20; *see also Prometheus II,* 652 F.3d at 462 (crediting the Commission's conclusion that tightening the limits would undermine settled expectations and unduly disrupt the industry).

[243] *See Prometheus II*, 652 F.3d at 462; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2074, para. 119.

[244] *FNPRM*, 29 FCC Rcd at 4410-12, paras. 94-97. No comments were submitted regarding the two-year waiting period or the exemptions to Note 4.

[245] *2002 Biennial Review Order*, 18 FCC Rcd at 13726, para. 278.

[246] *See, e.g., WFGE(FM), Tyrone, PA*, Letter Order, 28 FCC Rcd 16489, 16491 (MB 2013) (*WFGE(FM) Decision*); FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Instructions, Worksheet #3 at 3.

to a site outside the relevant Nielsen Audio Metro market boundaries.[247] Otherwise, the licensee of a station currently located in a Nielsen Audio Metro market could use the exception to reduce the number of its stations listed as "home" to that Metro, without triggering the two-year waiting period and without any change in physical coverage or market competition, merely by specifying a new community of license located outside the Metro.[248] No commenter objected to this clarification of the exception to the two-year waiting period. Accordingly, we adopt this clarification as it will ensure that the local radio ownership limits cannot be manipulated based on Nielsen Audio market definitions.

109. Note 4 to Section 73.3555 of the Commission's rules (Note 4) grandfathers existing station combinations that do not comply with the numerical ownership limits of Section 73.3555(a). However, we recognize that certain circumstances require applicants to come into compliance with the numerical ownership limits despite the fact that the relevant station may have been part of an existing grandfathered cluster. One such circumstance is a community of license change, which occasionally can lead to difficulty when an applicant with a grandfathered cluster of stations seeks to move a station's community of license outside the relevant Nielsen Audio Metro market. Given that the Commission relies on the BIA database for information regarding Nielsen Audio Metro "home" designations, such an applicant cannot concurrently demonstrate compliance with the multiple ownership limits at the time of application filing, because the station proposing to change its community will continue to be listed by BIA as "home" to the Metro.[249] To resolve this administrative issue, we adopt the proposal in the *FNPRM* to allow a temporary waiver of the radio multiple ownership limits in this limited instance for three months from grant of the community of license modification application to allow BIA sufficient time to change the affected station's "home" designation following a community of license relocation. Grant of the application will be conditioned on coming into compliance with the applicable multiple ownership limits within three months. In the event that the relevant station is still listed by BIA as "home" to the Metro at the end of this temporary waiver period, we will rescind grant of the application and re-specify the original community of license.[250]

110. We also proposed to exempt "intra-Metro" community of license changes from the requirements of Note 4. In 2006, the Commission introduced a streamlined procedure allowing an FM or AM broadcast licensee or permittee to change its community of license by filing a minor modification application.[251] We have found that strict application of Note 4 has produced disproportionately harsh results from what is now otherwise a minor and routine application process.[252] One commenter, Results Radio, suggests that the reasoning supporting the proposed exemption applies not only to community of license changes within the physical boundaries of the Metro market, but to any community of license change where the station remains designated as "home" to the Metro market.[253] We agree that such an exemption would, in limited circumstances, provide equitable relief from the divestiture requirements of Note 4. Moreover, we find that such intra-market community of license changes in most cases will have

[247] *FNPRM*, 29 FCC Rcd at 4411, para. 95.

[248] *Id.*; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13726, para. 277 n.585.

[249] *See WGFE(FM) Decision*, 28 FCC Rcd at 16491.

[250] *See id.*; *Enid Public Radio Association*, Letter Order, 28 FCC Rcd 2837 (MB 2013) (rescinding grant of a license renewal application due to licensee's failure to comply with the terms of the renewal grant).

[251] *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006).

[252] *See, e.g.*, *Galaxy Communications, L.P.*, Letter Order, 21 FCC Rcd 2994 (MB 2006), *dismissed as moot Galaxy Communications, L.P. Application for Modification of License Station WTKV(FM), Oswego, NY*, Memorandum Opinion and Order, 29 FCC Rcd 4254 (2014).

[253] Letter from Michael Beder, Counsel to Results Radio, LLC (Results Radio), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, Attach. at 1 (filed May 11, 2016); Letter from Michael Beder, Counsel to Results Radio, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, Attach. at 1 (filed May 23, 2016); Letter from Michael Beder, Counsel to Results Radio, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, Attach. at 1 (filed May 25, 2016).

little or no impact on the concentration of ownership within the local market. Accordingly, we adopt these exemptions to Note 4.[254]

111. Since 2003, the Commission has regularly waived the Nielsen Audio Metro market definition for Puerto Rico, which defines Puerto Rico as a single market, instead relying on a contour overlap analysis for proposed transactions. The Commission has held that the unique characteristics of Puerto Rico present a compelling showing of special circumstances that warrant departing from the Nielsen Audio Metro as the presumptive definition of the local market.[255] This practice is based on Puerto Rico's extremely mountainous topography, large number of radio stations and station owners, and division into eight Metropolitan Statistical Areas (MSAs) as defined by the Office of Management and Budget (OMB), which demonstrate that Puerto Rico has more centers of economic activity than are accounted for by the single Puerto Rico Nielsen Audio Metro definition.[256] In its comments filed in the *2010 Quadrennial Review* as well as in response to the *FNPRM*, the Arso Radio Corporation (Arso) renewed its longstanding request that the Commission redefine local radio markets for Puerto Rico.[257] Arso supports abandoning Nielsen Audio's treatment of Puerto Rico as a single market and creating a new definition based on contour overlap.[258] Arso states that it would also support any of the other approaches set forth in the *FNPRM*, such as relying on the eight MSAs or using the three Combined Statistical Areas defined by OMB.[259]

112. In previous waiver proceedings involving the Puerto Rico radio market, the Commission utilized the contour-overlap methodology that normally applies to defining markets in non-Nielsen Audio rated markets.[260] Under the contour-overlap methodology, the relevant radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.[261] The Commission has determined previously that this methodology was appropriate to apply when examining the Puerto Rico radio market because of Puerto Rico's unique characteristics as discussed above.[262] Therefore, we conclude that adoption of the contour-overlap market definition will facilitate the most appropriate application of the Local Radio Ownership Rule in Puerto Rico, and we note that no commenters oppose this proposal. Accordingly, we adopt the market definition based on contour overlap for Puerto Rico that we have applied consistently in previous waiver proceedings.

113. *AM/FM Subcaps*. The AM/FM subcaps limit the number of stations from the same service—AM or FM—that an entity may own in a single market. For example, in a market where an entity may own up to eight commercial radio stations, no more than five stations can be in the same service. The *FNPRM* tentatively concluded that it was still appropriate to retain the existing AM/FM subcaps based on differences between AM and FM stations that continue to justify limits on the concentration of ownership in each service.[263] Specifically, we found that the subcaps remained necessary to promote new entry and to account for the technological and marketplace differences between AM and

[254] *See* Appendix A; 47 CFR § 73.3555, Note 4.

[255] *MSG Radio, Inc., Assignor, and WIAC FM, Inc., Assignee, Application for Assignment of License for WTOK-FM, San Juan, Puerto Rico*, Letter Order, 27 FCC Rcd 7066, 7073 (MB 2014).

[256] *Id.* at 7072-74

[257] Arso Radio Corp. FNPRM Comments at 6 (Arso Radio); *see also* Arso Radio NPRM Comments at 4.

[258] Arso Radio FNPRM Comments at 6.

[259] *Id.*; *see also FNPRM*, 29 FCC Rcd at 4411, para. 97.

[260] The contour-overlap methodology is generally permitted to define the local radio market only when a station's community of license is located outside of a Nielsen Audio Metro boundary. *2002 Biennial Review Order*, 18 FCC Rcd at 13729, para. 284.

[261] *See id.* at 13729-30, paras. 284-86.

[262] *See, e.g.*, *Luis A. Soto*, Letter Order, 22 FCC Rcd 2549, 2551-53 (MB 2007).

[263] *See FNPRM*, 29 FCC Rcd at 4412-15, paras. 98-106; *see also Prometheus II*, 652 F.3d at 462-63.

FM stations and thereby promote competition.[264] We sought comment on the impact of the digital radio transition on the AM/FM subcaps, as well as issues regarding the aggregation of multiple AM stations to provide signal coverage in large geographic areas or in areas with mountainous terrain.

114. Just as we have found that the public interest is served by retaining the existing numerical limits, we find it appropriate to retain the existing subcaps. The subcaps, as originally adopted by Congress, were premised on the ownership limits adopted in the 1996 Act.[265] As the Commission has stated previously, tightening one or both of the subcaps absent a corresponding change to the numerical ownership limits (or a tightening of one subcap absent a loosening of the other) would result in an internal inconsistency in the rule, as such a tightening would result in an entity not being permitted to own all the stations otherwise permitted under certain numerical tiers.[266] We also find that loosening or abolishing the subcaps would create public interest harms by potentially permitting excessive consolidation of a particular service—an outcome the subcaps are designed to prevent—and reducing opportunities for new entry within local radio markets.[267]

115. NAB opposes the proposal to retain the subcaps and argues that removing the subcaps would give licensees more flexibility in structuring ownership.[268] NAB also states that the Commission should examine the necessity of the numerical subcap limits and explain why the numerical limits remain necessary given the increasingly competitive audio marketplace.[269] Alternatively, NAB proposes removing the AM subcap to help address challenges faced by AM broadcasters.[270]

116. We are not persuaded by suggestions that eliminating the subcaps would result in public interest benefits sufficient to justify that action. While flexibility in ownership structuring may benefit existing licensees, such benefits may not extend to new entrants who potentially would see opportunities for radio ownership diminish through the increased concentration of ownership in a particular service that elimination of the subcaps would permit. We also do not agree that eliminating or modifying the AM subcap would be an effective way to revitalize AM radio.[271] NAB's assertion that elimination of the

[264] *See FNPRM*, 29 FCC Rcd at 4414, para. 102 (noting that "AM signal propagation varies with the time of day… and many AM stations are required to cease operation at sunset"); *Prometheus II*, 652 F.3d at 462-63 (finding that the Commission provided an "adequate explanation" for retaining the AM/FM subcaps, which included specifically recognizing the significant technical and marketplace differences between AM and FM stations); *2006 Quadrennial Review Order,* 23 FCC Rcd at 2080, para. 134 (noting "AM stations' lesser bandwidth, inferior audio signal, and smaller radio audiences due to such technical differences"); *2002 Biennial Review Order*, 18 FCC Rcd at 13733-34, para. 294. As discussed below, we continue to find that, given their relative affordability, AM stations in general offer a particularly viable path to ownership for new entrants and represent significant radio voices in many of the top markets. Moreover, we also continue to find that technological differences between FM and AM stations generally result in greater listenership and revenues for FM stations. Recognizing these unique characteristics of each service, we continue to conclude that the AM and FM subcaps promote entry and competition in the local radio market and that there continue to be distinct reasons to separately limit the number of AM or FM stations in a market that any one entity can own.

[265] *See* Telecommunications Act of 1996 § 202(b); *see also* 47 CFR § 73.3555.

[266] *See FNPRM*, 29 FCC Rcd at 4415, para. 106. We sought comment on whether there is any reason we should adopt different subcaps despite this potential inconsistency. *Id.* No commenter argued for tightening the subcaps.

[267] *See Prometheus II*, 652 F.3d at 462-63 (finding that the Commission was "justified in retaining the AM/FM 'subcaps'" to "'prevent one entity from putting together a powerful combination of stations in a single service that may enjoy an advantage over stations in a different service'").

[268] NAB FNPRM Comments at 68-69.

[269] *Id.* at 69 n.220.

[270] *Id.* at 69.

[271] *See Revitalization of the AM Radio Service*, Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 30 FCC Rcd 12145 (2015) (adopting six proposals to help revitalize AM radio and seeking comment on additional proposals, which do not include relaxation of the radio ownership rules) (*AM Revitalization Order*, *AM Revitalization FNPRM*, *and AM Revitalization NOI*).

subcap would revitalize AM radio is unsupported, as NAB fails to explain how additional consolidation of AM stations will improve the ability of those stations to overcome existing technological and competitive challenges.

117. We continue to believe that broadcast radio, in general, remains the most likely avenue for new entry in the media marketplace—including entry by small businesses and entities seeking to serve niche audiences—as a result of radio's ability to more easily reach certain demographic groups and the relative affordability of radio stations compared to other mass media. As the Commission has stated previously, AM stations are generally the least expensive option for entry into the radio market, often by a significant margin, and therefore permit new entry for far less capital investment than is required to purchase an FM station.[272] Nothing in the record of this proceeding indicates that this marketplace characteristic has changed. Therefore, we conclude that the public interest remains best served by retaining the existing AM subcap, which limits concentration of AM station ownership and thereby promotes opportunities for new entry that further competition and viewpoint diversity.[273]

118. Furthermore, despite the general technological limitations of AM stations, there continue to be many markets in which AM stations are "significant radio voices."[274] As noted in the *FNPRM*, throughout the 300 Nielsen Audio Metro markets at that time, there were 187 AM stations ranked in the top five in terms of all-day audience share.[275] Also, AM stations are among the top revenue earners in some of the largest radio markets (e.g., New York, Chicago, and Los Angeles).[276] We therefore find that, in addition to the general promotion of new entry across all markets described above, retention of the existing AM subcaps is also necessary to prevent a single station owner from acquiring excessive market power through concentration of ownership of AM stations in those markets in which AM stations are significant radio voices.

119. We also conclude that there continue to be technical and marketplace differences between AM and FM stations that justify retention of both the AM and FM subcaps in order to promote competition in local radio markets. As the Commission has noted previously, FM stations enjoy unique advantages over AM stations, such as increased bandwidth, superior audio signal fidelity, and longer hours of operation.[277] These technological differences often, but not always, result in greater listenership and revenues for FM stations that justifies a limit on the concentration of FM station ownership, in particular. Nothing in the record of this proceeding indicates that we should depart from the tentative conclusions in the *FNPRM* regarding the differences between AM and FM radio. Therefore, we conclude

[272] *FNPRM*, 29 FCC Rcd at 4413, para. 101.

[273] *See id.* at 4413, para. 101 (finding that "broadcast radio, in general, continues to be a more likely avenue for entry in the media marketplace—including entry by small businesses and entities seeking to serve niche audiences—as a result of radio's ability to more easily reach certain demographic groups and the relative affordability of radio stations compared to other mass media"); *2006 Quadrennial Review Order*, 23 FCC Rcd at 2079-80, para. 133; *2002 Biennial Review Order,* 18 FCC Rcd at 13739, para. 306. In addition, we note that FCC Form 323 data for 2011 and 2013 indicates that minority and female ownership of radio stations (and AM stations, in particular) exceeds that of television stations. *See generally 2014 323 Report*, 29 FCC Rcd 7835; *2012 323 Report*, 27 FCC Rcd 13814.

[274] *See Prometheus II*, 652 F.3d at 463 (finding that "AM stations are significant radio voices in many of the top markets, and that their further consolidation could injure the public interest, including harm to the goal of promoting minority and female ownership"); *see also NPRM*, 26 FCC Rcd at 17516, para. 76 (noting that commenters "assert that many of the top stations in in large and small markets are AM stations").

[275] *FNPRM*, 29 FCC Rcd at 4415, para. 105; *see also* Clear Channel NOI Comments at 39 (citing Mark Fratrik, The Importance of AM Stations in Local Radio Markets 2 (June 30, 2010) (Attachment D of Clear Channel NOI Comments)). We note that no commenter offered data to refute our tentative conclusion in the *FNPRM* that AM stations continue to be "significant radio voices" in many markets.

[276] *FNPRM*, 29 FCC Rcd at 4415, para. 105 & n.276.

[277] *See, e.g.*, *id.* at 4413, para. 102; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2080, para. 134; *2002 Biennial Review Order*, 18 FCC Rcd at 13733-34, para. 294.

that retaining the existing FM subcap continues to serve the public interest as well. Accordingly, we retain both the AM and FM subcaps without modification.

120. We also find that the digital radio transition and the changes to the FM translator rules have not yet meaningfully ameliorated the general differences between AM and FM stations, such that the justifications described above have been rendered moot.[278] Recent digital radio deployment data support previous findings that FM stations are actually increasing the technological divide through greater adoption rates of digital radio technology than AM stations.[279] Also, the recent changes to the FM translator rules, "to allow AM stations to use currently authorized FM translator stations to retransmit their AM service within their AM stations' current coverage areas," have not yet significantly impacted the technological and marketplace differences between AM and FM stations.[280] While the change to the FM translator rule benefited many AM stations, more than half of all AM stations continue to operate without associated FM translators.[281] We note that no commenter submitted objections or material in the record to refute our findings; however, we will continue to monitor the impact of the digital radio deployment and the FM translator rule change in future media ownership proceedings.

121. *Waiver Criteria*. We sought comment on whether to adopt specific waiver criteria for the Local Radio Ownership Rule and on our tentative decision declining to do so.[282] Instead, we proposed to continue to rely on the general waiver standard under Section 1.3 of the Commission's rules.

122. NAB opposes the Commission decision to continue to rely on the general waiver standard and supports adoption of a waiver standard that would permit common ownership when such consolidation increases the number of radio broadcast stations in operation (e.g., the waiver would allow a dark radio station to return to the air, prevent a financially struggling station from going off the air, or facilitate the construction of unbuilt radio stations).[283]

123. We decline to adopt specific waiver criteria for the Local Radio Ownership Rule and will continue to rely on the general waiver standard. NAB has not provided sufficient information on which to evaluate why a specific waiver standard would be necessary. Indeed, we find that the considerations in NAB's proposal can be advanced adequately in the context of a general waiver request under Section 1.3 of the Commission's rules.[284] Therefore, we conclude that adoption of a specific waiver standard is not appropriate at this time.

[278] *See FNPRM*, 29 FCC Rcd at 4414, paras. 103-04; *Prometheus II*, 652 F.3d at 463 ("Although the digital transition may ultimately have a significant effect on the technological and economic advantages of FM stations, it has not yet done so. Thus, the FCC was justified in declining to rely on it in evaluating the rule.").

[279] *See FNPRM*, 29 FCC Rcd at 4414, para. 103 n.269. The trends noted in the *FNPRM* have continued. Based on staff analysis of Consolidated Database System (CDBS) license data as of October 30, 2015, and broadcast station totals as of September 30, 2015, of the 10,778 licensed FM stations (commercial and educational), 1,841 have notified the Commission that they have commenced digital operations (approximately 17.1 percent), while only 239 of the 4,692 licensed AM stations have filed such notifications (approximately 5.1 percent). *See Broadcast Station Totals as of September 30, 2015*, News Release (MB Oct. 9, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1009/DOC-335798A1.pdf.

[280] *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642, 9642, para. 1 (2009); *see also Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3394-95, paras. 66-70 (2012) (modifying date restriction on cross-service translators to include any additional new FM translator stations authorized from the 2003 filing window).

[281] *FNPRM*, 29 FCC Rcd at 4414, para. 104.

[282] *Id.* at 4415, para. 107.

[283] NAB FNPRM Comments at 69-70.

[284] 47 CFR § 1.3. The Commission has an obligation to take a hard look at whether enforcement of a rule in a particular case serves the rule's purpose or instead frustrates the public interest. *See Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted) (*WAIT Radio*).

124. *Minority and Female Ownership*. The *FNPRM* tentatively concluded that the proposed Local Radio Ownership Rule was consistent with the Commission's goal to promote minority and female ownership.[285] The *FNPRM* noted that part of the rationale for retaining the AM/FM subcaps was to promote new entry, particularly in the AM band, which has historically provided low-cost ownership opportunities for new entrants, including women and minorities.[286] The *FNPRM* also tentatively declined to tighten the ownership limits in order to promote minority and female ownership, as some commenters had recommended, and found that retention of the existing ownership limits addressed the concerns of those commenters who believed that additional consolidation would harm minority and female ownership.[287] UCC et al. support the Commission's proposal to retain the existing Local Radio Ownership Rule; however, they assert that the Commission must do even more to increase levels of minority and female ownership, including tightening the numerical limits or ending the exemption for grandfathered combinations.[288]

125. We affirm our tentative conclusion that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast radio stations.[289] While we retain the existing Local Radio Ownership Rule for the specific reasons stated above, we find that retaining the existing rule nevertheless promotes opportunities for diverse ownership in local radio ownership. This competition-based rule indirectly advances our diversity goal by helping to ensure the presence of independently owned broadcast radio stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants. We have also retained the AM/FM subcaps, in part, to help promote new entry—as noted, the AM band in particular has historically provided lower-cost ownership opportunities for new entrants.

126. Consistent with our analysis of the local television ownership rule above, however, we find the claim that tightening the Local Radio Ownership Rule would promote increased opportunities for minority and female ownership to be speculative and unsupported by existing ownership data.[290] Notably, NTIA ownership data from 1995—the year before the local radio ownership limits were relaxed and set to the existing levels—identified 312 minority owned radio stations (racial and ethnic minorities for both AM and FM stations).[291] The data demonstrate lower overall levels in 1996/97 (284 stations) and 1998 (305 stations); however, the total grew to 426 stations in 1999/2000, though NTIA attributes approximately half the growth between 1999 and 1999/2000 to improved methodology for identifying minority owned stations.[292] The Commission's Form 323 ownership data demonstrate that minority ownership has grown—indeed, more than doubled—since the rule was relaxed: 644 stations in 2009; 756 stations in 2011; and 768 stations in 2013.[293] Data provided by Free Press also show an increase in

[285] *FNPRM*, 29 FCC Rcd at 4416, para. 108.

[286] *Id.* at 4416, para. 111.

[287] *Id.* at 4417, para. 112.

[288] UCC et al. FNPRM Comments at 30.

[289] *See FNPRM*, 29 FCC Rcd at 4416-17, paras. 108-12.

[290] Combining older data with more recent data from FCC Form 323 biennial ownership reports (beginning in 2009) introduces potential variation based on differences in the way the data were collected rather than actual changes in the marketplace. However, in the absence of a continuous, unified data source, the Commission must rely on the available data, and our findings herein are consistent with the data.

[291] NTIA 2001 Minority Ownership Report at 38. As noted in the discussion of the Local Television Ownership Rule, the Commission has previously acknowledged that NTIA's data collection methodology did "not insure a complete listing of all commercial radio and television stations owned by minorities" and the data did not include separate data on female ownership. However, these are the only data from that time period that are available for purposes of comparison and evaluation of claims that tightening the local radio ownership limits would promote minority ownership. *See supra* note Error: Reference source not found.

[292] NTIA 2001 Minority Ownership Report at 37-38.

[293] *See 2014 323 Report*, 29 FCC Rcd at 7846-47, 7848-49; *2012 323 Report*, 27 FCC Rcd at 13824-25, 13826-27.

minority ownership after the Local Radio Ownership Rule was relaxed in 1996.[294] No data in the record support a contention that tightening the local radio ownership limits would promote ownership opportunities for minorities and women.

127. In addition, we do not believe that Media Ownership Study 7, which considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences, supports the contention that tightening the local radio ownership limits would promote minority and female ownership. While the data suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market, the potential impact of tightening the ownership limits on minority ownership was not part of the study design, nor something that can be reasonably inferred from the data.

128. While the NTIA and Form 323 data discussed above show an increase in ownership diversity since the local radio ownership limits were relaxed in 1996, which we have noted, we recognize some limits to their probative value. It is important to note that there is nothing in these data or any other evidence in the record that would permit us to infer causation; therefore, we decline to loosen the existing ownership limits on the basis of any trend reflected in the data. In addition, as discussed above, we decline to loosen the current limits, which place limits on consolidation, because we continue to find that the existing rule remains necessary to promote competition in local radio markets. Consistent with this conclusion, we remain mindful of the potential impact of consolidation in the radio industry on ownership opportunities for new entrants, including small businesses, and minority- and women-owned businesses, and we will continue to consider the implications in the context of future quadrennial reviews.

C. Newspaper/Broadcast Cross-Ownership Rule

1. Introduction

129. The Newspaper/Broadcast Cross-Ownership (NBCO) Rule prohibits common ownership of a daily newspaper and a full-power broadcast station (AM, FM, or TV) if the station's service contour encompasses the newspaper's community of publication.[295] In analyzing the NBCO Rule under Section 202(h), our focus is on the rule's primary purpose—to promote viewpoint diversity at the local level. As the Commission noted in adopting the NBCO Rule, "[i]f our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible."[296] Broadcast stations and daily newspapers remain the predominant sources of the viewpoint diversity that the NBCO Rule is designed to protect. The proliferation of (primarily national) content available from cable and satellite programming networks and from online sources has not altered the enduring reality that traditional media outlets are the principal sources of essential local news and information. The rapid and ongoing changes to the overall media marketplace do not negate the rule's basic premise that the divergence of viewpoints between a cross-owned newspaper and broadcast station "cannot be expected to be the same as if they were antagonistically run."[297] Some commenters argue that eliminating the NBCO Rule would benefit localism and competition. Because the purpose of the NBCO Rule hinges on viewpoint diversity, we find these arguments to be unpersuasive.

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[294] *See* S. Derek Turner, Off The Dial: Female and Minority Radio Station Ownership in the United States 16 (June 2007) (finding that minorities (racial and ethnic minorities) owned 776 commercial radio stations as of February 2007).

[295] *See 1975 Second Report and Order*, 50 FCC 2d at 1074-78, paras. 99-107. The rule currently in effect prohibits the licensing of an AM, FM, or TV broadcast station to a party (including all parties under common control) that directly or indirectly owns, operates, or controls a daily newspaper, if the entire community in which the newspaper is published would be encompassed within the service contour of the station, namely: (1) the predicted or measured 2 mV/m contour of an AM station, computed in accordance with Section 73.183 or Section 73.186; (2) the predicted 1 mV/m contour for an FM station, computed in accordance with Section 73.313; or (3) the Grade A contour of a TV station, computed in accordance with Section 73.684. *See* 47 CFR § 73.3555(d) (2002).

[296] *1975 Second Report and Order*, 50 FCC 2d at 1079-80, para. 111.

[297] *Id.*

130. After careful consideration of the record, we conclude that regulation of newspaper/broadcast cross-ownership within a local market remains necessary to protect and promote viewpoint diversity. We continue to find, however, that an absolute ban on newspaper/broadcast cross-ownership is overly broad.[298] Accordingly, and consistent with the Commission's approach in the 2006 proceeding, the rule we adopt today generally prohibits common ownership of a broadcast station and daily newspaper in the same local market but provides for a modest loosening of the previous ban on cross-ownership consistent with our view that an absolute ban may be overly restrictive in some cases. We find that the benefits of the revised rule, outlined below, outweigh any burdens that may result from adopting the rule.

131. First, although we maintain the rule's general prohibition, we modify its geographic scope to update its analog parameters and to reflect more accurately the markets that newspapers and broadcasters actually serve. Specifically, in light of the fact that the transition to digital television service has rendered obsolete the rule's reliance on an analog contour to determine when the newspaper/television cross-ownership restriction is triggered, we define the geographic scope of that restriction using a television station's digital principal community contour (PCC) as defined in Section 73.625 of the Commission's rules.[299] More importantly, in order to focus the application of the rule more precisely on the areas served by broadcast stations and newspapers, we revise the trigger of the NBCO Rule to consider both the contour of the television or radio station involved, and whether the station and the newspaper are located in the same Nielsen DMA or Audio Market (if any). As discussed further below, we believe this will narrow the application of the rule to those situations where the newspaper and broadcast station truly serve the same local audience.

132. Second, in recognition of the fact that a proposed merger involving a failed or failing entity does not present a significant risk to viewpoint diversity, we adopt an explicit exception to the NBCO Rule for proposed mergers involving a failed or failing broadcast station or newspaper.

133. Third, we will consider waivers of the NBCO Rule on a case-by-case basis and grant relief from the rule if the applicants can show that the proposed merger will not unduly harm viewpoint diversity in the market. In recognizing that a complete ban was potentially overly broad, the Commission in the *2006 Quadrennial Review Order* adopted a presumptive waiver standard that automatically favored some proposed mergers, but disfavored mergers in the vast majority of markets. We continue to believe that adopting a waiver standard specifically in the context of the NBCO Rule will provide appropriate relief from the complete ban; however we reject a presumptive waiver approach and will instead adopt a pure case-by-case approach. Such an approach will allow the Commission to consider the individual merits of a proposed merger, taking into consideration the totality of the circumstances, in a manner that is better suited to evaluating the potential effects of a proposed merger on viewpoint diversity in the local market. This approach will enable the Commission to focus its attention immediately on the evidence that is most relevant for each waiver request. In addition, we will allow for more timely and effective public participation in a waiver proceeding by requiring that, if the owner of a broadcast station seeks to acquire a newspaper under conditions that trigger the NBCO Rule, it must file a waiver request prior to consummating the acquisition, rather than at the time of its license renewal as previously permitted.

134. Finally, while we adopt this rule in order to help promote viewpoint diversity, we find that the rule we adopt is consistent with our goal of promoting minority and female ownership.

2. Background

135. In adopting the original NBCO Rule, the Commission's paramount goal was to promote and preserve a diversity of viewpoints at the local level, although the Commission's competition goal also

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[298] *2002 Biennial Review Order*, 18 FCC Rcd at 13760, para. 355; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2021-22, paras. 18-19; *see also Prometheus III*, 824 F.3d at 51-52.

[299] 47 CFR § 73.625. To the extent necessary as a result of the contour change, we grandfather existing combinations, as discussed below.

factored into the decision.[300] The Commission observed that "it is essential to a democracy that its electorate be informed and have access to divergent viewpoints on controversial issues."[301] The Supreme Court upheld the NBCO Rule and found that the Commission acted reasonably by relying on separation of ownership as a means to promote viewpoint diversity.[302] It approved the Commission's approach of measuring viewpoint diversity by looking at media outlets that disseminate local news, rather than those that primarily offer regional and national news.[303]

136. Although the Commission twice attempted to modify the NBCO Rule, it has never wavered from its goal of promoting viewpoint diversity. In the *2002 Biennial Review Order*, the Commission concluded that the NBCO Rule was not necessary to promote its goals of localism or competition, and might even hinder its localism goal.[304] Nonetheless, to protect viewpoint diversity, the Commission continued to restrict cross-ownership by replacing the NBCO Rule with a set of cross-media limits that were designed to ensure that a single entity could not "dominate public debate" in a local media market.[305] The cross-media limits, which applied a more relaxed standard than the NBCO restriction, reflected the Commission's conclusion that a cross-ownership ban may not be appropriate "in all communities and in all circumstances."[306] The Third Circuit upheld the Commission's decision to retain limits on newspaper/broadcast cross-ownership as necessary to protect viewpoint diversity.[307] The court, however, remanded the cross-media limits after finding that the Commission failed to support the new limits with a reasoned analysis.[308] As a result of the remand, the prior cross-ownership ban remained in effect.

137. In the *2006 Quadrennial Review Order*, the Commission affirmed its findings that newspaper/broadcast cross-ownership restrictions protect viewpoint diversity.[309] The Commission rejected the remanded cross-media limits and relied on the cross-ownership ban in the existing NBCO Rule as the starting point for its oversight of newspaper/broadcast cross-ownership.[310] However, consistent with its previous finding that a complete ban may be overly restrictive in certain circumstances, the Commission adopted a waiver approach that set forth circumstances under which it would view a waiver request favorably.[311] Specifically, the Commission decided to award a favorable presumption to waiver requests for proposed combinations in the 20 largest Nielsen DMAs and, in the case of a proposed newspaper/television combination, when the television station was not ranked among the DMA's top four

[300] *1975 Second Report and Order*, 50 FCC 2d at 1048-49, 1074, 1080, paras. 10-11, 99, 112 (explaining that promoting competition is correlative to the "higher" goal of promoting diversity).

[301] *Id.* at 1074, para. 99.

[302] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978) (*NCCB*).

[303] *NCCB*, 436 U.S. at 814-15; *see also Cross-Ownership of Broadcast Stations and Newspapers*, Order and Notice of Proposed Rulemaking, 16 FCC Rcd 17283, 17287, para. 8 (2001) (*2001 Cross-Ownership Notice*) (identifying the *local* media marketplace as the focus of the Commission's newspaper/broadcast policies) (emphasis in original); *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, Biennial Review Report, 15 FCC Rcd 11058, 11105-06, para. 89 (2000) (*1998 Biennial Review Report*) (reiterating the Commission's focus on promoting viewpoint diversity at the local level).

[304] *2002 Biennial Review Order*, 18 FCC Rcd at 13748-60, paras. 330-54.

[305] *Id.* at 13760, 13790, paras. 355, 432.

[306] *Id.* at 13760, para. 355.

[307] *Prometheus I*, 373 F.3d at 400-01.

[308] *Id.* at 402-13.

[309] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2038-39, paras. 47-49.

[310] *Id.* at 2021, para. 17.

[311] *Id.* at 2021-22, paras. 18-19.

television stations and when eight major media voices would remain in the market.[312]

138. Following the adoption of the *2006 Quadrennial Review Order*, the Third Circuit vacated and remanded the revised NBCO Rule on procedural grounds, namely that the Commission did not provide adequate prior public notice of its proposed rule as required by the Administrative Procedure Act.[313] The court did not address the Commission's substantive modifications to the rule.[314] Thus, notwithstanding the Commission's action in the 2006 quadrennial proceeding, the original NBCO Rule is currently in effect.

139. In the *FNPRM*, consistent with the *NPRM*, we sought comment on our tentative conclusion that some restriction on newspaper/broadcast cross-ownership remains necessary to protect and promote viewpoint diversity in local markets.[315] Given the Commission's findings in previous reviews that application of the NBCO Rule may not be necessary in every circumstance, we sought comment in the *FNPRM* on whether we might consider relief without posing a threat to viewpoint diversity, and if so, when and how such relief should be considered.[316] First, we asked whether the prohibition on newspaper/radio combinations could be lifted without harming viewpoint diversity.[317] Second, although we proposed to maintain the newspaper/television cross-ownership restriction in all markets, we sought comment on how to approach requests for waiver of the restriction.[318] We asked whether we should consider waiver requests on a purely case-by-case basis, assessing each request individually and considering the totality of the circumstances each proposed transaction presented.[319] Further, we sought comment on an alternative approach that would include presumptions to favor or disfavor waivers in accordance with certain prescribed guidelines.[320]

[312] *Id.* at 2021-22, 2040-46, paras. 19, 53-62. In all other cases, the Commission would presume that the proposed merger was inconsistent with the public interest. Waiver applicants needed to overcome the "high hurdle" of a negative presumption with "clear and convincing evidence" that the proposed combination would increase diversity and competition in the relevant market. However, a negative presumption could be reversed when either: (1) the newspaper or broadcast outlet was failed or failing; or (2) the proposed combination would result in a significant new source of local news in the market. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2047-49, paras. 65-68. Under the 2006 Rule, all waiver requests, regardless of the presumption that attached, were subject to a four-factor test. Waiver applicants were required to show: (1) that the combined entity would increase significantly the amount of local news in the market; (2) that the newspaper and broadcast outlets each would continue to employ its own staff and exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station was in financial distress, the proposed owner's commitment to invest significantly in newsroom operations. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2049-54, paras. 68-75.

[313] *Prometheus II*, 652 F.3d at 445-53.

[314] *Id.* at 445.

[315] We explained that the Commission has described viewpoint diversity as "the availability of media content reflecting a variety of perspectives." *FNPRM*, 29 FCC Rcd at 4418, para. 114 n.295 (citing 2002 *Biennial Review Order*, 18 FCC Rcd at 13627, para. 19).

[316] *Id.* at 4419-20, paras. 116-17; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2021-22, paras. 18-19; *2002 Biennial Review Order*, 18 FCC Rcd at 13762-67, paras. 361-67. The Third Circuit upheld the Commission's finding that an absolute ban on all newspaper/broadcast combinations is overly broad. *Prometheus I*, 373 F.3d at 398-400.

[317] *FNPRM*, 29 FCC Rcd at 4419, 4435-38, paras. 116, 144-49. We proposed, in the event we retained the ban on newspaper/radio combinations, to favor waiver requests for such combinations within the top 20 DMAs. *NPRM*, 26 FCC Rcd at 17526, para. 102; *FNPRM*, 29 FCC Rcd at 4445, para. 168 n.482.

[318] *FNPRM*, 29 FCC Rcd at 4419-20, 4438-41, paras. 117, 150-56.

[319] *Id.* at 4419-20, 4439, paras. 117, 154.

[320] *Id.* at 4420, 4441, paras. 118, 156. Specifically, as an alternative to a pure case-by-case approach to waiver requests, the *FNPRM* discussed the possibility of a presumptive waiver standard, which would hold that an applicant would be entitled to a favorable presumption in the case of a newspaper/television combination consisting of one daily newspaper and one full-power television station provided that the combination was located in a top-20 Nielsen

140. In addition, in recognition of the transition to digital television, we proposed that any newspaper/television cross-ownership restriction be modified to replace the obsolete analog Grade A contour. We proposed to prohibit common ownership of a full-power television station and a daily newspaper when: (1) the television station's community of license and the newspaper's community of publication are in the same Nielsen DMA, and (2) the PCC of the television station, as defined in Section 73.625 of the Commission's rules, encompasses the entire community in which the newspaper is published.[321] Further, we proposed to adopt an exception for merger applicants that demonstrate that either the station or the newspaper has failed or is failing.[322] Finally, we tentatively concluded that the NBCO Rule does not have a significant impact on minority and female broadcast ownership, and we expressed our belief that the potential revisions we put forth for comment would be unlikely to have a disproportionate effect on either minority or female owners.

3. Discussion

a. Policy Goals

141. Commenters continue to debate the Commission's public interest rationale for the NBCO Rule, offering differing views regarding the rule's effects on the Commission's policy goals of diversity, localism, and competition. Positions range from an argument that newspaper/broadcast combinations should be subject only to antitrust rules[323] to an argument that all three public policy goals justify the rule because the goals are "inextricably linked."[324]

142. *Viewpoint diversity*. The record before us reaffirms our view that the NBCO Rule remains necessary to promote diversity, specifically viewpoint diversity.[325] The *FNPRM* commenters that oppose our position do not present evidence persuading us to alter our tentative conclusion in the *FNPRM* that newspapers and broadcast television stations, and their affiliated websites, continue to be the predominant providers of local news and information upon which consumers rely.[326] In addition, as

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DMA and: (1) the television station was not ranked among the top-four television stations in the DMA, based on the most recent all-day (9 a.m.–midnight) audience share, as measured by Nielsen or by any comparable professional, accepted audience ratings service, and (2) at least eight independently owned and operating major media voices would remain in the DMA. Major media voices would include full-power television broadcast stations and any newspapers that are published at least four days a week within the DMA in the dominant language of the market and have a circulation exceeding five percent of the households in the DMA. In all other cases and in any DMA below the top-20 there would be a presumption that granting a waiver to permit a newspaper/television combination would be inconsistent with the public interest, convenience, and necessity. A party seeking to overcome a presumption would carry the burden of proof that the proposed combination would or would not unduly harm viewpoint diversity within the DMA. We sought comment on all aspects of this approach. *FNPRM*, 29 FCC Rcd at 4445-52, paras. 167-85.

[321] 47 CFR § 73.625. A daily newspaper is defined as "one which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication." *Id.* § 73.3555, Note 6 (clarifying that college newspapers are not considered to be circulated generally). We proposed to grandfather any combinations that would become newly non-compliant due to any rule revisions.

[322] *FNPRM*, 29 FCC Rcd at 4453-54, para. 188. We proposed to abandon the four-factor test previously required by waiver applicants under the 2006 rule. *Id.* at 4452 para. 184. We also proposed to abandon the local news exception, previously contemplated by the Commission in connection with the 2006 rule, pursuant to which the Commission would reverse a negative presumption against a waiver of the NBCO Rule if the proposed combination involved a broadcast station that had not been offering local newscasts and the applicants committed to airing at least seven hours of local news per week after the transaction. *Id.* at 4452-53, paras. 186-87.

[323] Thomas C. Smith FNPRM Comments at 2-3.

[324] Association of Free Community Papers FNPRM Comments at 7-9 (AFCP).

[325] *See FNPRM*, 29 FCC Rcd at 4435, para. 143.

[326] *See id.* at 4422, para. 123. Free Press supports the Commission's view that newspapers and local television stations, in particular, remain the primary sources of local news and information. Free Press FNPRM Comments at 10. NAB takes issue with what it views as Free Press' argument that the ban should be maintained because viewers

discussed below, the record demonstrates that broadcast radio stations continue to be an important source of viewpoint diversity in local markets. For the most part, opponents of the rule reiterate the two principal arguments put forth by commenters to the initial *NPRM*, namely that: (1) "ownership does not necessarily influence viewpoint" and (2) "an array of diverse viewpoints is widely available from an abundance of outlets, particularly via the Internet."[327] We addressed these arguments extensively in the *FNPRM*, and we do not find them any more persuasive after reviewing the *FNPRM* comments.[328]

143. With regard to the first argument, NAB and Newspaper Association of America (NAA) contend that the Commission provides no evidence that commonly owned newspapers and broadcast stations speak with a single editorial voice.[329] NAA claims that commonly owned newspapers and broadcast stations employ "independent editors and news directors who control the tone and direction of the news content," even though they may share administrative and newsgathering resources.[330] NAB proffers a list of studies that it claims show that the ideological predispositions of consumers, not ownership, drive viewpoint diversity.[331]

144. In the *FNPRM*, we acknowledged that *NPRM* commenters provided examples of instances when cross-owned properties diverged in viewpoint.[332] We noted, however, that, although similar examples were provided during the Commission's 2002 and 2006 reviews, the Commission continued to restrict newspaper/broadcast cross-ownership given that an owner has the opportunity, ability, and right to influence the editorial process of media outlets it owns, regardless of the degree to which it exercises that power.[333] The Third Circuit affirmed the Commission's reasoning that the possibility of a connection between ownership and viewpoint is not disproved by evidence that a connection is not always present.[334] Moreover, the Commission has noted previously the existence of ample evidence pointing in the other direction, namely that ownership can affect viewpoint.[335] In any event, our goal is to maximize the number of distinct voices in a market, which we believe is achieved more effectively by relying on separate ownership rather than on a hope or expectation that owners of

"trust" local broadcast news. NAB FNPRM Reply at 11-12. In addition, the Newspaper Association of America (NAA) argues that Free Press provides no support for its position and provides statistics about the growing number of Americans who obtain news from electronic devices instead of print publications. Newspaper Association of America FNPRM Reply at 5-6 (NAA). We note, however, that NAA does not identify the origin of most of the news that is consumed electronically. For example, a consumer may visit the website of the local newspaper instead of receiving a print copy of the publication.

[327] *FNPRM*, 29 FCC Rcd at 4422, para. 124.

[328] *See id.* at 4422-29, paras. 124-33; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2038-39, para. 49 (finding that, although a complete ban is not necessary, some cross-ownership limits are still needed to protect viewpoint diversity because ownership has the potential to influence viewpoint and because many online news sources are affiliated with traditional news outlets and provide the same local content as their affiliated outlet).

[329] NAB FNPRM Comments at 79-83; NAA FNPRM Comments at 17-18.

[330] NAA FNPRM Comments at 15; *see also id*. at 17-18 (claiming that three studies commissioned by the Commission contradict the notion that ownership influences viewpoint).

[331] NAB FNPRM Comments at 79-81, Attach. C (summarizing the conclusion of each study). In addition, NAB asserts that the media ownership rules do not require broadcasters to produce local news, and so the rule cannot be justified on the basis of sustaining traditional local news coverage. NAB FNPRM Reply at 9-10.

[332] *FNPRM*, 29 FCC Rcd at 4422-24, paras. 125-27.

[333] *Id.*; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13762-65, paras. 361-64; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2038-39, para. 49.

[334] *See FNPRM*, 29 FCC Rcd at 4423, para. 126 (citing *Prometheus I*, 373 F.3d at 400-01).

[335] *See id.*; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13762-65, paras. 361-64; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2038-39, para. 49. There is recent evidence of allegations of inappropriate interference with content by new ownership. *See* Sydney Ember, *In Sheldon Adelson's Newsroom, Looser Purse Strings and a Tighter Leash*, N.Y. Times (May 22, 2016), http://www.nytimes.com/2016/05/23/business/media/in-adelsons-newsroom-looser-purse-strings-and-a-tighter-leash.html.

cross-owned properties will maintain a distance from the editorial process. Our concern is not alleviated by NAB's argument that consumers' ideological preferences have a greater influence on editorial slant than ownership does.[336] Indeed, we believe that such influence only increases the importance of ensuring that a multiplicity of voices are available to consumers.

145. With regard to the second argument, opponents of the rule contend that today's access to a multitude of voices from numerous sources compels repeal of the rule,[337] and they describe how the media environment has changed since the adoption of the NBCO Rule.[338] Bonneville/Scranton notes that, in addition to the rise of cable and satellite television and the Internet, the number of broadcast facilities has nearly tripled since the rule's adoption.[339] NAA argues that the Commission's tentative conclusion that the Internet has not eliminated the need for cross-ownership restrictions contradicts the Third Circuit's conclusion in 2004 that cable and the Internet supplement the viewpoint diversity provided by broadcasters and newspapers.[340] Cox states that it "has watched the diversity of news and entertainment sources explode, as its markets have been flooded with new entrants."[341] Morris contends that the Commission's statutory obligations require it to look beyond traditional media and consider the "full panoply" of additional sources available as a result of the digital revolution.[342] Similarly, NAB claims the Commission is acting arbitrarily and capriciously by focusing on only two types of traditional media as the "true" sources of viewpoint diversity.[343]

146. In particular, several commenters argue that the Internet renders the NBCO Rule obsolete. They point to various ways in which the Internet has made it possible to access news and information anywhere at any time.[344] NAB argues that the ability of consumers to access local information sources directly through the Internet undermines the Commission's view that traditional news outlets continue to dominate local news production and consumption.[345] Delmarva et al. cites studies

[336] *See* NAB FNPRM Comments at 79-82.

[337] *See, e.g.*, Delmarva Broad. Co. et al. FNPRM Comments at 5 (Delmarva et al.) (providing the number of newspapers and broadcast stations available in Lancaster County, Pennsylvania).

[338] Morris Communications FNPRM Comments at 32-41 (Morris); NAB FNPRM Comments at 70-73; Delmarva et al. FNPRM Comments at 2-5.

[339] Bonneville Int'l Corp. and The Scranton Times, LP FNPRM Reply at 4 n.7 (Bonneville/Scranton). Bonneville/Scranton asserts that since the late 1960s, the number of full-power television stations has grown from 851 to 1,783; the number of full-power radio stations has grown from 6,197 to 15,406; and that 774 new LPFM radio stations, 429 Class A stations, and 2,035 LPTV stations have been created. It also notes that multicasting technology allows for simultaneous multiple broadcasts on certain stations. *Id.*

[340] NAA FNPRM Comments at 15-16. In addition, NAA argues that the NBCO Rule violates the First Amendment because it is not rationally related to a substantial governmental interest. NAA argues that the rule fails to meet the test regardless of the validity of the scarcity doctrine because each of the governmental interests at issue—localism, competition, diversity of ownership, and viewpoint diversity—would be better served without the rule. *Id*. at 19-20. Arguments that the NBCO Rule violates the First Amendment have been routinely rejected by the courts, and we reject NAA's assertion that the Commission's policy goals would be better served by eliminating the rule. *See Prometheus II*, 652 F.3d at 464-65; *Prometheus I*, 373 F.3d at 401-02.

[341] Cox Media Grp. FNPRM Comments at 8-9 (Cox).

[342] Morris FNPRM Comments at 4; *see also id*. at 32-35 (arguing that various public statements of the Chairman and Commissioners demonstrate their recognition of the "transformative changes" rendered by the digital revolution).

[343] NAB FNPRM Comments at 78-79 (contending that the Commission cannot "ignore or discount the profound effects" of the Internet just because not all Americans use it); *see also* Morris FNPRM Comments at 36-41 (criticizing the Commission's consideration of "the popularity or weight" that each medium carries).

[344] Morris FNPRM Comments at 32-41 (also noting the wide variety of devices that consumers use to access information); Delmarva et al. FNPRM Comments at 3-5; NAB FNPRM Reply at 4-8.

[345] NAB FNPRM Comments at 77-78 (arguing that "past concerns about traditional media agenda-setting or gatekeeping are no longer relevant" in light of consumers' ability to obtain information directly from government agencies, political campaigns and candidates, educational entities, or health and safety organizations); NAB FNPRM

claiming that Americans access digital and online sources more often than radio or newspapers for daily news and that social media surpasses newspapers and equals television as a primary source of daily news for Americans under the age of 30.[346] NAA identifies several online news portals and claims that "consumers receive approximately 40 percent of their news from online sources, up from 20 percent in 2003."[347]

147. In the *FNPRM*, we addressed *NPRM* commenters' argument that the NBCO Rule is obsolete because today's consumers have access to a vast array of news sources.[348] We tentatively concluded that a cross-ownership restriction remains necessary, despite the increase in media outlets.[349] Supporters of the rule agreed with us that traditional news providers, and their affiliated websites, continue to be the most relied-upon sources of local news and information.[350] In the *FNPRM*, we pointed to evidence suggesting that, despite the Internet's increased role in news distribution, traditional news providers are still critical to ensuring viewpoint diversity at the local level.[351] The record showed that independent online sources "currently do not provide a substitute for the original reporting by professional journalists associated with traditional local media."[352]

148. After reviewing the *FNPRM* comments, which raise substantially the same points that we addressed in the *FNPRM*, our position is unchanged. Several *FNPRM* commenters reiterate that our focus on traditional media is too narrow because other media outlets contribute to viewpoint diversity. Evidence shows, however, that the contributions of cable, satellite, and Internet sources serve as a supplement, but not as a substitute, for newspapers and broadcasters providing local news and information.[353] The news and information provided by cable and satellite networks generally targets a

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Reply at 9 (noting that the Internet provides opportunities to engage in discussions of local and hyper-local public issues and to shape public conversation in ways that limit the gatekeeping power of media); Letter from Rick Kaplan, General Counsel and Executive Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 1-2 (filed May 16, 2016) (NAB May 16, 2016 *Ex Parte*) (citing evidence of a rise in non-traditional outlets as a source of news and information about politics and government); *see also* Delmarva et al. FNPRM Comments at 5 (asserting that entry barriers no longer exist in today's digital world where anyone can engage in the "free exchange of information and diversity of viewpoint" in ways not contemplated in 1975).

[346] Delmarva et al. FNPRM Comments at 4.

[347] NAA FNPRM Comments at 15-17; *see also* Morris FNPRM Comments at 36-41 (citing BuzzFeed, Mashable, Huffington Post, and ProPublica as examples of news sources that compete with traditional media outlets).

[348] *See FNPRM*, 29 FCC Rcd at 4424-29, paras. 128-33.

[349] *Id.*

[350] *Id.* at 4425, para. 129; *see also id.* at para. 130 (citing evidence of consumers' primary reliance on local television stations and newspapers (and their affiliated websites)).

[351] *Id.* at 4424-29, paras. 128-33.

[352] *See id.* at 4427-28, para. 131.

[353] *See, e.g.*, Knight Foundation, Part One – News Goes Mobile: How People Use Smartphones to Access Information at 4, 6 (2016), http://www.knightfoundation.org/media/uploads/publication_pdfs/Topos_KF_Mobile-Report_Final_052616.pdf (News Goes Mobile) (finding that television remains the most popular news source among those who also access news through social media and that audiences for the top news apps are flattening); Pew Research Center, Local News in a Digital Age at 5 (2015), http://www.journalism.org/files/2015/03/PJ_MediaEcology_completereport.pdf (Local News in a Digital Age) (finding that, based on an examination of the local news environments in three distinct U.S. metropolitan areas, "reliance on nontraditional news outlets is still the exception rather than the norm"); American Press Institute, The Personal News Cycle at 1-4 (2014), http://www.americanpressinstitute.org/wpcontent/uploads/2014/03/The_Media_Insight_Project_The_Personal_News_Cycle_Final.pdf (The Personal News Cycle) (finding that people turn to local television and newspapers (print and online) most often for news about their local town or city); *see also* AFCP FNPRM Comments at 4-5 (supporting the Commission's tentative finding that the Internet has not obviated the need for cross-ownership restrictions). A U.S. District Court judge recently rejected an argument that online sources of local news present sufficient competition to local newspapers in Orange County and Riverside County in Southern

wide geographic audience, and the record demonstrates that local news and information available online usually originates from traditional media outlets.[354] We affirm our earlier finding that local, hyperlocal, and niche websites generally do not fill the role of local television stations or daily newspapers.[355] Moreover, a May 2016 report based on the Radio Television Digital News Association's (RTDNA) annual national survey of newsrooms showed that, in 2015, the number of television stations running local news reached a record high of 1,053; the amount of local news on television reached a record high, with an average amount of weekday news of 5.5 hours; the percentage of television stations adding a newscast increased more than seven points from 2014; and 33.2 percent of television news directors expect to air more news in 2016.[356] These findings are not surprising given evidence cited in the *FNPRM* that local television remains Americans' most popular source of local news and information.[357] Local television continues to dominate despite the increasing use of social media as a source of news.[358] Moreover, the social media platforms that consumers turn to for news, such as Facebook, Twitter, and Google, generally aggregate news stories from other sources and those sources do not focus necessarily on local news.[359]

149. Even opponents of the NBCO Rule recognize the continuing role of newspapers and broadcasters as the primary producers of original reporting centered on local news.[360] In addition, although Bonneville/Scranton observes that broadcast facilities in the United States have nearly tripled since the Commission originally contemplated the NBCO Rule,[361] the record does not reflect a significant increase in facilities since our most recent ownership reviews in which the Commission determined that continuing regulation of newspaper/broadcast combinations was necessary to promote and protect viewpoint diversity.[362] Furthermore, Bonneville/Scranton's observation regarding a nationwide increase in broadcast facilities does not provide a basis for lifting the restriction, which is local in scope, because the increase may be spread unevenly across individual markets.

California. The judge concluded that, as creators of local content, "local newspapers continue to serve a unique function in the marketplace" and are not "reasonably interchangeable" with online sources of news. He was "not convinced . . . that the [I]nternet renders geography and distinctions between kinds of news sources obsolete." *United States v. Tribune Publ'g Co.*, No. 16 CV 01822 AB (PJWx) (C.D. Cal. Mar. 18, 2016) (granting the application of the Department of Justice for a temporary restraining order to prevent Tribune Publishing Company from acquiring the assets of a bankrupt publisher of two local newspapers in Southern California).

[354] As discussed in the *NPRM* and *FNPRM*, considerable evidence shows that most online sources of local news are affiliated with newspapers or broadcast stations or contain content that originates from those traditional sources. *See NPRM*, 26 FCC Rcd at 17524-25, para. 97; *FNPRM*, 29 FCC Rcd at 4426-28, paras. 130-31.

[355] *FNPRM*, 29 FCC Rcd at 4429, para. 133; *see also* Local News in a Digital Age at 5 (finding that the percentage of residents "who often get local news from their main daily paper" ranged from 23 percent to 40 percent in three metropolitan areas, but "the portion of [those] residents who often get local news from neighborhood associations, government agencies or officials, or digital-only outlets is in the single digits").

[356] Bob Papper, RTDNA/Hofstra University, RTDNA Research: Local News by the Numbers (2016), http://www.rtdna.org/article/rtdna_research_local_news_by_the_numbers (Local News by the Numbers).

[357] *FNPRM*, 29 FCC Rcd at 4426-27, para. 130.

[358] News Goes Mobile at 10.

[359] *See id.*

[360] *See* NAA FNPRM Comments at 12-13 (noting the continued predominance of traditional media as the purveyor of local reporting despite the rising number of blogs and aggregator websites); Delmarva et al. FNPRM Comments at 6 (recognizing that ease of access does not equate to reliability, quality, or credibility). *But see* NAA FNPRM Comments at 17 (arguing that restricting newspaper/broadcast cross-ownership because independent websites generate little local news content does not serve the goal of encouraging original reporting).

[361] Bonneville/Scranton FNPRM Reply at 4 n.7 (providing broadcast totals showing a more than doubling of full-power television stations and radio stations since the late 1960s and a tripling of facilities when low-power and Class A stations are included).

[362] *See Prometheus I*, 373 F.3d at 400-01 (upholding the Commission's decision to continue to regulate cross-media ownership in order to promote viewpoint diversity).

150. We conclude that the NBCO Rule should continue to apply to newspaper/radio cross-ownership. We find that the newspaper/radio cross-ownership restriction serves the public interest because the record before us shows that radio stations contribute in meaningful ways to viewpoint diversity within their communities. We are persuaded that radio adds an important voice in many local communities such that lifting the restriction could harm viewpoint diversity. Although the Commission tentatively concluded earlier in this proceeding that radio stations are not the primary outlets that contribute to viewpoint diversity in local markets and that consumers rely predominantly on other sources for local news and information,[363] we find that radio's role in promoting viewpoint diversity is significant enough to warrant retention of the restriction. Therefore, for the reasons explained in more detail below, we decline to eliminate the restriction[364] or to adopt a presumptive waiver standard, such as the one proposed in the *NPRM*, favoring newspaper/radio mergers in the top 20 DMAs.[365]

151. Supporters of the newspaper/radio cross-ownership restriction urge the Commission not to discount radio's contributions to viewpoint diversity. UCC et al. argue that the legal standard in Section 202(h) does not require a showing that repeal of the restriction would harm viewpoint diversity, and they assert that it is sufficient for the Commission to find that the restriction is useful in serving the public interest.[366] To that end, UCC et al. cite studies finding that 33 percent of Americans listened to news radio "yesterday," a higher percentage than those that read a newspaper the day before, and that 51 percent of people obtain local news on the radio at least once a week.[367] In addition, UCC et al. point to a study by the Pew Research Center showing that over 4,000 radio stations identify themselves as "news/talk/information" or "talk/personality" and that these formats are second in popularity to country music formats and enjoy the longest listening times among their audiences.[368] In addition, UCC et al. and NHMC challenge the view that music format stations do not contribute to viewpoint diversity.[369] UCC et al. provide examples of radio stations that would not be categorized as news stations but that nonetheless air programs addressing issues of local concern, such as HIV/AIDS awareness and domestic violence.[370] UCC et al. note also that the Pew study observed that radio listeners of music or sports programs likely are exposed to hourly headline newscasts.[371]

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[363] *NPRM*, 26 FCC Rcd at 17529-30, para. 112; *FNPRM*, 29 FCC Rcd at 4435-36, para. 145.

[364] *See NPRM*, 26 FCC Rcd at 17529-30, para. 112; *FNPRM*, 29 FCC Rcd at 4435-38, paras. 145-48.

[365] *NPRM*, 26 FCC Rcd at 17526, para. 102.

[366] UCC et al. FNPRM Comments at 42-43.

[367] *Id*. at 33-35 (citing Laura Santhanam et al., Pew Research Center, Audio: Digital Drives Listening Experience (2013), http://stateofthemedia.org/2013/audio-digital-drives-listener-experience (Digital Drives Listening Experience); Knight Foundation, How People Learn About Their Local Community at 35 (2011), http://www.knightfoundation.org/publications/how-people-learn-about-their-local-community (How People Learn About Their Local Community)).

[368] UCC et al. FNPRM Comments at 35 (citing Digital Drives Listening Experience). The study that UCC et al. cite distinguishes news/talk/information and talk/personality radio stations from "all-news" radio stations, based on data from Nielsen Audio. It explains that the stations identify their own programming category and that no official rules or requirements govern the categories. The study does not examine the extent to which news/talk broadcasts contain local content, but it noted that previous research found an increase in nationally syndicated programming on such stations. Digital Drives Listening Experience at n.1 (asserting that news/talk stations often provide local news and information).

[369] UCC et al. FNPRM Comments at 35-39; NHMC FNPRM Comments at 6-7. Bonneville/Scranton notes that no commenter argues that eliminating the newspaper/radio restriction would harm the formats or programs discussed by UCC et al. or NHMC. Bonneville/Scranton FNPRM Reply at 7 n.20.

[370] UCC et al. FNPRM Comments at 35-39; *see also* Letter from Cheryl Leanza, Policy Advisor, United Church of Christ, Office of Communication Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 2 (filed May 31, 2016).

[371] UCC et al. FNPRM Comments at 33-35. The study that UCC et al. cite notes, however, that hourly headline newscasts often disseminate from the corporate headquarters of a radio conglomerate and are not produced locally. *See* Digital Drives Listening Experience.

152. UCC et al. and National Hispanic Media Coalition (NHMC) claim further that radio stations play an important role for underserved communities. NHMC asserts that the Latino community, in particular, relies on radio as a source of news and information to a greater degree than the general population.[372] It provides data showing that radio listenership is higher among Latinos than other ethnic groups and that 56 percent of Latinos obtain news from radio on a typical weekday.[373] NHMC argues that Latino-owned radio stations, both news/talk stations and music format stations, provide news and information of interest to their local communities, and it uses immigration issues as a prime example.[374] Similarly, UCC et al. objects to the Commission's statement that the record does not suggest that minority- and female-owned stations contribute more significantly to viewpoint diversity than other radio stations.[375] In support, it cites a Pew study finding that the 2008 presidential candidates used black talk radio to reach the African-American community.[376] It points to a finding that the more often that media outlets target a minority group, the more likely that group is to vote.[377] It contends further that the racial identity of the station owner is linked to the voter participation of its listeners.[378]

153. Opponents of the newspaper/radio cross-ownership restriction agree with the Commission's tentative conclusion that radio stations are not the primary outlets that contribute to local viewpoint diversity.[379] Morris and Stephens Capital Partners LLC (SCP) assert that radio's lesser role in promoting viewpoint diversity is reflected in the history of the NBCO Rule and the Commission's past findings to that effect.[380] Morris argues further that the relevant question is not whether radio stations provide any local news, but whether their contributions to viewpoint diversity are significant enough to justify the restriction.[381] Bonneville/Scranton claims that radio stations generally engage in little local news production.[382] In addition, Morris argues that studies, including the studies cited by UCC et al. and

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[372] NHMC FNPRM Comments at 6-8; *but see* Morris FNPRM Reply at 4-5 (citing findings that Hispanics turn to two or three news media platforms a day and rely most heavily on television for news and information).

[373] NHMC FNPRM Comments at 7-8.

[374] *Id*. at 8-11 (adding that ClearChannel stations also contribute to viewpoint diversity, even though the views they disseminate are often harmful to Latinos).

[375] UCC et al. FNPRM Comments at 42-43.

[376] *Id*. at 39-41 (stating also that political advertising on radio has increased 15 percent since 2008).

[377] *Id*. at 40.

[378] *Id*. (stating also that minority owners tend to target minority listeners).

[379] Cox FNPRM Comments at 4, 5-6; Bonneville/Scranton FNPRM Comments at 4-5; NAB FNPRM Comments at 83-84; Stephens Capital Partners LLC FNPRM Comments at 3 (SCP); Letter from Rosemary C. Harold, Counsel for Bonneville Int'l Corp. and The Scranton Times, L.P., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 2, Attach. B (filed June 6, 2016) (Bonneville/Scranton June 6, 2016 *Ex Parte*) (providing statistics showing that radio's level of original newsgathering and reporting is unchanged or slightly worse since 2014); Letter from John R. Feore, Counsel for Cox Enterprises, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 2 (filed June 10, 2016) (Cox June 10, 2016 *Ex Parte*); *see also* Bonneville/Scranton FNPRM Reply at 1-3, 5-7, Attach. A (attaching a chronology of Commission statements showing the agency's history of connecting viewpoint diversity with local news production). Several commenters argue that if the Commission does not eliminate the NBCO Rule in its entirety, it should at a minimum abolish the newspaper/radio cross-ownership rule. Cox FNPRM Comments at 2; Cox June 10, 2016 *Ex Parte* at 1; Bonneville/Scranton FNPRM Comments at 1-2; Bonneville/Scranton June 6, 2016 *Ex Parte* at 1; Morris FNPRM Comments at 2, 5, 9-16, 23; Morris FNPRM Reply at 1; *see also* NAB FNPRM Comments at 83-84; Delmarva et al. FNPRM Comments at 2-6; SCP FNPRM Comments at 2-5.

[380] Morris FNPRM Comments at 5-10, 12-14; SCP FNPRM Comments at 2-3.

[381] Morris FNPRM Reply at 4.

[382] Bonneville/Scranton FNPRM Comments at 3-7; Bonneville/Scranton FNPRM Reply at 6-8; *see also* Letter from Kenneth E. Satten, Counsel to Bonneville/Scranton, to Marlene H. Dortch, Secretary, FCC, at 2-3, 4-5 (filed July 27, 2016) (refuting arguments that the NBCO rule is necessary to maintain viewpoint diversity and can be supported by the record) (Bonneville/Scranton July 27 *Ex Parte* Letter).

NHMC, show that the reliance on radio for local news is decreasing and is considerably less than UCC et al. and NHMC suggest.[383] Bonneville/Scranton claims that supporters of the rule "muddy the Commission's traditional understanding of diversity" by attempting to include radio stations devoted to music and entertainment.[384] It argues that the news contributions of music-format radio stations do not equate to those of local daily newspapers.[385] NAA argues that, although music radio personalities provide services vital to the community, they serve a different function than a newspaper's local reporter and are not a substitute source for the original local news offered by newspapers.[386]

154. After careful consideration of the full record and consistent with our initial proposal in the *NPRM* to continue to include newspaper/radio restrictions in the NBCO Rule,[387] we will retain the newspaper/radio cross-ownership restriction in order to protect and promote viewpoint diversity in local markets. Although we continue to find that, in general, newspapers and television stations are the main sources that consumers turn to for local news and information, we conclude that radio contributes sufficiently to viewpoint diversity to warrant retention of the newspaper/radio cross-ownership restriction.[388] As discussed in the *FNPRM*, this conclusion is consistent with the Commission's longstanding position that newspaper/radio combinations should be prohibited even though radio generally plays a lesser role in contributing to viewpoint diversity.[389] A lesser role does not mean that radio plays no role. The record shows that broadcast radio stations produce a meaningful amount of local news and information content that is relied on by a significant portion of the population and, therefore, provide significant contributions to viewpoint diversity.

155. With over 90 percent of Americans listening to radio on a weekly basis, radio's potential for influencing viewpoint is great.[390] Moreover, recent evidence suggests that radio stations air a substantial amount of local news programming. For example, RTDNA's annual national survey of newsrooms showed that radio stations in major markets air an average of 148.1 minutes (and a median of 74 minutes) of local news per weekday and radio stations nationwide air an average of 77.4 minutes (and a median of 50 minutes) of local news per weekday.[391] According to the report, 84.6 percent of commercial radio stations air local news, and 80 percent of local radio groups include at least one station

[383] Morris FNPRM Reply at 2-5 (stating, for example, that only nine percent of Americans cite radio as a key source for breaking news and weather and that radio places fourth among media outlets as a breaking news source); *see also* Bonneville/Scranton FNPRM Reply at 5 n.13, 8 n.24 (noting that UCC et al. fail to mention that the number of Americans who listen to radio news has decreased significantly over the years). Morris cites a 2013 Gallup poll showing that only six percent of Americans turn to radio as their main news source and a Pew study finding that the percentage of Americans reporting that they got any news from radio on the previous day fell from more than 50 percent in 1990 to 33 percent in 2012. Morris FNPRM Comments at 14.

[384] Bonneville/Scranton FNPRM Reply at 1-2, 5-8.

[385] *Id*. at 5-9 (arguing that radio's headline newscasts contain information that is not likely generated locally and that only two percent or fewer of consumers consider radio a source for topics such as community events, schools, taxes, government activities, or jobs).

[386] NAA FNPRM Reply at 4; *see also* Bonneville/Scranton FNPRM Reply at 5-8 (arguing that NHMC and UCC et al. miss the point that the NBCO Rule is premised on local news production). Bonneville/Scranton cites a 2010 Pew study finding no original reporting on the radio programs studied. Bonneville/Scranton FNPRM Reply at 7 n.21.

[387] *See NPRM*, 26 FCC Rcd at 17526, para. 102.

[388] *See, e.g.*, *2006 Quadrennial Review Order*, 23 FCC Rcd at 2022-23, 2038-39, 2040, paras. 20, 49, 53 (including restrictions on newspaper/radio combinations in the revised NBCO Rule, which was adopted to promote viewpoint diversity).

[389] *FNPRM*, 29 FCC Rcd at 4436-37, para. 147.

[390] Pew State of the News Media 2015 at Audio: Fact Sheet (finding that 91 percent of Americans aged 12 and older reported listening to traditional AM/FM radio during the week before they were surveyed); see also Letter from Ted Kalo, Executive Director, MusicFIRST Coalition, to Tom Wheeler, Chairman, FCC, at 1 (filed July 27, 2016) (supporting retention of the cross-ownership rules by citing radio's ability to influence public access to viewpoints).

that airs local news.[392] In addition, a 2014 study by the Media Insight Project revealed that 65 percent of Americans used radio to get news during the previous week and that Americans across all generations continue to seek out traditional sources of news, including radio, despite the availability of news through social media and its accessibility on a variety of devices and technologies.[393]

156. Moreover, there is some evidence in the record that members of certain communities may rely more heavily on broadcast radio stations for local news and information. For example, NHMC provides data that demonstrate radio's importance in Latino communities. Among other findings, NHMC cites evidence that more than half of Latinos regularly turn to radio for at least some of their news.[394] UCC et al. provide evidence that radio stations played a meaningful role preceding the 2008 presidential election in disseminating political news and increasing voter participation in the African-American community.[395] Such reliance may be especially strong when radio stations target particular demographic groups or offer news programs in a foreign language. For example, a community radio station recently licensed in Minneapolis reports local news stories in the Somali language and provides information of particular interest to the local Somali-American community.[396]

157. Evidence of reliance on broadcast radio for local news and public information programming is important for assessing radio's contributions to viewpoint diversity; however, to be a meaningful source of viewpoint diversity in local markets, broadcast radio stations must increase the diversity of local information, not simply its availability.[397] The record demonstrates that radio stations still contribute to viewpoint diversity by producing a meaningful amount of local news and public interest programming that is responsive to the needs and concerns of the community. Commenters state that original radio programs often address issues of local interest involving, among other things, health care, politics, and immigration.[398] For example, NHMC discusses the influence of Latino radio stations in mobilizing support for immigration rallies that were held across the country in 2006 in response to

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[391] Local News by the Numbers. Of the 4,037 radio stations randomly surveyed, valid responses were provided by 484 radio news directors and general managers representing a total of 1,316 radio stations. The report's author cautions that stations that air news programming may be more likely to respond to the news survey than those that do not. The report does not describe the types of content that are included in the category of local news.

[392] *Id.* (finding that 69.9 percent of all responding radio stations air local news).

[393] The Personal News Cycle at 2, 4, 6-7 (concluding that "tech-savvy news consumers continue to use traditional platforms . . . and are no more or less likely than everyone else to use print publications, television, or radio to access the news"). The study reported the following percentages of respondents by age group that used radio to get news during the previous week: 64 percent of adults aged 60 and over; 74 percent of adults aged 40 to 59; 59 percent of adults aged 30-39; and 53 percent of adults aged 18-29. *Id.* at 25. These results differ considerably from the finding cited in the *FNPRM* that 34 percent of respondents surveyed in 2010 reported listening to news on the radio. Even though that finding represented a dramatic drop from 54 percent in 1991, it nonetheless indicated that at least a third of Americans obtain news and information from radio. *See FNPRM*, 29 FCC Rcd at 4436, para. 146 (citing Steve Waldman & the Working Group on Information Needs of Communities: The Changing Media Landscape in a Broadband Age at 62 (2011), https://transition.fcc.gov/osp/increport/The_Information_Needs_of_Communities.pdf (Information Needs of Communities)).

[394] NHMC FNPRM Comments at 6-11.

[395] UCC et al. FNPRM Comments at 39-40 (citing evidence that Radio One sponsored a voter registration drive that enrolled 30,000 voters in one day).

[396] Hannah Weikel, *New Radio Stations Broadcast to Underserved Neighborhoods*, The Washington Times (Dec. 19, 2015), http://www.washingtontimes.com/news/2015/dec/19/new-radio-stations-broadcast-to-undeserved-neighbo/?utm_source=RSS_Feed&utm_medium=RSS. Although the NBCO Rule does not apply to that particular station due to its low-power status, the example nonetheless demonstrates the important contributions that radio can make to viewpoint diversity.

[397] *See FNPRM*, 29 FCC Rcd at 4429, para. 133 ("We tentatively find that the diversity of local news coverage is not enhanced by the fact that newspapers from around the world are only a click away. Remote access to hometown sports scores and local weather reports expands the availability, but not the diversity, of information.").

[398] *See* UCC et al. FNPRM Comments at 35-37, App. D; NHMC FNPRM Comments at 8-11.

proposed federal legislation.[399] UCC et al. list HIV/AIDS awareness, domestic violence, and hurricane safety among the topics addressed by a hip-hop music station in the Washington, D.C., market.[400] In addition, UCC et al. submit numerous examples of minority-owned radio stations in different parts of the country that, in varying degrees, produce local news and public affairs programming.[401] Moreover, invitations to "call-in" to a radio program offer local residents unique opportunities to participate interactively in a conversation about an issue of local concern. For example, NHMC provides a description of a Colorado radio station serving the local Latino community that touts as its most popular talk show a weekly call-in program centered on immigration law issues.[402]

158. For the foregoing reasons, we find that radio provides an important contribution to viewpoint diversity such that lifting the newspaper/radio cross-ownership restriction in all markets across-the-board could sweep too broadly.[403] We find that we must take care not to overlook the contributions to viewpoint diversity offered by radio stations, particularly to the extent that dedicated audiences of radio stations rely on radio as a valuable source of local news and information, and that radio stations provide an additional opportunity for civic engagement, as certain commenters attest.[404] Thus, while the Commission previously has recognized that a radio station generally cannot be considered the equal of a newspaper or television station when it comes to providing news, in fact, for a significant portion of the population radio may play an influential role as a "source for news or […] the medium turned to for discussion of matters of local concern."[405]

159. Accordingly, we find that radio stations can contribute in a meaningful way to viewpoint diversity within local communities and that a newspaper's purchase of a radio station in the same local market could harm viewpoint diversity in certain circumstances. As a result, we retain both the newspaper/radio and the newspaper/television cross-ownership restrictions (for the reasons discussed above). However, consistent with previous Commission findings, we believe that enforcement of the NBCO Rule may not be necessary to promote viewpoint diversity in every circumstance and that there could be situations where enforcement would disserve the public interest.[406] For example, a newspaper/radio combination might not pose a significant risk of harm in a market that contains numerous radio stations that offer a substantial amount of local news programming. Furthermore, we reaffirm the Commission's earlier findings that the opportunity to share newsgathering resources and realize other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information.[407] In certain circumstances, newspaper/broadcast cross-ownership may benefit the news offerings in a local market without causing undue harm to viewpoint diversity. In recognition of this, as discussed below, we will ease the application of the prohibition through a waiver process and other modifications to the scope of the rule.

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[399] NHMC FNPRM Comments at 8-11.

[400] UCC et al. FNPRM Comments at 36.

[401] *Id.* at App. D (compiling examples of radio programming that "expresses editorial viewpoint" from a review of the websites of numerous minority-owned stations).

[402] NHMC FNPRM Comments at 8-9.

[403] As discussed further below, to the extent an applicant believes the loss of an independent radio voice in a particular market will not unduly harm viewpoint diversity, it may request a waiver under our new waiver standard based upon a showing to that effect.

[404] *See* UCC et al. FNPRM Comments at 39-41; NHMC FNPRM Comments at 6-8.

[405] *1975 Second Report and Order*, 50 FCC 2d at 1083-84, paras. 115-16 (noting that radio may play a vital role particularly in communities where there are no local television stations).

[406] Under Section 202(h) of the 1996 Act, we must repeal or modify any media ownership regulation that no longer serves the public interest. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

[407] *See FNPRM*, 29 FCC Rcd at 4408, para. 89; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2032-33, para. 39; *2002 Biennial Review Order*, 18 FCC Rcd at 13761-62, paras. 359-60.

160. *Localism*. Several opponents of the rule argue that, as the Commission previously has recognized, newspaper/broadcast combinations can promote localism by creating efficiencies that cross-owned properties can use to produce a higher quantity and quality of news and information programming.[408] Citing Commission studies, NAA states that, on average, a cross-owned television station produces almost 50 percent more local news, provides 30 percent more coverage of local and state political candidates, and airs 40 percent more time to candidates' speeches and comments than other commercial stations.[409] Several commenters assert that the NBCO Rule affirmatively harms local journalism by preventing combinations that could enhance efficiencies in local news production and distribution.[410] In response, Free Press argues that it is not surprising that cross-owned television stations claim to have superior reporting abilities given their competitive advantage over stations unaffiliated with the local newspaper.[411] Free Press points to the finding in Media Ownership Study 4 and a previous Free Press study that even if a cross-owned television station itself produces more local news, the overall effect of cross-ownership at the market level can be a reduction in total local news available to the market due to the so-called "crowding out effect."[412] However, as explained in the *FNPRM*, the results of Media Ownership Study 4 were largely inconclusive.[413]

161. Cox and SCP argue that eliminating the newspaper/radio cross-ownership restriction would promote localism by revitalizing local news on radio stations and by allowing newspapers to maximize efficiencies of scale.[414] Bonneville/Scranton also argues that allowing newspaper/radio combinations would promote localism by providing struggling newspapers with a broader base of financial support and an increased ability to reach audiences.[415] SCP and Delmarva et al. argue that the prohibition unnecessarily restricts investment that would benefit both newspapers and radio stations and that allowing them to share expertise, resources, and capital would bolster their abilities to provide news and information.[416] NAB states that Commission studies have found that cross-owned radio stations are more likely to air news and public affairs programming and are four to five times more likely to have a

[408] Cox FNPRM Comments at 8-11; Morris FNPRM Comments at 10-11; NAB FNPRM Comments at 73-77; NAB FNPRM Reply at 9-10; NAA FNPRM Comments at 12-13; Bonneville/Scranton June 6, 2016 Ex Parte Letter at 2; *see also* NAA FNPRM Comments at 3-5 (citing research commissioned by the Commission). Cox asserts that grandfathered combinations benefit the communities they serve and that advocates of the rule have not produced contrary evidence. Cox FNPRM Comments at 8-11 (pointing to improved coverage during Atlanta's January 2014 winter storm due to the combined resources of Cox's Atlanta newspaper, television station, and radio stations).

[409] NAA FNPRM Comments at 3-10 (providing examples in various cities, including Phoenix, Dayton, South Bend, Milwaukee, Cedar Rapids, Atlanta, and Spokane, in support of its position that cross-ownership leads to more comprehensive local news coverage across all platforms); *see also* NAB FNPRM Comments at 73-77 (listing studies dating from 1975 to 2011 that it claims show that cross-ownership promotes localism).

[410] Cox FNPRM Comments at 10-11 (arguing that the NBCO Rule "is simply standing in the way of local media properties that want to offer consumers a better service and a deeper localism"); NAA FNPRM Comments at 1-2 (claiming that the NBCO Rule is the type of harmful regulation that Congress had in mind when it required the Commission to review its media ownership rules periodically); Delmarva et al. FNPRM Comments at 6 (contending that "the prohibition inhibits the ability of trained communications professionals from deploying their skills and expertise across multiple distribution channels to the detriment of the public"); Letter from Walter Isaacson, President & CEO, The Aspen Institute, to Marlene H. Dortch, Secretary, FCC, at 1 (filed July 9, 2014) (arguing that broadcast owners should be encouraged, not forbidden, to invest in newspapers in order to promote strong local journalism); *see also* NAA FNPRM Reply at 8 (supporting Isaacson's position).

[411] Free Press FNPRM Reply at 11-14.

[412] *Id.*

[413] *FNPRM*, 29 FCC Rcd at 4430-31, paras. 135-37.

[414] Cox FNPRM Comments at 4-5; SCP FNPRM Comments at 4-5; *see also* Morris FNPRM Comments at 11-12, 15.

[415] Bonneville/Scranton FNPRM Comments at 7-9; Bonneville/Scranton FNPRM Reply at 4; *see also* Morris FNPRM Comments at 15, 24-30 (asserting that lifting the restriction will help struggling newspapers by stimulating investment in print media).

news format than a non-cross-owned station.[417] Morris claims that its cross-owned radio stations are the only radio stations in their respective markets providing local news.[418]

162. We affirm our belief that "the nation's interest in maintaining a robust democracy through a 'multiplicity of voices' justifies maintaining certain NBCO restrictions even if doing so prevents some combinations that might create cost-savings and efficiencies in news production."[419] While *FNPRM* commenters proffer further examples in support of the proposition that such cost-savings and efficiencies may allow cross-owned properties to provide a higher quality and quantity of local news, these additional examples do not change our conclusion.[420] The Commission has long accepted that proposition but also recognized that increased efficiencies do not necessarily lead to localism benefits.[421] Furthermore, even if cost-savings are used to increase investment in local news production, the purpose of this rule is to promote and preserve the widest possible range of viewpoint; it is not, as NAB seems to suggest, to promote localism.[422] We therefore disagree with NAB's argument that retaining cross-ownership restrictions will stymie the rule's intended benefits.[423] Allowing media owners to achieve economies of scale and scope may enable them to disseminate a greater amount of local news over one or both of their cross-owned properties, but the costly result would be fewer independently owned outlets in the market. The loss of a local voice runs counter to our goal of promoting viewpoint diversity, regardless of whether cross-ownership is more or less likely to produce localism benefits. Although the Commission has found previously that the NBCO Rule is not necessary to promote its localism goal, that determination, which we affirm today, does not undermine the viewpoint diversity rationale for the rule.[424]

163. *Competition*. Promoting competition was not the Commission's primary concern when it considered implementation of the NBCO Rule,[425] and in its 2002 biennial review the Commission found that the rule was not necessary to promote competition because newspapers and broadcast stations do not compete in the same product markets.[426] The National Association of Black Owned Broadcasters, Inc. (NABOB) disputes the Commission's longstanding conclusion and claims that radio stations do compete with newspapers for advertisers.[427] In response, NAA notes that the Commission adopted its view from

[416] Delmarva et al. FNPRM Comments at 2; SCP FNPRM Comments at 3-5; *see also* NAA FNPRM Comments at 22 (asserting that cross-ownership improves the quality of local news on radio stations by providing them access to the news and information gathered by newspapers).

[417] NAB FNPRM Comments at 83-84.

[418] Morris FNPRM Comments at 17-23 (describing in detail the award-winning local news coverage of its cross-owned radio stations in Topeka, Kansas, and Amarillo, Texas). Morris agrees with other opponents of the rule that the restriction prevents partnerships that would promote the Commission's localism goal. Morris FNPRM Comments at 41-43.

[419] *FNPRM*, 29 FCC Rcd at 4431-32, para. 138.

[420] In particular, nothing in the *FNPRM* record alters our view that Media Ownership Study 4 produced inconclusive evidence that newspaper/broadcast cross-ownership reduces the overall level of local news in a market. *See id.* at 4430-31, paras. 135-37.

[421] *See FNPRM*, 29 FCC Rcd at 4430-32, paras. 135-38; *but see* NAB FNPRM Comments at 73-77 (criticizing the Commission's suggestion that cross-ownership does not guarantee localism benefits as an impossible standard inconsistent with the requirements of Section 202(h)).

[422] *See* NAB FNPRM Comments at 70-72, 78-79; NAB FNPRM Reply at 12.

[423] NAB FNPRM Comments at 70-72, 78-79; NAB FNPRM Reply at 12.

[424] *2002 Biennial Review Order*, 18 FCC Rcd at 13753-60, paras. 342-54; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2038, para. 46; *see also FNPRM*, 29 FCC Rcd at 4418-19, 4435-36, paras. 115, 145.

[425] *1975 Second Report and Order*, 50 FCC 2d at 1048-49, 1074, 1080, paras. 11, 99, 112 (analyzing competition concerns in connection with the rule's divestiture requirement but viewing diversification as the principal support for the rule's prospective application).

[426] *2002 Biennial Review Order*, 18 FCC Rcd at 13748-53, paras. 331-41.

[427] NABOB FNPRM Comments at 13-15 (citing reports from BIAKelsey and the Radio Advertising Bureau).

findings by the Department of Justice and the courts that the advertising markets for broadcasters and newspapers are distinct product markets.[428] Bonneville/Scranton asserts that NABOB provides data showing merely the relative usage of different advertising platforms, not the degree of actual competition for advertisers.[429] Morris and NAA argue that the fact that both newspapers and radio stations earn local advertising revenues does not make them economic substitutes.[430] NAA contends that the pertinent issue is whether newspapers and radio stations compete against each other for local news, not for advertising.[431]

164. A few *FNPRM* commenters raise concerns with respect to competition arising from new forms of media, as opposed to competition between newspapers and broadcasters. Commenters argue that repeal of the NBCO Rule is essential to relieve the struggling newspaper and broadcast industries, which they argue have suffered revenue declines and audience fragmentation, particularly as a result of the challenges that new technologies pose to traditional business models.[432] Morris agrees that the obstacles facing the traditional media industry are part of a long-term trend and not a temporary effect of the global recession.[433] NAA attributes the steep decline in newspaper advertising revenues to the "disaggregation of advertising from news" caused by online entities such as Craigslist and other non-news outlets.[434] NAA and NAB urge the Commission to permit traditional news outlets to respond to these competitive challenges by achieving economies of scale through common ownership of newspapers and broadcast stations.[435] In addition, Morris argues that allowing broadcasters to own multiple television and/or radio stations puts newspaper owners at an unfair competitive disadvantage.[436]

165. Proponents of the NBCO Rule counter that further media consolidation is not a desirable or necessary strategy for reversing the declining fortunes of traditional news outlets. The Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) warns that "[m]ore ownership concentration means fewer jobs for media professionals, which results in fewer independent news sources and editorial perspectives in news coverage."[437] It argues that the rapid consolidation in the media marketplace is a reason to strengthen the NBCO Rule, not weaken it.[438] Free Press contends that eliminating or weakening the NBCO Rule would risk consumer harm unnecessarily because the predicted

[428] NAA FNPRM Reply at 3-4.

[429] Bonneville/Scranton FNPRM Reply at 3 n.5; *see also* Bonneville/Scranton June 6, 2016 *Ex Parte* Letter at 2.

[430] Morris FNPRM Reply at 5-6 (citing Commission decisions, court decisions, and a DOJ official); NAA FNPRM Reply at 3-4.

[431] NAA FNPRM Reply at 3-4 (asserting that radio stations and newspapers provide different local news products).

[432] Morris FNPRM Comments at 24-30; NAB FNPRM Reply at 4-8. NAB cites evidence that the newspaper industry's total advertising revenue, including online, was lower in 2013 than in 1954, adjusting for inflation. It also claims that newspapers' print advertising revenues have dropped over 50 percent since 2008 and nearly 70 percent since 2003. NAB FNPRM Comments at 71; *see also* NAB May 16, 2016 *Ex Parte* at 1.

[433] Morris FNPRM Comments at 25-26 (pointing to the 2.6 percent decline in overall revenues for newspapers from 2012 to 2013).

[434] NAA FNPRM Comments at 11-12.

[435] NAA FNPRM Comments at 11-12; NAB FNPRM Comments at 71-72; *see also* NAB FNPRM Reply at 12; NAA FNPRM Comments at 1 (noting that the newspaper industry is the only U.S. industry that federal law bars from investment by local television companies).

[436] Morris FNPRM Comments at 41-43 (arguing that newspapers typically have greater newsgathering resources than other local entities and thus are well-positioned to promote the Commission's localism goal); *see also* NAA FNPRM Comments at 11-12 (the cross-ownership ban hinders competition by placing a constraint on newspapers and broadcasters but not their competitors).

"impending doom" of newspapers has not occurred.[439] It points to the splitting apart of several newspaper/broadcast conglomerates as evidence of newspapers' hopes for a more profitable future.[440] Wick responds that the spinning off of newspaper assets reflects an attempt to prevent struggling print enterprises from dragging down the stock prices of the profitable businesses of media conglomerates.[441]

166. The *FNPRM* record does not change our longstanding position that the NBCO Rule is not necessary to promote competition given that newspapers and broadcasters do not compete in the same product markets.[442] We agree with the view of several commenters that NABOB has not presented a convincing case to the contrary.[443] The fact that broadcasters and newspapers both sell to local advertisers does not mean they compete with each other for advertising.

167. Although we do not find that the rule is necessary to promote competition, we have concluded that it is necessary to promote viewpoint diversity. Therefore, we are not swayed by the media industry's arguments that the NBCO Rule should be eliminated because it potentially limits opportunities for newspapers and broadcasters to expand their businesses. As we stated in the *FNPRM*, we do not believe that viewpoint diversity in local markets should be jeopardized in order to enable media owners to increase their revenue by pursuing cross-ownership within the same local market.[444] Moreover, the application of the NBCO Rule has a very limited geographic scope. Even if the potential efficiencies of inter-market consolidation are fewer than those to be gained from in-market acquisitions, the rule does not prevent media owners that seek new revenue streams from acquiring properties in other markets or alternative media outlets that are not subject to the NBCO Rule.

b. The Scope of the Rule

168. *Newspaper/Television Combinations*. The current rule prohibits common ownership of a daily newspaper and a television station when the Grade A contour of the station encompasses the entire community in which the newspaper is published.[445] The trigger for the newspaper/television cross-ownership restriction therefore relies on a station's Grade A contour, which was rendered obsolete by the transition to digital television service. In the *FNPRM*, the Commission tentatively concluded that the geographic scope of the newspaper/television cross-ownership restriction should be updated to reflect the fact that analog Grade A contours can no longer be used to determine when the rule is triggered.[446] Previously, in the *NPRM*, the Commission sought comment on whether the cross-ownership prohibition should be triggered when a daily newspaper and a television station are in the same Nielsen DMA.[447] In response to concerns that such an approach would expand the rule's application too broadly, the

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[437] Screen Actors Guild-American Federation of Television and Radio Artists FNPRM Comments at 2 (SAG-AFTRA).

[438] *Id.* at 3-4.

[439] Free Press FNPRM Comments at 10.

[440] *Id.* AFCP observes that Gannett Company is the latest media conglomerate to divide its newspaper and broadcast operations, following similar action by News Corporation, Time Warner, Tribune, and Media General. AFCP FNPRM Comments at 2-3 n.3.

[441] Wick FNPRM Reply at 16.

[442] *See, e.g., 2002 Biennial Review Order*, 18 FCC Rcd at 13748-53, paras. 331-41.

[443] *See* NAA FNPRM Reply at 3-4; Morris FNPRM Reply at 5-6; Bonneville/Scranton FNPRM Reply at 3 n.5.

[444] *FNPRM*, 29 FCC Rcd at 4434-35, 4435-36, paras. 141-42, 145.

[445] 47 CFR § 73.3555(d)(1)(iii). The Commission retained the Grade A contour approach when it revised the NBCO Rule in 2006. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2093, App. A.

[446] *FNPRM*, 29 FCC Rcd at 4441, para. 157.

[447] *NPRM*, 26 FCC Rcd at 17525, para. 99.

Commission instead proposed in the *FNPRM* that the rule be triggered for newspaper/television combinations when both: (1) the television station and the newspaper are in the same Nielsen DMA and (2) the PCC of the television station encompasses the entire community in which the newspaper is published.[448] The Commission's proposed approach received support, and no opposition, from *FNPRM* commenters.[449]

169. We adopt our uncontested proposal in the *FNPRM* to update the geographic scope of the restriction by incorporating both a television station's DMA and its digital service contour.[450] Specifically, cross-ownership of a full-power television station and a daily newspaper will be prohibited when: (1) the community of license of the television station and the community of publication of the newspaper are in the same Nielsen DMA, and (2) the PCC of the television station, as defined in Section 73.625 of the Commission's rules, encompasses the entire community in which the newspaper is published.[451] Both conditions need to be met in order for the cross-ownership prohibition to be triggered. The DMA requirement ensures that the newspaper and television station serve the same media market, and the contour requirement ensures that they actually reach the same communities and consumers within that larger geographic market.[452]

170. *Newspaper/Radio Combinations*. In the *NPRM*, the Commission sought comment on whether the trigger for the newspaper/radio cross-ownership restriction should continue to rely on radio contours or whether Nielsen Audio market definitions should be used instead.[453] Consistent with arguments made in the record, we will not replace radio contours, but instead we will include an additional requirement that the radio station and the newspaper be located in the same Nielsen Audio Metro market, where one is defined.[454] In circumstances in which neither the radio station nor the newspaper is geographically located within a defined Nielsen Audio Metro market, then the trigger will

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[448] *FNPRM*, 29 FCC Rcd at 4441-42, para. 159.

[449] Cox FNPRM Comments at 7-8; AFCP FNPRM Comments at 6.

[450] *FNPRM*, 29 FCC Rcd at 4441-42, para. 159. Cox and AFCP support the Commission's combined approach, in part because incorporating the PCC of a television station will ensure that the rule's coverage does not extend to outlets located in distant parts of large DMAs. Cox FNPRM Comments at 2-3, 7-8; AFCP FNPRM Comments at 6. Cox would prefer, however, that the Commission use a digital equivalent to the analog Grade A contour instead of the PCC. Cox FNPRM Comments at 7-8. As we explained in the *FNPRM*, we rejected Cox's suggestion because a digital equivalent to the analog Grade A contour has not been defined and the PCC is a defined contour that can be verified in a straightforward manner, which ensures reliable service for the community of license. *FNPRM*, 29 FCC Rcd at 4442, para. 160 n.460. Cox did not dispute our reasoning in its further comments, and we affirm our rejection of its suggestion herein.

[451] 47 CFR § 73.625. For the reasons provided in the *FNPRM*, we will maintain the current definition of a daily newspaper as one "which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication." *FNPRM*, 29 FCC Rcd at 4443-44, para. 164; *see also* 47 CFR § 73.3555, Note 6. We explained our disinclination to revise the definition, for example by imposing a minimum circulation requirement, and *FNPRM* commenters did not address the issue further.

[452] *See FNPRM*, 29 FCC Rcd at 4441-42, para. 159; *see also id*. at 4442, para. 159 n.457 (noting the similarities with the local television ownership rule). Cox agrees that using DMAs will provide an accurate way to define the market and will prevent the rule from triggering in situations where a station's contour reaches a distinct and separate audience in a different DMA. Cox FNPRM Comments at 2-3, 7-8 (claiming that DMAs are "a better measure of audience reach and economic market overlap than station contours").

[453] *NPRM*, 26 FCC Rcd at 17530-31, paras. 113-14; *see also FNPRM*, 29 FCC Rcd at 4435, para. 144 n.413. The current rule prohibits cross-ownership when the entire community in which the newspaper is published would be encompassed within the service contour of: (1) the predicted or measured 2 mV/m contour of an AM station, computed in accordance with Section 73.183 or Section 73.186, or (2) the predicted 1 mV/m contour for an FM station, computed in accordance with Section 73.313. *See* 47 CFR § 73.3555(d) (2002).

[454] Both Cox and Morris urge the Commission to use Nielsen Audio Metro markets to help define the scope of any newspaper/radio cross-ownership restriction that the Commission retains. Cox NPRM Comments at 24-25; Cox FNPRM Comments at 7 n.16; Morris FNPRM Comments at 30-31; *see also* Morris NPRM Comments at 21-22.

be determined, as before, solely on the basis of the station's service contour.[455] We agree with Morris that the added Nielsen Audio Metro market condition will "serve a valid limiting role" because Nielsen Audio designations are based on listening patterns, which will focus the restriction on properties serving the same audience.[456]

171. Specifically, in areas designated as Nielsen Audio Metro markets, cross-ownership of a full-power radio station and a daily newspaper will be prohibited when: (1) the radio station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market, and (2) the entire community in which the newspaper is published is encompassed within the service contour of the station, namely: (a) the predicted or measured 2 mV/m groundwave contour of an AM station, computed in accordance with Section 73.183 or Section 73.186; or (b) the predicted or measured 1 mV/m contour for an FM station, computed in accordance with Section 73.313. Both conditions need to be met in order for the cross-ownership restriction to apply, except when both the community of publication of the newspaper and the community of license of the radio station are not located in a Nielsen Audio Metro market, then only the second condition need be met. Consistent with the Local Radio Ownership Rule, we will rely on Nielsen to determine whether a radio station is in the same Nielsen Audio Metro market as the newspaper's community of publication.[457] Specifically, for purposes of this rule, a radio station will be counted as part of the Nielsen Audio Metro market in which the station's community of license is geographically located and any other Nielsen Audio Metro market in which the station is listed by BIA as "home" to that market.[458] This approach will ensure that a radio station is considered to be part of each Nielsen Audio Metro market in which that station is either geographically located or competes. We believe Nielsen's determination of a radio market's boundaries is useful in considering whether particular communities rely on the same media voices. We believe that such a determination, combined with the actual service areas of the respective facilities, gives a stronger picture of the relevant market and instances in which we should prohibit common ownership. Therefore, as Morris notes in its comments, we believe that including consideration of the Nielsen Audio Metro market (if one exists) in the determination of when the cross-ownership prohibition is triggered will help focus the restriction specifically on those circumstances where the newspaper and broadcast facility truly serve the same audience.[459]

c. Exception for Failed and Failing Broadcast Stations and Newspapers

172. In the *FNPRM*, the Commission sought comment on whether to create an exception to the NBCO Rule, regardless of the waiver standard adopted, when one of the entities in the proposed combination is either failed or failing.[460] The Commission asked whether it should adopt the criteria used

[455] *See* Cox NPRM Comments at 25.

[456] Morris FNPRM Comments at 30-31 (urging the Commission to eliminate the newspaper/radio cross-ownership restriction, but supporting the condition in the event the Commission retained the restriction).

[457] The Local Radio Ownership Rule relies, in part, on Nielsen Audio Metro markets in applying the radio ownership limits. In that context, the Commission has developed certain procedural safeguards to deter parties from attempting to manipulate Nielsen Audio market definitions to evade the Local Radio Ownership Rules. By relying on Nielsen Audio Metro markets, where available, our revised NBCO Rule is susceptible to similar manipulation by parties; accordingly, we will apply the procedures adopted in the context of the Local Radio Ownership Rule to the NBCO Rule we adopt today. *See, e.g., 2002 Biennial Review Order*, 18 FCC Rcd at 13726, para. 278; *supra* para. 108 (adopting additional procedures in the Local Radio Ownership Rule context).

[458] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13726-28, paras. 279-81 (discussing methodology for determining which stations are counted as part of a Nielsen Audio market).

[459] Morris FNPRM Comments at 30-31.

[460] *FNPRM*, 29 FCC Rcd at 4453-54, para. 188. In the *FNPRM*, the Commission proposed not to adopt the 2006 exception for proposed mergers involving a broadcast station that does not offer local newscasts but that commits to airing at least seven hours of local news per week after the transaction. *Id.* at 4453, para. 187. *FNPRM* commenters did not address this issue. For the reasons expressed in the *FNPRM*, we will not create such an exception. *Id.* at 4452-53, paras. 186-87. Our current approach will not preclude waiver applicants from attempting to show how

in the 2006 rule for failed/failing entities.[461] The Commission posited that "the continued operation of a local news outlet under common ownership would cause less harm to viewpoint diversity than would its complete disappearance from the market."[462] *FNPRM* commenters did not address the specifics of the issue, but the Association of Free Community Papers (AFCP) supports the concept of taking into account whether a proposed merger involves a failed/failing entity.[463]

173. Consistent with our proposal in the *FNPRM*, we will adopt an express exception for proposed combinations involving a failed or failing newspaper, television station, or radio station.[464] It stands to reason that a merger involving a failed or failing newspaper or broadcast station is not likely to harm viewpoint diversity in the local market. If the entity is unable to continue as a standalone operation, and thus contribute to viewpoint diversity, then preventing its disappearance from the market potentially can enhance, and will not diminish, viewpoint diversity.

174. We adopt failed/failing criteria consistent with those proposed in the *FNPRM*, which are similar to those used for the Local Television Ownership Rule and the Radio/Television Cross-Ownership Rule.[465] That is, a "failed" newspaper or broadcast station must show that, as applicable, it had stopped circulating or had been dark due to financial distress for at least four months immediately prior to the filing of the assignment or transfer of control application, or that it was involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings.[466] To qualify as "failing," the applicant would have to show that: (1) if a broadcast television station is the failing entity, that it has had a low all-day audience share (i.e., 4 percent or lower); (2) the financial condition of the newspaper or broadcast station was poor (i.e., a negative cash flow for the previous three years); and (3) the combination would produce public interest benefits.[467] In addition, the applicants must show that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the failed or failing newspaper or station and that selling the newspaper or station to any out-of-market buyer would result in an artificially depressed price.[468]

175. Because we are creating an exception to the NBCO Rule, rather than a waiver opportunity, applicants seeking a failed/failing entity exception need not show, either at the time of their

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such a commitment could enhance viewpoint diversity in the local market. However, applicants seeking a waiver in part or in whole on that basis should recall our previously stated concerns that such a commitment would be impracticable to enforce and arguably might require us to make content-based assessments. *See id.* at 4453, para. 187.

[461] *Id.* at 4453-54, para. 188.

[462] *Id.* The Commission discussed the issue with respect to newspaper/television combinations, but the same policy concerns apply to radio stations.

[463] AFCP FNPRM Comments at 7.

[464] For the reasons explained below in connection with the timing of a waiver request, we will require television and radio licensees to file for an exception to the NBCO Rule prior to consummating the acquisition of a newspaper. *See infra* at para. 183.

[465] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2047-48, para. 65; 47 CFR § 73.3555, Note 7.

[466] *FNPRM*, 29 FCC Rcd at 4453-54, para. 188 (citing *2006 Quadrennial Review Order*, 23 FCC Rcd at 2047-48, para. 65).

[467] *Id.*; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2047-48, para. 65. In addition, as with the exemption for satellite television stations pursuant to Note 5 of Section 73.3555, in the event of an assignment of license or transfer of control of the broadcast/newspaper combination, the proposed assignee or transferee would need to make an appropriate showing demonstrating compliance with the elements of the failed/failing entity exception at the time of the assignment or transfer if it wishes to continue the common ownership pursuant to this exception. Further, although we are not including this failed/failing exception in Note 7 of Section 73.3555 of the Commission's rules (which addresses the failed/failing waiver criteria applicable to the local television ownership rule and the radio/television cross-ownership rule), given the similarities, the precedent established in the application of Note 7 shall apply to the application of the NBCO failed/failing criteria, as appropriate.

application or during subsequent license renewals, that the tangible and verifiable public interest benefits of the combination outweigh any harms.[469] As we have concluded that the exception serves the public interest in diversity simply by preserving a media outlet, it is not necessary for licensees to demonstrate that the additional benefits outweigh the potential harms. Recognizing that an absolute ban on newspaper/broadcast cross ownership is overly broad, we believe it is appropriate to provide greater flexibility and certainty in the context of this rule. Thus, we believe a clear exception to the rule for failed and failing entities, rather than a waiver requiring a balancing of the harms and benefits, is appropriate to provide certainty for relief, as we believe such combinations will have a minimal impact on viewpoint diversity.[470]

d. Waiver Standard

176. In the *NPRM* and the *FNPRM*, the Commission proposed to retain the general prohibition on newspaper/broadcast combinations, subject to various waiver criteria, rather than to revise the restriction to allow combinations under certain expressly prescribed circumstances.[471] In the *FNPRM*, we sought comment on two different approaches for handling waiver requests: a pure case-by-case approach entailing a review of the totality of circumstances of each individual case, and a case-by-case approach guided by a set of presumptions favoring or disfavoring proposed combinations depending on whether they meet certain criteria.[472] As described below, the Commission also sought comment on whether it should retain the waiver criteria that the Commission contemplated in connection with its divestiture requirement when it first adopted the NBCO Rule.[473] Finally, the Commission asked whether a licensee should be required to file a waiver request at the time it seeks to acquire a newspaper, rather than at the time of its license renewal, in order to enable a timely public response to the proposed merger.[474]

177. In the *FNPRM*, we sought comment on various criteria that could be included if we were to adopt a presumptive waiver standard.[475] Borrowing from the waiver standard in the 2006 rules, the *FNPRM* first asked whether the Commission should favor waiver requests for newspaper/broadcast

[468] *FNPRM*, 29 FCC Rcd at 4453-54, para. 188; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2048, para. 65; 47 CFR § 73.3555, Note 7. One way to satisfy this requirement would be to provide an affidavit from an independent broker affirming that active and serious efforts had been made to sell the newspaper or broadcast station, and that no reasonable offer from an entity outside the market had been received. *FNPRM*, 29 FCC Rcd at 4454, para. 188 n.550 (citing *2006 Quadrennial Review Order*, 23 FCC Rcd at 2048, para. 65 n.217).

[469] *Cf., FNPRM*, 29 FCC Rcd at 4454, para. 188 n.549; *1999 Ownership Order*, 14 FCC Rcd at 12939, para. 81; 47 CFR § 73.3555, Note 7; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2047-48, para. 65 n.216.

[470] *See also 1999 Ownership Order*, 14 FCC Rcd at 12939, para. 81.

[471] *NPRM*, 26 FCC Rcd at 17526-27, paras. 101-04; *FNPRM*, 29 FCC Rcd at 4438-39, paras. 150-52.

[472] *FNPRM*, 29 FCC Rcd at 4439-41, paras. 154-56.

[473] *FNPRM*, 29 FCC Rcd at 4440, para. 155. At the time it adopted the NBCO Rule, the Commission required the divestiture of a number of newspaper/broadcast combinations, but it indicated that a waiver of its divestiture requirement might be appropriate where: (1) there was an inability to dispose of an interest to conform to the rules; (2) the only possible sale was at an artificially depressed price; (3) separate ownership of the newspaper and station could not be supported in the locality; or (4) the purposes of the rule would be disserved by divestiture. *1975 Second Report and Order*, 50 FCC 2d at 1084-85, paras. 117-19.

[474] *See FNPRM*, 29 FCC Rcd at 4439, para. 153.

[475] The *FNPRM* proposed not to subject waiver requests to the four-factor test that applied to all waiver requests under the 2006 rule. It tentatively concluded that the factors were vague, subjective, difficult to verify, and costly to enforce. *Id.* at 4452, para. 184. The four-factor test examined: (1) the likelihood that the combined entity would increase significantly the amount of local news in the market; (2) the extent to which the newspaper and the broadcast outlets each would continue to employ its own staff and exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station was in financial distress, the proposed owner's commitment to invest significantly in newsroom operations. *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2049-54, paras. 68-75.

combinations within the top 20 DMAs and disfavor waiver requests for newspaper/broadcast combinations in all other markets.[476] Second, it sought comment on whether proposed newspaper/television combinations should be granted a favorable presumption only if they involved a television station that was not ranked among the top four television stations in the DMA.[477] The *FNPRM* tentatively concluded that viewpoint diversity in even the largest markets could be harmed if a top-four television station merged with a newspaper because those stations typically generate more local news than lower-ranked stations.[478] Third, the *FNPRM* proposed to favor only those transactions where at least eight independently owned and operated "major media voices" would remain in the DMA post-transaction.[479] The *FNPRM* further proposed to retain the current definition of major media voices, which includes only full-power television stations and newspapers published at least four days a week within the DMA in the dominant language of the market and circulated to more than five percent of the DMA's households.[480]

178. Proponents of the rule support a general prohibition with no built-in or codified exemptions.[481] In contrast, other commenters argue that adding exemptions would not narrow the rule enough; instead, they urge the Commission to eliminate the entire restriction.[482]

179. Commenters also disagree about the type of waiver approach that the Commission should use if it decides to retain the general prohibition but grant waivers when appropriate.[483] Free Press supports a pure case-by-case waiver approach and opposes awarding favorable presumptions for any waiver requests.[484] Free Press warns that a presumptive waiver standard would invite gamesmanship among broadcasters "to match deals against a set of pre-fabricated factors."[485] It asserts that an examination of the facts of each case would be the best protection against the loss of an independent

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[476] *FNPRM*, 29 FCC Rcd at 4445-46, para. 168. The Commission sought comment on the advisability of a top-20 DMA demarcation for newspaper/radio combinations in the event it decided to retain a restriction on such combinations. *Id.* at 4445, para. 168 n.482.

[477] *Id.* at 4448-49, paras. 174-77.

[478] *Id.* at 4448, para. 174.

[479] *Id.* at 4450, para. 179.

[480] *Id.* at 4450-51, paras. 179-81; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2042, para. 57; 47 CFR § 73.3555(c)(3)(iii). UCC et al. agree with the Commission that major media voices should comprise only full-power television stations and major newspapers. UCC et al. FNPRM Comments at 44. Bonneville/Scranton argues that UCC et al.'s position is a tacit acknowledgment that radio stations do not contribute significantly to viewpoint diversity. Bonneville/Scranton FNPRM Reply at 8 n.25.

[481] *See* UCC et al. FNPRM Comments at 44 (asserting that a general prohibition is appropriate); WGAW FNPRM Comments at 10 (arguing that current consolidation in the video distribution market shows that relaxation of the ban would lead to more mergers and a decrease in unique local news outlets); AFCP FNPRM Comments at 5-6 (claiming that a case-by-case waiver approach already exists).

[482] *See* NAB FNPRM Comments at 72-73 (argues that retaining the current absolute prohibition after repeatedly finding it unnecessary would be arbitrary and capricious and noting that the Third Circuit has upheld the Commission's finding that a blanket ban does not serve the public interest); NAA FNPRM Comments at 18-22 (contending that an investor is not likely to commit resources to a transaction that requires a lengthy and uncertain approval process); NAA FNPRM Reply at 5-7 (arguing that waiver requests can be prohibitively expensive and time-consuming).

[483] No *FNPRM* commenters object to the Commission's proposal to require a television station to file a waiver request at the time of a newspaper acquisition and that such waiver requests be placed on public notice. AFCP and UCC et al. support such a requirement. AFCP FNPRM Comments at 5-6; UCC et al. FNPRM Comments at 44.

[484] Free Press FNPRM Comments at 10-11 (reiterating its opposition to all three presumptions included in the 2006 rule (i.e., market tiers divided at the top-20 DMAs, a top-four television restriction, and an eight voices test)); Free Press FNPRM Reply at 10-11.

[485] Free Press FNPRM Comments at 11; Free Press FNPRM Reply at 10-11.

voice.[486] Similarly, WGAW favors retention of the cross-ownership ban without the inclusion of any specific waiver criteria.[487] WGAW argues that the Commission's proposition to allow a favorable presumption for waiver requests in the top 20 DMAs would not support diversity or localism.[488]

180. On the other hand, Cox opposes a pure case-by-case waiver approach, which it views as a retreat from the Commission's previous presumptive waiver standards.[489] Cox argues that businesses need a predictable waiver standard in order to develop effective business plans and to encourage the expensive planning and investment required for integrating news operations.[490] Cox re-submits its own proposal for a presumptive waiver standard, which it argues should apply to NBCO waiver requests in all markets. Cox argues that the first part of its two-part test would protect diversity by requiring that at least 20 independently owned major media voices remain in the market following a newspaper/broadcast combination. Cox would consider major media voices to include independently owned daily newspapers, full-power television and radio stations, cable and satellite television systems (counted as one voice), and the Internet (counted as one voice). Arguing that the Commission confuses its diversity policy with its localism policy, Cox believes that these outlets should be counted regardless of the extent to which they provide local news and information. The second part of Cox's test, intended to preserve localism, would require that at least three independent media voices that produce and distribute local news and information programming, other than the combining properties, remain in the market post-transaction. Cox dismisses the Commission's concern that qualifying an outlet as a producer of local news would be a content-based determination.[491]

181. There is little support for the presumptive waiver approach that the Commission offered for consideration. Cox and NAA claim that a favorable presumption only for the top 20 markets would harm small and mid-sized markets where investment in local newsrooms may be most needed.[492] In addition, NAA is critical of a top-four television restriction, which it argues would deny relief to those television stations most likely to produce local news and therefore most likely to benefit from the economies of scale of merging with a newspaper.[493] In contrast, AFCP would prefer that the Commission adopt a neutral, rather than a favorable, approach for proposed newspaper/television combinations in the top 20 DMAs and for those involving television stations ranked below the top four stations in the DMA.[494] It recommends a "strong" negative presumption for proposed mergers not meeting those criteria.[495] AFCP

[486] Free Press FNPRM Comments at 11. Free Press appears to equate a pure case-by-case approach with the Commission's traditional waiver standard, which it argues is best suited to serve the rule's purpose. Free Press FNPRM Comments at 11; Free Press FNPRM Reply at 10-11. It argues that a case-by-case approach with presumptive guidelines is essentially a revised, bright-line rule, which it notes the Commission tentatively has rejected. Free Press FNPRM Comments at 11-12.

[487] WGAW FNPRM Comments at 10.

[488] *Id*.

[489] Cox FNPRM Comments at 11-13 (asserting that a pure case-by-case waiver approach is "the equivalent of no waiver standard at all").

[490] *Id*. at 11-12; *see also* Cox June 10, 2016 *Ex Parte* at 1-2.

[491] Cox FNPRM Comments at 13-18.

[492] NAA FNPRM Comments at 20-21; NAA FNPRM Reply at 5; Cox FNPRM Comments at 13-18. NAA cites the Information Needs of Communities report for the finding that the vast majority of the 200 newspapers that closed or eliminated their print edition were in markets of small or medium size. NAA FNPRM Comments at 20-21 (also pointing to evidence in the report showing that television stations in small or medium-sized markets are likely to air fewer minutes of local news than their counterparts in larger markets). *See also* Letter from Danielle Coffey and Kurt Wimmer, NAA, to Marlene H. Dortch, Secretary, FCC (filed Aug. 9, 2016) (arguing that the NBCO Rule should be eliminated and rejecting that a waiver would lessen the harms of the NBCO Rule).

[493] NAA FNPRM Comments at 21; NAA FNPRM Reply at 5. NAA sees little reason for a station that does not produce local news to combine with a newspaper. NAA FNPRM Comments at 21.

[494] AFCP FNPRM Comments at 6-7.

[495] *Id*.

supports the eight voices test but recommends that the Commission consider requiring a higher number of voices in the very largest markets.[496]

182. Consistent with our tentative conclusion in the FNPRM, we decline to adopt a bright-line rule that would exempt certain combinations from the newspaper/broadcast cross-ownership rule based on a certain set of criteria.[497] Given the variability among local markets, we maintain our view that blanket exemptions should not be built into the rule. As we explained in the *FNPRM*, while a rule with built-in exemptions might lend greater certainty to parties considering a merger, it would not lead necessarily to the best result in an individual market.[498] We reiterate our concern that such a rule would be "too blunt an instrument" to be used for these types of mergers because, for example, "allowing certain combinations only in the top 20 DMAs could foreclose merger opportunities in smaller markets where viewpoint diversity is sufficiently robust" and, conversely, "permit combinations in a top 20 DMA that would harm the public interest."[499] Rather, we believe that the more prudent way to ease the rule's application is through a case-by-case waiver process with a particular focus on the impact the proposed merger would have on viewpoint diversity in the market.

183. Therefore, consistent with our other efforts to ease the rule's application, we provide for the consideration of waiver requests of the NBCO Rule on a case-by-case basis.[500] We believe a case-by-case waiver approach will "produce sensible outcomes and also improve transparency and public participation in the process."[501] To facilitate public participation further, we will require television and radio licensees to file a request for waiver of the NBCO Rule prior to consummating the acquisition of a newspaper, rather than at the time of the station's license renewal.[502] As we explained in the *FNPRM*, a broadcast licensee that triggered the NBCO Rule with the purchase of a newspaper previously was required, absent a waiver, to dispose of its station within one year or by the time of its next renewal date, whichever was longer.[503] Alternatively, it could have pursued a waiver in conjunction with its license renewal, at which point interested parties could comment on the waiver request. As a result, the opportunity to comment on a licensee's acquisition of a newspaper might have arisen years after the purchase. Our remedy will enable the public to comment on such acquisitions in a timely and effective manner before the purchase is consummated. Moreover, by requiring prior approval, this approach will provide certainty to transaction participants that the proposed combination will not be subject to potential divestiture after the operations already have been integrated—a certainty that is not provided by the current approach. To alert interested parties to a proposed newspaper acquisition, we will require that the Media Bureau place such waiver requests on public notice and solicit public comment on the proposed acquisition.

184. With regard to the two case-by-case options that we described in the *FNPRM* for considering waivers, we adopt what we termed a "pure" case-by-case approach.[504] That is, we will evaluate waiver requests by assessing "the totality of the circumstances for each individual transaction,

[496] *Id*.

[497] *See FNPRM*, 29 FCC Rcd at 4438-39, paras. 151-52.

[498] *Id.* at 4438, para. 151.

[499] *Id.*

[500] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2021-22, paras. 18-19; *2002 Biennial Review Order*, 18 FCC Rcd at 13762-67, paras. 361-67; *see also Prometheus I*, 373 F.3d at 398-400 (upholding the Commission's finding that an absolute ban on all newspaper/broadcast combinations is overly broad).

[501] *FNPRM*, 29 FCC Rcd at 4439, para. 153.

[502] *Id*. *FNPRM* commenters support this requirement. AFCP FNPRM Comments at 5-6; UCC et al. FNPRM Comments at 44.

[503] *FNPRM*, 29 FCC Rcd at 4439, para. 153; *see also 1975 Second Report and Order*, 50 FCC 2d at 1076, para. 103 n.26.

[504] *FNPRM*, 29 FCC Rcd at 4439-41, paras. 154-56.

considering each waiver request anew without measuring it against a set of defined criteria or awarding the applicant an automatic presumption based on a *prima facie* showing of particular elements."[505] Waiver applicants will have the flexibility to present their most compelling reasons why strict application of the rule is not necessary to promote the goal of viewpoint diversity in that particular local market.[506] Thus, an applicant seeking a waiver under this approach will have to show that grant of the waiver will not unduly harm viewpoint diversity. Likewise, opponents of a transaction can respond with a range of arguments and evidence they consider most pertinent to that case. We believe this approach will provide the Commission the flexibility needed to allow due consideration of all factors relevant to a case, without spending time and resources assessing presumptive criteria that may not be useful for a particular review.[507] Thus, the Commission can hone in quickly on the most important considerations of the proposed transaction and approach them with an openness that might not occur with a set framework.[508] We believe that, as a result, the Commission will be able to determine more accurately and precisely whether a proposed combination will have an adverse impact on viewpoint diversity in the relevant local market. If a proposed combination does not present any undue harm to viewpoint diversity, which is the underlying purpose of the rule, then it is not necessary in the public interest to prohibit the combination.

185. We recognize that a case-by-case approach with presumptive guidelines, such as the one described in the *FNPRM*, potentially could offer waiver applicants greater certainty and consistency. The criteria proposed in this proceeding, however, were widely criticized and rejected by commenters.[509] For example, while newspaper and broadcast industry commenters support a predictable waiver standard, these commenters assert that it would be overly restrictive to distinguish markets below the top 20 DMAs and mergers with top-ranked television stations, as proposed in this proceeding.[510] Ultimately, we are persuaded by the criticism in the record that the proposed presumptive guidelines should not be adopted. Moreover, we are concerned that any presumptive approach could result in an unduly rigid evaluation of a waiver application. Instead, as discussed above, we believe that the pure case-by-case approach is the appropriate way to assess requests for waiver of the NBCO Rule. For all the reasons that favor a pure case-by-case approach, plus those stated in the *FNPRM*, we decline to adopt Cox's proposal for a two-part test that would measure every proposed transaction against the same set of fixed criteria.[511] As we stated in the *FNPRM*, we believe that the first part of Cox's proposed test would define independent

[505] *Id.* at 4439, para. 154. Free Press and WGAW support a pure case-by-case approach with no presumptive waiver criteria. Free Press FNPRM Comments at 10-12 (arguing that a case-by-case approach with presumptive guidelines is essentially a revised, bright-line rule, which the Commission tentatively rejected); Free Press FNPRM Reply at 10-11; WGAW FNPRM Comments at 10 (asserting that the Commission's proposition to allow a favorable presumption for waiver requests in the top 20 DMAs would not support diversity or localism).

[506] Furthermore, consistent with our tentative conclusion in the *FNPRM*, we decline to adopt the four-factor test that applied to waiver requests under the 2006 rule because we conclude that the factors would be vague, subjective, difficult to verify, and costly to enforce. *See FNPRM*, 29 FCC Rcd at 4452, para. 184. UCC et al. agree that the four-factor test should not apply to waiver requests. UCC et al. FNPRM Comments at 44; *see also supra* note Error: Reference source not found (detailing the four factors). As we stated in the *FNPRM*, evidence supporting considerations like those reflected in the four factors, although not required, is also not discouraged if a waiver applicant believes it would be useful in supporting its request. *FNPRM*, 29 FCC Rcd at 4452, para. 184.

[507] The 2006 rule required a waiver applicant attempting to overcome a negative presumption to show, with clear and convincing evidence, that the merged entity would increase diversity and competition. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2049, para. 68. In the *FNPRM*, we proposed not to incorporate the requirement into any presumptive waiver standard that we might adopt. *FNPRM*, 29 FCC Rcd at 4453, para. 187. *FNPRM* commenters did not address the issue, and our concern remains that the requirement would impose "an overly burdensome evidentiary standard." *See FNPRM*, 29 FCC Rcd at 44553, para. 187. Although the issue arguably is mooted by our decision not to adopt a presumptive waiver standard, we also will not incorporate that standard into our adopted waiver approach.

[508] *See* Free Press FNPRM Comments at 11; *see also* Free Press FNPRM Reply at 10-11.

[509] *See supra* paras. 179-181.

[510] *See* NAA FNPRM Comments at 20-21; NAA FNPRM Reply at 5; Cox FNPRM Comments at 11-12, 13-18.

[511] Cox FNPRM Comments at 13-18; *see also FNPRM*, 29 FCC Rcd at 4447, para. 171.

media voices too broadly and that the second part of Cox's proposed test would be difficult to apply and enforce in an objective, content-neutral manner.[512]

186. In addition, we disagree with Cox that a pure case-by-case approach is necessarily a retreat from a presumptive waiver standard.[513] Rather, a pure case-by-case approach lifts the potential burden of having to overcome a negative presumption. Regardless, our intent in choosing a pure case-by-case approach over a presumptive waiver standard is not to increase or decrease the number of waiver approvals; it is to increase the likelihood of achieving the proper result in each individual case. Applying presumptive criteria can work well in other contexts and for other rules, but, under the current record and given the nature of viewpoint diversity and its dependency on the particular facts and circumstances of a specific market, we find that a pure case-by-case approach is best suited for handling requests for waiver of this rule.

187. We also disagree with Cox that a pure case-by-case approach is the equivalent of not having a waiver standard.[514] To be clear, our standard requires applicants seeking a waiver of the NBCO Rule to show that their proposed combination would not unduly harm viewpoint diversity in the local market. The pure case-by-case approach describes the method by which we will determine whether this standard is met. Our method of examining the totality of the circumstances may entail a broad review, but the standard to be met is narrowly focused on the impact on viewpoint diversity. We anticipate that the precedent that evolves from future waiver decisions will provide further guidance to entities considering a merger.

188. We clarify that this waiver standard is distinct from the traditional waiver standard under Section 1.3, which requires a showing of "good cause" and applies to all Commission rules.[515] By specifically allowing for a waiver of the NBCO Rule in cases where applicants can demonstrate that the proposed combination will not unduly harm viewpoint diversity, we signal our recognition that there may be instances where enforcing the prohibition against ownership of a newspaper and broadcast station is not necessary to serve the rule's purpose of promoting viewpoint diversity in the local market. Indeed, it is our determination herein that the public interest would not be served by restricting specific combinations that do not unduly harm viewpoint diversity. While in the context of Section 1.3 waiver requests the Commission has considered showings of undue hardship, the equities of a particular case, or other good cause, in this particular context an applicant is required to make a narrower showing, and a waiver will be granted so long as the applicants can demonstrate that viewpoint diversity will not be unduly harmed as a result of the proposed combination. The NBCO waiver standard does not replace or limit a waiver applicant's available options under Section 1.3. Indeed, while the NBCO waiver standard we articulate focuses specifically on the impact of the proposed merger on viewpoint diversity in the local market and requires applicants to make a showing as to such impact, waiver requests under Section 1.3 could include a broader public interest showing, under which parties can assert any variety of considerations they believe warrant waiver of the rule consistent with established precedent.[516]

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[512] *FNPRM*, 29 FCC Rcd at 4447, para. 171.

[513] *See* Cox FNPRM Comments at 11-13.

[514] *See id.* at 12.

[515] 47 CFR § 1.3; *but see* Free Press FNPRM Comments at 11 (appearing to equate a pure case-by-case approach with the Commission's traditional waiver test); Free Press FNPRM Reply at 10-11.

[516] Waiver of the Commission's policies or rules under Section 1.3 is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest. *See Network IP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166. Under this section, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *See WAIT Radio*, 418 F.2d at 1157; *Northeast Cellular*, 897 F.2d at 1166. Although the Commission must give waiver requests "a hard look," an applicant for waiver under Section 1.3 "faces a high hurdle even at the starting gate" and must support its waiver request with a compelling showing. *See WAIT Radio*, 418 F.2d at 1157; *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094, para. 9 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011,

189. Finally, the *FNPRM* sought comment on whether to adopt a waiver standard based on the divestiture waiver criteria that the Commission contemplated at the time it first adopted the NBCO Rule. At that time, the Commission grandfathered most existing newspaper/broadcast combinations, but it required divestiture for a small number of combinations in areas where there was an absence or near absence of other media.[517] The Commission contemplated that a waiver of its divestiture requirement might be appropriate where: (1) there was an inability to dispose of an interest to conform to the rules; (2) the only possible sale was at an artificially depressed price; (3) separate ownership of the newspaper and station could not be supported in the locality; or (4) the purposes of the rule would be disserved by divestiture.[518] Since then, these criteria also have been applied prospectively to new newspaper/broadcast combinations.[519] *FNPRM* commenters did not address our question whether a case-by-case approach should incorporate, or disavow, these waiver criteria, which remain in effect along with the current rule.[520] Accordingly, in light of the lack of comment on these criteria (for or against), and for the reasons discussed above, we are adopting a new waiver standard that replaces these earlier divestiture waiver criteria.

e. Grandfathering

190. In the *FNPRM*, the Commission tentatively concluded that it should grandfather any existing combinations that would become non-compliant due to any changes it made to the rule, such as an update to the trigger requirement.[521] It stated that it would continue to allow existing combinations that previously were grandfathered or approved by permanent waiver. It sought comment on its view that any grandfathered or approved combinations that subsequently are transferred must come into compliance with the revised rule.[522] *NPRM* commenters representing newspaper and broadcast owners supported grandfathering and argued that grandfathered and approved combinations should be freely transferable.[523] *FNPRM* commenters did not address grandfathering issues.

191. We will grandfather, to the extent required, any existing newspaper/broadcast combinations that no longer comply with the NBCO Rule as a result of our changes to the scope of the rule. In addition, as stated in the *FNPRM*, we will continue to allow all combinations currently in existence that have been grandfathered or approved by permanent waiver to the extent that grandfathering/permanent waivers are still necessary to permit common ownership.[524] Consistent with Commission precedent, grandfathered combinations, including those subject to permanent waivers, are

1012, para. 5 (1974)).

[517] *1975 Second Report and Order*, 50 FCC 2d at 1078-84, paras. 108-17.

[518] *Id.* at 1084-85, paras. 117-19; *see also Applications of Tribune Co. and its Licensee Subsidiaries, Debtors In Possession, et al.*, Memorandum Opinion and Order, 27 FCC Rcd 14239, 14247, para. 24 (MB 2012).

[519] *See Shareholders of Tribune Co., Transferors, & Sam Zell, et al. Transferees*, 29 FCC Rcd 844, 845-46, para. 5 (2014) (summarizing rationale for denying temporary waivers and granting permanent waiver in prior order); *id.*at 850-52, paras. 19-23 (discussing waiver criteria and rationale for granting permanent waiver in Chicago based on diversity considerations); *see also Kortes Communications, Inc., (Assignor) and Stafford Broadcasting, L.L.C., (Assignee) for Consent to the Assignment of License of Stations WPLB(AM), Greenville, MI, and WPLB-FM, Lakeview, MI*, Memorandum Opinion and Order, 15 FCC Rcd 11846, 11852-53, para. 18 (2000); *Columbia Montour Broadcasting Co., Inc., (Assignor) and Community Communications, Inc., (Assignee) for Consent to the Assignment of License of Station WCNR(AM), Bloomsburg, PA*, Memorandum Opinion and Order, 13 FCC Rcd 13007, 13013, para. 20 (1998); *Fox Television Stations, Inc., Licensee Of Television Station WNYW, New York, New York, Request for Waiver of the Broadcast–Newspaper Cross–Ownership Rule Relating to WNYW And the New York Post*, Declaratory Ruling, 8 FCC Rcd 5341, 5348 n.19 (1993); *Application Of Hopkins Hall Broadcasting, Inc. (Assignor) and Shelbyville Publishing Co., Inc. (Assignee) for Assignment of License of WLIJ (AM), Shelbyville, Tennessee*, Memorandum Opinion and Order, 10 FCC Rcd 9764, 9765, para. 5 (1995).

[520] *See FNPRM*, 29 FCC Rcd at 4440, para. 155.

[521] *Id.* at 4444-45, para.166.

[522] *Id.*

[523] *See id.* at 4444, para. 165.

not transferrable.[525] We disagree with commenters that assert that, contrary to longstanding Commission precedent, grandfathered and approved combinations should be freely transferable in perpetuity.[526] Our approach today strikes the appropriate balance between avoiding imposition of the hardship of divestiture on owners of existing combinations that have owned a combination in reliance on the rules and moving the industry toward compliance with current rules when owners voluntarily decide to sell their properties. A transferee or assignee of the properties must comply with the NBCO Rule in effect at the time of the transaction or obtain a new waiver. This requirement applies to the transfer of existing combinations already grandfathered or approved and to the transfer of combinations grandfathered as a result of becoming non-compliant due to our changes to the scope of the rule.

f. Minority and Female Ownership

192. The *FNPRM* provided commenters another opportunity to address the relationship of the NBCO Rule to minority and female ownership.[527] The Commission tentatively concluded that minority and female ownership would not be affected adversely by the proposed modifications to the NBCO Rule.[528] The Commission noted a lack of evidence in the existing record to support the proposition that newspaper mergers with minority/women-owned radio stations would result in greater harm to viewpoint diversity in local markets than combinations involving radio stations that are not minority- or women-owned.[529] With respect to the newspaper/television cross-ownership restriction, the Commission was not persuaded that the modifications under consideration likely would affect minority and female ownership levels.[530] The Commission sought further comment on its views. In addition, the Commission described comments addressing a study submitted by MMTC, which found that cross-ownership generally is not a concern among minority and female broadcast station owners.[531] The Commission stated that it could not draw definitive conclusions based solely on the study, but it invited commenters to provide new or additional evidence.[532] The Commission asked whether a waiver requirement would protect its diversity goals adequately.[533] It rejected the argument that the *Prometheus II* decision prevents the Commission from making any changes to the NBCO Rule without first showing that minority ownership would not be harmed.[534]

[524] *Id.* at 4445, para. 166 n.481 (citing *2006 Quadrennial Review Order*, 23 FCC Rcd at 2054-55, para. 76). As we explained, we leave in place any filing deadlines the Commission has imposed previously on specific parties related to cross-ownership proceedings. *Id*.

[525] *See id.* at 4444-45, para. 166; *id.* at 4386, para. 34 n.80 (citing *1975 Second Report and Order*, 50 FCC 2d at 1076, para. 103 (requiring divestiture upon the sale of an existing combination)); *Incentive Auctions Report and Order*, 29 FCC Rcd at 6848-49, paras. 691-93 (grandfathering existing station combinations that otherwise would no longer comply with the media ownership rules as a result of the auction, but, upon transfer, requiring new owners to comply with the rules in place at the time of the transfer or to obtain a waiver); *2002 Biennial Review Order*, 18 FCC Rcd at 13809-10, para. 487 (rejecting the argument that grandfathered combinations should be freely transferrable in perpetuity); *1999 Ownership Order*, 14 FCC Rcd at 12909, para. 11 ("Any transfer of a grandfathered combination after the adoption date of this Report and Order (whether during the initial grandfathering period [or] after a permanent grandfathering decision has been made) must meet the [existing] radio/TV cross-ownership rule."); *Applications of Stauffer Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 5165, 5165, para. 3 (1995) ("[G]randfathered status under our multiple ownership rules terminates upon Commission approval of a transfer of control."); *see also supra* para. 35.

[526] As stated in the *FNPRM*, we will continue to allow grandfathered status to survive *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. *FNPRM*, 29 FCC Rcd at 4386, para. 34 n.80 (citing *1975 Second Report and Order*, 50 FCC 2d at 1076, para. 103).

[527] *FNPRM*, 29 FCC Rcd at 4454, para. 189.

[528] *Id.* at 4454-55, para. 190.

[529] *Id.* at 4455, para. 191.

[530] *Id.* at 4456-57, para. 193.

[531] *Id.* at 4458-60, para. 196-98; *see also id.* at 4454, para. 189 n.553.

[532] *Id.* at 4459-60, para. 198.

[533] *Id.* at 4460, para. 199.

[534] *Id.* at 4454-55, para. 190.

193. Several commenters argue that newspaper/broadcast cross-ownership does not have a material adverse effect on minority and female ownership, and they assert that there are more targeted and effective means of promoting ownership diversity than keeping the NBCO Rule.[535] Bonneville/Scranton asserts that the large number of radio stations offers plenty of ownership opportunities for minorities and women and that elimination of the newspaper/radio cross-ownership restriction would be unlikely to incite newspaper purchases of radio stations, given the current industry trend of spinning off newspaper properties.[536] NAA claims that cross-ownership benefits minority communities because newspaper owners try to diversify newsrooms and provide a voice for minority communities.[537] Morris argues that increasing flexibility for broadcast owners would benefit all owners, including minority and female owners.[538] NAA agrees with the Commission that the agency is not required to show that a rule change would have no impact on minority ownership levels before taking any action, and it questions how such a showing could even be made.[539]

194. Free Press, by contrast, criticizes the Commission's tentative finding that the NBCO Rule does not have a significant effect on minority ownership.[540] Free Press argues that consolidation in general makes it difficult for small businesses, such as those owned by minorities, to compete.[541] It reasons that the Commission should not eliminate a restriction that promotes ownership diversity merely because the rule on its own may not be enough to maintain or increase minority ownership.[542] Free Press claims that the Commission has not conducted a proper study of the potential adverse effects on ownership diversity and therefore has no basis upon which to relax the rule.[543] While recognizing the small number of cross-owned properties available to study, Free Press suggests that a proper study would examine grandfathered newspaper/broadcast combinations separately from waived combinations, given the different histories and market positions of these two categories.[544] AFCP reiterates its plea for the Commission to study the effects of consolidation, including cross-media consolidation, on smaller media owners, including disadvantaged, female, and minority owners.[545]

195. WGAW argues that eliminating the newspaper/radio cross-ownership restriction could encourage large corporations to target radio stations for acquisition.[546] It warns that ownership diversity could decrease given that radio remains one of the affordable entry points for minorities and women into the communications industry.[547] NHMC and UCC et al. likewise contend that the radio cross-ownership rules help prevent consolidation and promote opportunities for new entrants.[548] In addition, NABOB

[535] Morris FNPRM Comments at 43-45; NAA FNPRM Comments at 13-15; Bonneville/Scranton FNPRM Reply at 8-9; Bonneville/Scranton June 6, 2016 *Ex Parte* at 1-2; Cox June 10, 2016 *Ex Parte* at 2; *see also* Morris FNPRM Reply at 7.

[536] Bonneville/Scranton FNPRM Reply at 8-9.

[537] NAA FNPRM Comments at 14-15 (calling supporters' demands for further studies a delay tactic).

[538] Morris FNPRM Reply at 7.

[539] NAA FNPRM Comments at 14.

[540] Free Press FNPRM Comments at 12-13.

[541] *Id*.

[542] *Id*. Wick states that, although Free Press' argument may be the most convincing reason put forth by commenters for retaining the ban, any positive effect that the ban has on minority and female ownership is "miniscule." Wick FNPRM Reply at 17.

[543] Free Press FNPRM Comments at 13-14; Free Press FNPRM Reply at 14; *but see* NAA FNPRM Comments at 14 (calling demands for further studies a delay tactic).

[544] Free Press FNPRM Comments at 13-14.

[545] AFCP FNPRM Comments at 3-4, 8-9.

[546] WGAW FNPRM Comments at 10-11; *see also* NHMC FNPRM Comments at 12-13.

[547] WGAW FNPRM Comments at 10-11; *see also* UCC et al. FNPRM Comments at 41.

[548] NHMC FNPRM Comments at 7, 12-13; UCC et al. FNPRM Comments at 41-42.

argues that, if owners of large station groups are allowed to purchase a newspaper, they will strengthen their competitive advantage over minority-owned radio stations, which tend to own one or two stations, in attracting advertisers seeking a volume discount.[549]

196. As discussed above, we have declined to adopt the potential rule changes that commenters argue could lead to increased consolidation to the possible detriment of minority- and women-owned businesses. Instead, the rule we adopt generally prohibits common ownership of a broadcast station and daily newspaper in the same local market but provides for a modest loosening of the previous ban on cross-ownership through revisions to the rule's geographic scope, creation of an exception for failed/failing entities, and adoption of a viewpoint diversity-based waiver standard. We do not believe that these modest revisions are likely to result in significant new combinations, nor does the record establish that there is significant demand for newspaper/broadcast combinations; indeed, the trend is in the opposite direction, as cross-owned combinations are being severed.[550] Moreover, as discussed in the *FNPRM*, we find that the record fails to demonstrate that the modifications to the NBCO Rule that we adopt today are likely to result in harm to minority and female ownership.[551] Additionally, the study that Free Press proposes, which would involve examining grandfathered combinations separately from waived combinations, would be unlikely to provide useful results given the small sample size available for each of those categories (Free Press's own criticisms of the MMTC Cross-Ownership Study are instructive in this regard).[552] Nor is such a study necessary in light of existing record evidence and the modest revisions we adopt today.

197. Ultimately, while we adopt the revised NBCO Rule based on our viewpoint diversity goal, and not with the purpose of preserving or creating specific amounts of minority and female ownership, we find that this rule nevertheless helps to promote opportunities for diversity in broadcast television and radio ownership. The rule helps to increase the likelihood of a variety of viewpoints and to preserve potential ownership opportunities for new voices.

D. Radio/Television Cross-Ownership Rule

1. Introduction

198. The Radio/Television Cross-Ownership Rule prohibits an entity from owning more than two television stations and one radio station within the same market, unless the market meets the following size criteria.[553] If at least 10 independently owned media voices would remain in the market post-merger, an entity may own up to two television stations and four radio stations. If at least 20 independently owned media voices would remain in the market post-merger, an entity may own either: (1) two television stations and six radio stations, or (2) one television station and seven radio stations. In all instances, entities also must comply with the local radio and local television ownership limits. The market is determined by looking at the service contours of the relevant stations.[554] The rule specifies how

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[549] NABOB FNPRM Comments at 13-15.

[550] *See FNPRM*, 29 FCC Rcd at 44556, para. 192; *see also* Gannett, News Release, *Gannett Completes Company Split to Move Forward as the Nation's Largest Local-to-National Media Company*, http://investors.gannett.com/press-release/gannett-completes-company-split-move-forward-nations-largest-local-national-media (June 29, 2015); Media General, News Release, *Media General Completes Sale of Newspapers to Berkshire Hathaway*, http://www.mediageneral.com/press/2012/june25_12.html (June 25, 2012) (announcing Media General's sale of 63 daily and weekly newspapers to World Media Enterprises, Inc., a subsidiary of Berkshire Hathaway, Inc.).

[551] *See FNPRM*, 29 FCC Rcd at 4455, para. 190. In addition, for discussions regarding the potential impact of relaxation of the media ownership limits on minority and female ownership, see paragraphs 73 through 81 (Local Television Ownership Rule) and 124 through 128 (Local Radio Ownership Rule).

[552] *See* Free Press MMTC Cross-Ownership Study Reply at 3 ("[T]he limited sample size and scope of the study render it unfit for shaping policy.").

[553] 47 CFR § 73.3555(c)(2). The rule applies only to commercial stations.

to count the number of media voices in a market, including television stations, radio stations, newspapers, and cable systems.[555]

199. After consideration of the full record, including the further comments received in response to the *FNPRM*, we conclude that the Radio/Television Cross-Ownership Rule continues to be necessary given that radio stations and television stations both contribute in meaningful ways to promote viewpoint diversity in local markets. Our finding is consistent with the Commission's decision in the *2006 Quadrennial Review Order* to retain the rule, which the Third Circuit upheld.[556] In the *NPRM* and *FNPRM*, we asked whether the rule continues to serve the public interest by preserving viewpoint diversity in local markets or whether the local radio and television ownership rules alone would protect our goals adequately.[557] We have concluded that the rule continues to play an independent role in serving the public interest separate and apart from the local radio and television ownership rules, which are designed primarily to promote competition. Accordingly, given the important policy interests at stake, we will retain the cross-ownership rule in order to ensure that consumers continue to have access to a multiplicity of media voices.

200. As detailed further below, we modify the rule only to the extent necessary to update its references to two analog television service contours that became obsolete with the transition to digital television service. First, consistent with our update to the NBCO Rule, we will use a television station's digital PCC instead of its analog Grade A contour when determining the rule's trigger.[558] Second, we will use a television station's digital NLSC instead of its analog Grade B contour when counting the number of media voices remaining in the market post-merger.[559] We find that the benefits of retaining the rule (with minor contour modifications), outlined below, outweigh any burdens that may result from adopting the rule.

201. Finally, although the *NPRM* and *FNPRM* inquired whether eliminating the Radio/Television Cross-Ownership Rule would affect minority and female broadcast ownership,[560] we have declined to eliminate the rule. While we retain the rule in order to help promote viewpoint diversity, we find that retaining the rule is consistent with our goal of promoting minority and female ownership.

2. Background

202. The Commission originally restricted cross-ownership of radio and television stations with "the principal purpose" of promoting viewpoint diversity in local markets, but with the expectation that competition also would benefit.[561] The original rule prohibited ownership of more than one broadcast

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[554] *Id.* § 73.3555(c)(1).

[555] *Id.* § 73.3555(c)(3)(i)-(iv).

[556] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2058-60, paras. 82-86 (retaining the rule "to provide protection for diversity goals in local markets and thereby serve the public interest"); *Prometheus II*, 652 F.3d at 456-58 (finding that the Commission provided "a reasoned explanation" for its decision to retain the rule).

[557] *FNPRM*, 29 FCC Rcd at 4460-61, 4465-67, paras. 200, 210-15; *NPRM*, 26 FCC Rcd at 17533, 17537-38, paras. 119, 131-33 (tentatively concluding that the rule is not necessary based on the record at that time).

[558] 47 CFR § 73.625. Prior to this change, the Radio/Television Cross-Ownership Rule was triggered when a television station's Grade A contour encompassed a radio station's entire community of license. *Id.* § 73.3555(c)(1)(i)-(ii).

[559] *Id.* § 73.622(e). Previously, an independently owned television station was counted as a media voice remaining in the market post-merger if it was in the same DMA as the television station(s) at issue and had a Grade B signal contour that overlapped with the Grade B signal contour of the television station(s) at issue. *Id.* § 73.3555(c)(3)(i).

[560] *FNPRM*, 29 FCC Rcd at 4469-71, paras. 222-25; *NPRM*, 26 FCC Rcd at 17538, para. 134.

[561] *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, 313, para. 25 (1970) (*1970 First Report and Order*).

station in a market.[562] In 1999, the Commission modified the rule to its current form.[563] In the *2002 Biennial Review Order*, the Commission replaced the rule, among others, with a set of new cross-media limits that the Commission believed could protect viewpoint diversity more effectively than the existing rule.[564] In *Prometheus I*, the Third Circuit rejected and remanded the cross-media limits, leaving in place the 1999 rule.[565] Subsequently, the Commission retained that rule in the *2006 Quadrennial Review Order*, finding that both radio and television contribute to the "marketplace of ideas" and thus add to the diversity of viewpoints.[566] The Commission's decision was based in part on the concern that the local radio and television ownership rules were insufficient to protect viewpoint diversity because those rules are primarily intended to protect competition.[567] In *Prometheus II*, the Third Circuit upheld the Commission's decision to retain the rule, finding that the Commission had provided a reasoned explanation for its conclusion that the rule is necessary to protect viewpoint diversity.[568]

203. The Commission tentatively concluded in the *NPRM* that, based on the record before it at the time, the Radio/Television Cross-Ownership Rule is no longer necessary to promote the public interest.[569] Consistent with past Commission findings, the *NPRM* tentatively concluded that the rule does not promote competition or localism.[570] The *NPRM* also tentatively concluded that the rule is no longer necessary to promote viewpoint diversity.[571] It pointed to media ownership studies suggesting that radio/television cross-ownership does not diminish the amount of local news available to consumers or the diversity of such programming.[572] In addition, the *NPRM* posited that repeal of the rule would not lead to significant consolidation of broadcast facilities, at least within the largest markets, and it tentatively concluded that the local radio and television ownership rules adequately protect the Commission's policy goals.[573] The Commission sought comment on how the rule's repeal might affect minority and female broadcast ownership.[574] Finally, it explored how to update the rule, if retained, so that it would rely on digital, rather than analog, television contours.[575]

204. In the *FNPRM*, we sought further comment on the extent to which the Radio/Television Cross-Ownership Rule promotes the public interest and asked commenters to submit any new evidence relevant to our consideration of the rule's costs and benefits.[576] We encouraged commenters to quantify, to the greatest extent possible, these costs and benefits and the costs and benefits of any alternatives to the rule.[577] We sought comment on evidence in the record at that time suggesting that radio stations are not primary outlets that contribute to viewpoint diversity and that consumers rely on newspapers and

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[562] *Id.* at 309, para. 11. The rule did not require divestiture of existing facilities. *Id.* It provided an exception allowing a licensee of a Class IV AM station in a community with a population below 10,000 to obtain a license for an FM station in the same market. *Id.* at 309, para. 14.

[563] *1999 Ownership Order*, 14 FCC Rcd at 12903.

[564] *2002 Biennial Review Order*, 18 FCC Rcd at 13775, para. 390. As mentioned above, the cross-media limits were intended to replace the NBCO Rule as well.

[565] *Prometheus I*, 373 F.3d at 402-03.

[566] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2058-60, paras. 82-86.

[567] *Id.* at 2059-60, para. 84.

[568] *Prometheus II*, 652 F.3d at 456-57.

[569] *NPRM*, 26 FCC Rcd at 17532-39, paras. 118-35.

[570] *Id.* at 17535-37, paras. 123-30.

[571] *Id.* at 17537-38, paras. 131-33.

[572] *See id.* at 17536-37, paras. 127-32.

[573] *Id.* at 17533, 17535-36, 17537, paras. 119, 126-27, 131.

[574] *Id.* at 17538, para. 134.

[575] *Id.* at 17538-39, para. 135.

[576] *FNPRM*, 29 FCC Rcd at 4460-61, 4465-67, paras. 200, 210-25.

[577] *Id.* at 4460-61, para. 200.

television stations as their principal sources of local news and information.[578] We reiterated our tentative conclusions that the rule is not necessary to promote competition or to promote localism.[579] We again invited commenters to submit evidence bearing on our view that repealing the rule would not have a significant impact on minority and female broadcast ownership.[580]

205. Several commenters urge the Commission to retain the Radio/Television Cross-Ownership Rule.[581] UCC et al. assert that further consolidation would disserve the public interest because radio stations provide diverse programming as well as a means of market entry for minority and women owners.[582] According to UCC et al., radio is a healthy, vibrant medium on which consumers rely for news and information.[583] They note that, according to the Radio Advertising Bureau, radio reaches 91.5 percent of Americans over 12 years old on a weekly basis, including 92 percent of African-American consumers and 93 percent of Hispanic consumers.[584] As mentioned in the NBCO section above, UCC et al. cite surveys finding that 33 percent of adults listened to news on the radio "yesterday," including 20 percent of young adults aged 18 through 24, and that 51 percent of people obtain local news on the radio at least once a week.[585] Also as discussed above, UCC et al. and NHMC claim that underserved communities in particular rely on radio as a source of local news and information.[586] UCC et al. dispute the notion that the Commission's local radio and television ownership rules are sufficient to constrain the harmful effects of consolidation.[587] In addition, SAG-AFTRA claims that consolidation of broadcast station ownership reduces the number of jobs for media professionals, which results in fewer independent editorial perspectives in news coverage.[588]

206. In response, Morris discounts the findings that UCC et al. cite, arguing that those studies also show that radio has become a less important source of local news in the past decade and that it places fourth behind television, newspapers, and the Internet as a breaking news source.[589] Morris additionally points to a study showing that most Latinos use two or three news media platforms on a typical weekday, underscoring that consumers have come to rely on an assortment of media to serve their information needs and are exposed to a diverse range of viewpoints on any given topic.[590] NAB argues that the Radio/Television Cross-Ownership Rule should be eliminated because it does not promote competition or diversity and because it affirmatively harms localism.[591] NAB also asserts that many Commission studies have concluded that cross-owned radio/television combinations produce greater amounts of news and

[578] *Id.* at 4465-68, paras. 210-17.

[579] *Id.* at 4465, 4468-69, paras. 210, 218-21.

[580] *Id.* at 4469-71, paras. 222-25.

[581] SAG-AFTRA FNPRM Comments at 2, 3-4; UCC et al. FNPRM Comments at 31; NABOB FNPRM Comments at 17.

[582] UCC et al. FNPRM Comments at 32.

[583] *Id.* at 35.

[584] *Id.* at 33 (citing Radio Advertising Bureau, Why Radio, http://www.rab.com/whyradio/index.cfm).

[585] *Id.* at 34 (citing Laura Santhanam et al., Pew Research Center, *Audio: Digital Drives Listening Experience*, *in* The State of the News Media 2013 (2013), http://stateofthemedia.org/2013/audio-digital-drives-listening-experience (*Digital Drives Listening Experience*); How People Learn About Their Local Community at 35. UCC et al. note that, by comparison, 29 percent of Pew respondents reported reading a newspaper yesterday. However, that figure presumably does not account for the shift in newspaper readership online.

[586] *See supra* paras. 152, 156-157.

[587] UCC et al. FNPRM Comments at 41-42.

[588] SAG-AFTRA FNPRM Comments at 2, 3-4 (arguing that SSAs exemplify this "pernicious impact").

[589] Morris FNPRM Reply at 3-4 (citing *Digital Drives Listening Experience* at 1; How People Learn About Their Local Community at 35).

[590] *Id.* at 5 (citing Mark Hugo Lopez & Ana Gonzalez-Barrera, Pew Research Center, A Growing Share of Latinos Get Their News in English (2013), http://www.pewhispanic.org/2013/07/23/a-growing-share-of-latinos-get-their-news-in-english/ (Hispanic Trends Project)).

public affairs programming.[592] In addition, NAB agrees with the proposition that radio stations are not the primary outlets contributing to viewpoint diversity.[593]

3. Discussion

207. We conclude that the Radio/Television Cross-Ownership Rule should be retained because, as discussed above in the context of the NBCO Rule, we find that radio stations are meaningful contributors to viewpoint diversity within their communities.[594] We find that broadcast radio and television stations are valuable mediums for viewpoint expression such that losing a distinct voice through additional consolidation could disserve the public interest. We recognize that the current rule permits a degree of common ownership, especially in larger markets, but that latitude is not a sufficient reason to ignore the potential harms to viewpoint diversity that may result from further consolidation. We believe that there is a significant risk of harm in potentially reducing the number of "diverse and antagonistic" information sources within a market.[595] Therefore, we retain the Radio/Television Cross-Ownership Rule, with modifications limited to updating its obsolete references to analog television service contours, in order to protect viewpoint diversity in local markets.[596]

208. *Retaining the Rule*. As discussed above in the context of the NBCO Rule, while broadcast television stations and newspapers may be the primary sources of viewpoint diversity in local markets, the current record shows that broadcast radio contributes to viewpoint diversity in meaningful ways.[597] For example, by providing an over-the-air forum for live, interactive discussion and expression of viewpoint on matters of local concern, radio offers added opportunities for public participation and civic engagement.[598] Commenters that support retention of the cross-ownership restriction provide new evidence of radio's contributions to viewpoint diversity with examples of radio programming containing local news and public affairs content and with data showing that consumers regularly turn to radio for news and information.[599] Moreover, platforms such as the Internet or cable do not contribute significantly to viewpoint diversity in local markets and therefore do not meaningfully protect against the potential loss of viewpoint diversity that would result from increased radio/television cross-ownership.[600] We are cognizant of the fact that consumers' reliance on radio for local news and information has declined over time, as has the number of all-news commercial radio stations.[601] Nonetheless, we find that it would be inconsistent with our goal of preserving viewpoint diversity to rescind the Radio/Television Cross-Ownership Rule and allow greater consolidation to diminish the viewpoint diversity available in local

[591] NAB FNPRM Comments at 85.

[592] *Id.* at 86.

[593] *Id.* at 86-87.

[594] *See supra* paras. 150-159.

[595] *See Turner Broad. Sys.*, 512 U.S. 622, 663-64 (1994) (*Turner I*).

[596] Consistent with our analysis in the NBCO context, we find that Radio/Television Cross-Ownership Rule is not necessary to promote competition or localism in local markets. In the *FNPRM*, we recognized that cross-ownership can create efficiencies that may result in public interest benefits, such as localism. *FNPRM*, 29 FCC Rcd at 4469, para. 221. However, there is no guarantee that owners will use any gains produced by such efficiencies to benefit consumers, for example, by increasing investment in local news production.

[597] *See supra* paras. 150-159.

[598] *See supra* para. 157.

[599] *See, e.g.*, UCC et al. FNPRM Comments at 35-43, App. D (Examples of Editorial Programming on Minority-Owned Radio Stations); NHMC FNPRM Comments at 6-11.

[600] *See supra* paras. 145-149.

[601] *See FNPRM*, 29 FCC Rcd at 4467, para. 215 ("The number of people who listen to some news on the radio dropped from 54 percent to 34 percent during that period. Only 30 commercial radio stations out of over 11,000 are all-news radio stations, a reduction from 50 in the mid-1980s.") (internal citations omitted). As discussed above, while broadcast radio stations have historically been a less significant source of viewpoint diversity than newspapers and broadcast television stations, the Commission has still been justified in its efforts to regulate cross-ownership. *See supra* para. 154.

markets.

209. As acknowledged in the *FNPRM*, the existing rule already permits various levels of cross-ownership, based on the size of the market.[602] As the Commission has found previously, however, the existing limits strike an appropriate balance between the protection of viewpoint diversity and the potential public interest benefits that could result from the efficiencies gained by common ownership of radio and television stations in a local market.[603] While relying solely on the local television and local radio ownership rules, each designed to promote competition, might result in only limited additional consolidation, there would still be a loss to viewpoint diversity if the Radio/Television Cross-Ownership Rule were eliminated.[604] As UCC et al. and NHMC show, a significant percentage of consumers, particularly in underserved communities, regularly obtain at least some of their local news and information from radio.[605] And although we continue to find that, in general, newspapers and television stations are the main sources that consumers turn to for local news and information, and the Commission previously has held that radio generally plays a lesser role in contributing to viewpoint diversity,[606] we nevertheless conclude that radio contributes meaningfully to viewpoint diversity. The record shows that broadcast television and radio are both important sources of viewpoint diversity in local markets; accordingly, we find that the public interest is best served by retaining the existing rule in order to protect viewpoint diversity in these markets.[607]

210. Finally, the Commission asked in the *NPRM* how the results of Media Ownership Studies 8A and 8B, which found little to no correlation between radio/television cross-ownership and viewpoint diversity, should inform its analysis.[608] As we explained in the *FNPRM*, Media Ownership Study 8A analyzes the impact of radio/television cross-ownership on viewpoint diversity available in local markets by examining how consumers react to content.[609] Media Ownership Study 8B examines the impact of media ownership, including radio/television cross-ownership, on the amount of programming provided in television news programs in three categories: politics, local programming, and diversity in coverage of news topics.[610] We did not receive meaningful comment on how the results of these studies should inform our analysis. Based on our review, these studies provide some evidence that common ownership does not always limit viewpoint diversity.[611] We find, however, that the conclusions in these studies are too limited

[602] We sought comment in the *FNPRM* on the extent to which the rule constrains consolidation beyond what is permitted under the local television and local radio ownership rules and whether those rules would be sufficient to protect our policy goals absent the Radio/Television Cross-Ownership Rule. *FNPRM*, 29 FCC Rcd at 4467-68, paras. 216-17; *see also NPRM*, 26 FCC Rcd at 17535-36, para. 126. We tentatively concluded that eliminating the rule would have no effect on the number of television stations an entity could own in a market and would permit the acquisition of only one or two additional radio stations in large markets. *FNPRM*, 29 FCC Rcd at 4467-68, paras. 216-17; *see also NPRM*, 26 FCC Rcd at 17535-36, para. 126.

[603] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2059, para. 83.

[604] *See* UCC et al. FNPRM Comments at 41-42.

[605] *See, e.g.*, *id*. at 35-43; NHMC FNPRM Comments at 6-11.

[606] *See, e.g.*, *FNPRM*, 29 FCC Rcd at 4436-37, para. 147.

[607] The *FNPRM* referenced *Prometheus I* for the proposition that "mergers involving media that are not significant sources of local news do not pose a serious threat to viewpoint diversity." *Id.* at 4465, para. 212 n.629 (citing *Prometheus I*, 373 F.3d at 404-05). The cited discussion in *Prometheus I* does not contradict our conclusion that radio's contributions to viewpoint diversity are significant enough to warrant the rule's retention. Rather, *Prometheus I* supports our current view that cable and satellite television and the Internet are not significant sources of independently produced local news and information. *Prometheus I*, 373 F.3d at 404-08.

[608] *NPRM*, 26 FCC Rcd at 17537, para. 132.

[609] *FNPRM*, 29 FCC Rcd at 4461, para. 201 n.598.

[610] *Id.*

[611] The Commission already has recognized that there is some evidence that cross-ownership does not always limit viewpoint diversity. However, the Commission also has found that the possibility of a connection between

to serve as a basis for a rule change.[612] Ultimately, while the studies do present interesting findings based on indirect means of measuring viewpoint diversity, we do not find that the results—standing in contrast to the record evidence demonstrating the importance of broadcast radio and television stations to viewpoint diversity in local markets—justify elimination of the Radio/Television Cross-Ownership Rule.

211. *Contour Modifications*. In the *NPRM*, the Commission sought comment on how the Radio/Television Cross-Ownership Rule could be modified to account for the fact that the analog broadcast television contours upon which the rule relies became obsolete with the transition to digital television service.[613] The Commission observed that the digital NLSC approximates the Grade B contour but that the Grade A contour does not have a digital equivalent.[614] Given that we are retaining the rule and did not receive any comments on this issue in the context of this rule, we will draw from the relevant discussions and comments in the context of other rules to make the modifications necessary to update the Radio/Television Cross-Ownership Rule.

212. The first of these modifications updates the television contour used to determine when the rule is triggered. The digital PCC, as defined in Section 73.625 of the Commission's rules, will replace the analog Grade A contour when assessing whether a television station's contour encompasses a radio station's community of license.[615] This change is consistent with our replacement of the Grade A contour for purposes of the NBCO Rule.[616] Additionally, as we stated in the *FNPRM*, a television station's PCC ensures reliable service for the community of license, is already defined in the Commission's rules, and can be verified easily in the event of a dispute.[617]

213. The second modification updates the use of a television station's Grade B contour for purposes of determining how many media voices would remain in a market following a station acquisition. A television station's digital NLSC, the digital approximate of the Grade B contour, will replace that analog measurement.[618] Therefore, we will count as media voices those independently owned and operating full-power broadcast television stations within the DMA of the television station's (or stations') community (or communities) of license that have digital NLSCs that overlap with the digital NLSC(s) of the television station(s) at issue.[619] This digital NLSC substitution is consistent with our replacement of the Grade B contour in the Local Television Ownership Rule.[620]

214. *Grandfathering*. Due to the contour modifications we adopt herein, there may be

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ownership and viewpoint is not disproved by evidence that a connection is not always present. Indeed, the Commission has noted previously the existence of ample evidence that ownership can affect viewpoint. As noted in the context of the NBCO Rule, we believe the best way to promote viewpoint diversity is by maximizing the number of independently owned stations in a market, not by relying on a hope or expectation that cross-owned properties will maintain distinct voices. *See supra* para. 144.

[612] The authors of Media Ownership Study 8A caution that their evidence "does not provide any conclusive basis for policymaking," that they do not make "any claims of causality," and that their findings are based on limited data. Media Ownership Study 8A, as revised, at 22-23. The authors of Media Ownership Study 8B, while forming more detailed conclusions than in Media Ownership Study 8A, concede that they were "forced to rely on limited variation in many policy variables, a constraint that leads to less precise estimates, making it difficult to identify the effects of interest." Media Ownership Study 8B, as revised, at 18-19.

[613] *NPRM*, 26 FCC Rcd at 17538-39, para. 135.

[614] *Id.*

[615] *See* 47 CFR § 73.625. See Appendix A for the revised rule section.

[616] *See supra* paras. 168-169.

[617] *FNPRM*, 29 FCC Rcd at 4442, para. 160.

[618] *See NPRM*, 26 FCC Rcd at 17538-39, para. 135.

[619] *See* 47 CFR § 73.3555(c)(3)(i).

[620] *See supra* paras. 32-33.

circumstances in which an existing combination now will be impermissible under the revised rule.[621] For example, because the PCC is slightly larger than the previous analog Grade A contour, combinations that previously were permissible under the rule may now violate the ownership limits. Consistent with our approach in adopting technical modifications to the Local Television Ownership Rule and the NBCO Rule, we will grandfather any existing combinations, so long as they are held by their current owners, in order to avoid imposing the hardship of divestiture on owners previously compliant with the rules. However, subsequent purchasers must either comply with the rule in effect at that time or obtain a waiver.[622]

215. *Minority and Female Ownership*. The *FNPRM* and *NPRM* asked whether repealing the Radio/Television Cross-Ownership Rule would have an effect on minority and female broadcast ownership.[623] In the *FNPRM*, we noted that we did not believe that there was evidence in the record to suggest that eliminating the rule would harm minority and female ownership or that the rule has protected or promoted minority or female ownership.[624] In response to the *FNPRM*, UCC et al. argue that permitting further consolidation would disserve the public interest because radio provides one of the few entry points into media ownership for minorities and women.[625] No commenters dispute that radio is a key entry point for minority and female ownership in the broadcast industry. While we retain the existing Radio/Television Cross-Ownership Rule (with minor contour modifications) based on our viewpoint diversity goal, and not with the purpose of preserving or creating specific amounts of minority and female ownership, we find that retaining the existing rule nevertheless helps to promote opportunities for diversity in broadcast television and radio ownership. The rule helps to increase the likelihood of a variety of viewpoints and to preserve ownership opportunities for new entrants.

E. Dual Network Rule

1. Introduction

216. Based on the record compiled in the 2010 and 2014 Quadrennial Review proceedings, we find that the Dual Network Rule, which permits common ownership of multiple broadcast networks but prohibits a merger between or among the "top-four" networks (specifically, ABC, CBS, Fox, and NBC),[626] continues to be necessary to promote competition and localism and should be retained without modification.[627] We find that, in comparison to other broadcast and cable networks, the top-four broadcast television networks have a distinctive ability to attract larger primetime audiences on a regular basis, which enables the top-four networks to earn higher rates from those advertisers seeking to reach large, national mass audiences consistently. By reducing the number of choices available to such advertisers, a

[621] As noted above, we did not receive any comments on this issue. *Supra* para. 211.

[622] Thus, stations that are subject to license assignment or transfer of control applications will be required to comply with the applicable rules, except that grandfathering will continue to apply to stations that are subject to *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. *See supra* notes Error: Reference source not found, Error: Reference source not found.

[623] *FNPRM*, 29 FCC Rcd at 4469-71, paras. 222-25; *NPRM*, 26 FCC Rcd at 17538, para. 134.

[624] *FNPRM*, 29 FCC Rcd at 4469-70, para. 222. For discussions regarding the potential impact of relaxation of the media ownership limits on minority and female ownership, see paragraphs 73 through 81 (Local Television Ownership Rule) and 124 through 128 (Local Radio Ownership Rule).

[625] UCC et al. FNPRM Comments at 41-43 (arguing that radio stations owned by minorities and women promote diversity).

[626] The rule provides that "[a] television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations *unless* such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in [Section] 73.3613(a)(1) of the Commission's regulations . . . ." 47 CFR § 73.658(g) (emphasis in original).

[627] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2082, para. 139; *2002 Biennial Review Order*, 18 FCC Rcd at 13858, para. 621. The Third Circuit upheld the Commission's decision in the *2006 Quadrennial Review Order* to retain the dual network rule to promote competition and localism. *Prometheus II*, 652 F.3d at 463-64.

combination among top-four broadcast networks could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high-quality programming. We also find that the Dual Network Rule remains necessary to preserve the ability of affiliates to influence network decisions in a manner that best serves the interests of their local communities, thereby maintaining the balance of bargaining power between the top-four networks and their affiliates. We conclude that the benefits of retaining the rule outweigh any potential burdens.

2. Background

217. In the *FNPRM*, we tentatively concluded that the Dual Network Rule should be retained in order to promote competition and localism.[628] We sought comment on these tentative findings and invited commenters to augment the record with any new or different evidence, data, or information relevant to our consideration of the rule.[629]

218. No new comments were filed in response to the *FNPRM* advocating the repeal of the Dual Network Rule. However, CBS and Fox resubmitted their earlier comments filed in response to the *NPRM*, in which CBS and Fox each argued that the Dual Network Rule should be repealed.[630] According to CBS, developments in the television marketplace have undermined the original rationales for the rule, and the Commission is no longer justified in singling out the top-four broadcast networks for disparate treatment vis-à-vis cable networks.[631] CBS stated that in recent years cable networks have modified their programming lineups to include more programming of the sort that, in the past, has aired primarily on broadcast networks (e.g., original scripted dramas and sitcoms, national and local news, and sports programming).[632] CBS noted that, under the Commission's rules, "one entity can own an unlimited number of these cable networks . . . but cannot own even two of the four broadcast networks named in the Dual Network Rule, even if those networks are not the most-watched."[633] Fox questions the basis for the Dual Network Rule in today's media environment, asserting that a merger between two networks would not harm localism, diversity, or, absent a violation of antitrust laws, competition.[634]

219. By contrast, several parties submitted comments in response to the *FNPRM* supporting our tentative conclusion to retain the Dual Network Rule.[635] WGAW states that the rule remains necessary to promote competition in the market for primetime programming.[636] WGAW notes that broadcast networks are increasingly airing programming produced by affiliated studios, with content produced by an affiliated studio comprising between 45 percent and 59 percent of the series airing on each of the top-four networks during the 2012-2013 season.[637] WGAW argues that any merger between the top national networks would place more content under common control, which would harm competition and limit consumer choice.[638]

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[628] *FNRPM*, 29 FCC Rcd at 4471, para. 226.

[629] *Id.* at 4473, para. 232.

[630] CBS FNPRM Comments, Attach., CBS NPRM Comments at 16-18; Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. FNPRM Comments, Attach. (Fox); Fox NPRM Comments at 3, 19; Fox FNPRM Comments, Attach., Fox NPRM Reply at 16-17.

[631] CBS NPRM Comments at 16-18.

[632] *Id.* at 17.

[633] *Id.*

[634] Fox NPRM Reply at 16-17.

[635] CBS Television Network Affiliates FNPRM Comments at 1-3 (CBS Affiliates); NBC Television Affiliates FNPRM Comments at 1-3 (NBC Affiliates); WGAW FNPRM Comments at 11-13; NABOB FNPRM Comments at 17; Communications Workers of America FNPRM Comments at 4 (CWA).

[636] WGAW FNPRM Comments at 11-12.

[637] *Id.* According to WGAW, the CW, co-owned by CBS and Warner Brothers, owned 75 percent of the series airing on the network during the 2012-2013 season. *Id.*

[638] *Id.* at 12.

220. Furthermore, the CBS Television Network Affiliates Association (CBS Affiliates) and the NBC Television Affiliates (NBC Affiliates) argue that the Dual Network Rule remains necessary to promote localism.[639] They argue that the rule maintains the balance between the networks and their affiliates, which in turn protects the independent discretion of local affiliates to make programming decisions.[640] These commenters state that local network affiliates promote localism through the provision of complementary local programming, such as local news, sports, weather, and public information programming.[641] According to these commenters, the loss of an independent top-four network would reduce the bargaining power that local affiliates have with the networks, which would harm the affiliates' ability to serve their local markets.[642] The CBS Affiliates are also concerned that consolidation between top-four networks could harm competition by discouraging networks from bidding on or investing in more regional and national sports programs, which may in turn result in such programming migrating away from free, over-the-air television.[643] Furthermore, the NBC Affiliates assert that the potential negative impacts of a top-four network merger would be exacerbated in light of the recent horizontal and vertical integration involving MVPDs and content providers.[644]

3. Discussion

221. *Competition*. We conclude that the Dual Network Rule continues to be necessary in the public interest to foster competition in the provision of primetime entertainment programming and the sale of national advertising time. As discussed in more detail below, we find that the primetime entertainment programming supplied by the top-four broadcast networks is a distinct product and that the provision of this programming could be restricted if two or more of the top-four networks were to merge. We continue to believe that at present these four major networks continue to constitute a "strategic group" in the national advertising marketplace and compete largely among themselves for advertisers that seek to reach comparatively large, national audiences. Accordingly, we find that a top-four network merger would substantially lessen competition for advertising dollars in the national advertising marketplace, which would, in turn, reduce incentives for the networks to compete with each other for viewers by providing innovative, high-quality programming. Based on their distinctive characteristics relative to other broadcast and cable networks, we conclude that the top-four broadcast networks continue to serve a unique role in the provision of primetime entertainment programming and the sale of national advertising time that justifies the retention of this rule specific to them.

222. We find that the top-four broadcast networks continue to attract primetime audiences that are more consistent and larger than those achieved by other broadcast or cable networks, as measured both by the audience size for individual programs and by the audience size for each network as a whole. The primetime entertainment programming supplied by the top-four broadcast networks generally is designed to appeal to a mass audience, and financing such programming on the scale needed for a consistent primetime lineup, in turn, requires investment of substantial revenues that only a consistently large, mass audience can provide. Thus, the primetime entertainment programming that the top-four networks provide to their affiliated local stations is intended to attract on a regular basis both mass audiences and the advertisers that want to reach them. This is in contrast to other broadcast networks, and many cable networks, which tend to target more specialized, niche audiences.[645]

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[639] CBS Affiliates FNPRM Comments at 1-2; NBC Affiliates FNPRM Comments at 1-2.

[640] CBS Affiliates FNPRM Comments at 1-2; NBC Affiliates FNPRM Comments at 1-2.

[641] CBS Affiliates FNPRM Comments at 2; NBC Affiliates FNPRM Comments at 1-2.

[642] CBS Affiliates FNPRM Comments at 2-3; NBC Affiliates FNPRM Comments at 2.

[643] CBS Affiliates FNPRM Comments at 1.

[644] NBC Affiliates FNPRM Comments at 3.

[645] For example, Univision targets Hispanic viewers, and the CW network targets women between the ages of 18 and 34. *See* Univision Communications Inc., *Univision – The #1 place to reach Hispanic America*, http://corporate.univision.com/ (last visited June 8, 2016); Warner Bros., *The CW Television Network –*

223. We note that in recent years some cable networks may have modified their primetime lineups to more closely resemble those of broadcast networks[646] and that some online video providers have started offering original programming that may also attract sizable audiences. Nonetheless, at this time we do not believe that cable networks or online providers have assembled a platform of programming that is consistently of the same broad appeal and audience share, on the whole, as the primetime entertainment programming provided by the top-four broadcast networks.

224. Although, as discussed further below, certain individual cable primetime entertainment programs have managed to achieve audiences of a size that is comparable to those achieved regularly by their broadcast network counterparts,[647] we continue to believe that the ability of the top-four broadcast networks to attract consistent, large primetime audiences remains unmatched by that of any other broadcast or cable network. In the *FNPRM*, we noted that, while the highest-rated cable primetime entertainment programs in 2011 attracted between 8 and 9 million viewers at most, there were typically a dozen or more primetime entertainment programs on the top-four broadcast networks that attracted more than 10 million viewers during any given week of the 2010-2011 television season.[648] We noted that the highest-rated broadcast programs frequently attracted more than 20 million viewers, based on Nielsen data.[649]

225. More recent data show that, while certain cable networks have continued to air a discrete number of individual programs or episodes that have become increasingly capable of attracting primetime audiences on par with, or even greater than, the top-four broadcast networks, no one cable network—let alone several—has been able to consistently deliver such audiences beyond individual programs or episodes. For instance, during 2015, *The Walking Dead* on AMC attracted between 12 and 16 million primetime viewers per episode, placing it among the 20 most-watched primetime entertainment programs on broadcast and cable during the weeks that it aired on the cable network.[650] Other popular primetime entertainment programs on cable networks, such as *Game of Thrones* on HBO and *Fear the Walking Dead* on AMC, attracted between 7 and 11 million viewers for their highest-rated episodes and placed among the 20 most-watched primetime entertainment programs on broadcast and cable during some weeks but not others.[651] Besides these few individual series or episodes, however, the highest-rated primetime entertainment programs on cable networks attracted, at most, between 6 and 7 million viewers, with one exception.[652] By contrast, for most of 2015 there were, at minimum, a dozen—and in a number

WarnerBros.com – The Studio, http://www.warnerbros.com/studio/divisions/television/cw-television-network (last visited June 8, 2016). Due to their targeted approaches, programming on these networks attracts smaller audiences than the top-four networks. For example, during the 2014-2015 broadcast television season, the highest-rated broadcast program that aired on a non-top-four network was *The Flash* on the CW, which ranked 109th among primetime programs airing on broadcast networks during the 2014-2015 season. FCC staff analysis of broadcast television ratings data from Nielsen. Ratings data are for total viewers (live plus DVR viewing within seven days).

[646] CBS NPRM Comments at 17.

[647] *See infra* paras. 226-227.

[648] *See FNPRM*, 29 FCC Rcd at 4474-75, para. 234 & nn.696-97 (citing FCC staff analysis of week-by-week television ratings data from Nielsen, as provided on the website TV by the Numbers).

[649] *Id.*

[650] FCC staff analysis of week-by-week broadcast and cable television ratings data from Nielsen. The staff's review excluded TV news magazines and any series with fewer than four episodes (e.g., individual sports events, news events, movies, and awards shows). Ratings data are for total viewers (live plus same-day DVR viewing).

The Walking Dead was consistently the highest-rated primetime entertainment program on cable during the weeks that it aired in 2015, attracting more than two times the number of viewers attracted by the second-highest rated primetime entertainment program shown on a cable network during the same week. During 2015, the program's highest-rated episode attracted approximately 15.78 million viewers during the week of March 23-29, 2015. *Id.*

[651] *Id.*

[652] *Id.* One episode of *Talking Dead* on AMC attracted approximately 7.53 million viewers during the week of March 23-29, 2015. That was the highest-rated episode of the program, however, and no other episodes of the

of weeks around two dozen or so—primetime entertainment programs on the top-four broadcast networks that attracted more than 7 million viewers, with some of the highest-rated episodes attracting between 18 and 26 million viewers.[653] Moreover, during any given week in 2015, primetime entertainment programs on the top-four broadcast networks accounted for nearly all—if not all—of the 20 most watched primetime entertainment programs on broadcast and cable networks, based on total viewership.[654] These data indicate that primetime entertainment programs on the top-four broadcast networks have continued to attract audiences that are larger and more consistent than those attracted by primetime entertainment programs on other broadcast and cable networks.

226. This conclusion is also supported by data on the average primetime audience size of individual broadcast and cable networks, as measured at the network level. Even though an increasing number of individual cable primetime entertainment programs or episodes have achieved audiences of a similar size to their broadcast network counterparts, on average the primetime audience size for each of the top-four broadcast networks has remained significantly larger than the audience size for even the most popular cable networks. In 2011, the average primetime audience for a top-four broadcast network was more than three times larger than the average primetime audience of the highest-rated non-sports cable networks and more than five times larger than that of the next-highest rated English-language broadcast network, based on Commission staff analysis of data from SNL Kagan.[655] Based on staff analysis of more recent data from 2014, we find that there continues to be a significant gap in size between the average primetime audience of the top-four broadcast networks and that of other broadcast or cable networks. During 2014, the average primetime audience for a top-four broadcast network was approximately three and a half times larger than the average primetime audience for the highest-rated non-sports cable networks and nearly four times larger than that of the next-highest rated English-language broadcast network, based on staff analysis of data from SNL Kagan.[656] Accordingly, we conclude that the primetime

program attracted more than 7 million viewers in 2015. *Id.*

[653] *Id.*

[654] *Id.*

[655] In 2011, the top-four broadcast networks had an average primetime audience of approximately 5.11 million households, compared to approximately 1.70 million for the four highest-rated non-sports cable networks (USA, Disney Channel, TNT, and Nickelodeon/Nick At Nite). Staff calculated an average for the top-four networks by adding together the average primetime audience of each of the four networks in the group and then dividing the total by four. Univision, a Spanish-language network, was the fifth-highest rated broadcast network, with an average primetime audience of approximately 1.92 million households during 2011, or less than half the size of the average primetime audience of the top-four broadcast networks and less than half the size of the average primetime audience of the lowest-rated top-four broadcast network, which was NBC at approximately 4.26 million. The next-highest rated English-language broadcast network was the CW, which ranked sixth overall, with an average primetime audience of approximately 0.94 million households. *See* SNL Kagan, TV Network Summary, Broadcast Networks by Average Prime Time TVHH Delivery (000) as of June 8, 2016 (SNL Kagan Broadcast Networks by Average Prime Time TVHH Delivery June 8, 2016); SNL Kagan, TV Network Summary, Basic Cable Networks by Average Prime Time TVHH Delivery (000) as of June 8, 2016 (SNL Kagan Basic Cable Networks by Average Prime Time TVHH Delivery June 8, 2016). We find that it is appropriate, for purposes of the Dual Network Rule, to exclude all-sports networks, such as ESPN, from our review of network primetime viewership data, advertising prices, and advertising revenue, because we believe that the focus of these networks (i.e., live sports and other sports-related programming) distinguishes them from other broadcast and cable networks. Even if we included all-sports networks in our review, however, these networks would not have a significant impact on our analysis such that we would reach different conclusions.

[656] *See* SNL Kagan Broadcast Networks by Average Prime Time TVHH Delivery June 8, 2016; SNL Kagan Basic Cable Networks by Average Prime Time TVHH Delivery June 8, 2016. In 2014, the top-four broadcast networks had an average primetime audience of approximately 4.69 million households, compared to approximately 1.34 million for the four highest-rated non-sports cable networks (USA, Disney Channel, TNT, and TBS). Staff calculated an average for the top-four networks by adding together the average primetime audience of each of the four networks in the group and then dividing the total by four. The fifth-highest rated broadcast network, Univision, had an average primetime audience of 1.64 million households, or less than half the size of the average primetime

entertainment programming provided by the top-four broadcast networks continues to be a distinct product capable of attracting large audiences of a size that individual cable networks cannot consistently replicate, despite the ability of a few primetime cable network programs to achieve similarly large audiences on an individual basis.

227. In addition, there continues to be a wide disparity in the advertising rates earned by the top-four broadcast networks and the advertising rates charged by other broadcast and cable networks, which further indicates that the top-four broadcast networks are distinct from other networks. In the *NPRM*, the Commission noted that based on data for 2009, the top-four broadcast networks generally earned higher advertising rates than cable networks,[657] and we find that this disparity continues to exist, as shown by more recent data. For instance, based on staff analysis of SNL Kagan data for 2011, the average advertising rate among the top-four broadcast networks, as estimated in cost per thousand views (referred to as cost per mille or CPM), was approximately $19.19.[658] By contrast, the four highest CPMs among non-sports cable networks for the same period (MTV, Bravo, Discovery Channel, and TBS) had an average of approximately $10.95, or approximately 43 percent less than that of the top-four broadcast networks.[659] This gap grew slightly between 2011 and 2014, when the average of the four highest CPMs among non-sports cable networks (MTV, Bravo, Discovery Channel, and Food Network) was approximately $12.43,[660] or approximately 44 percent less than the average CPM among the top-four broadcast networks, which was approximately $22.31.[661]

228. Data on net advertising revenues provide further indication that the top-four broadcast networks are particularly appealing to advertisers seeking consistent, large national audiences. As noted in the *FNPRM*, in 2011, the top-four broadcast networks averaged approximately $3.17 billion in net advertising revenues, based on Commission staff analysis of data from SNL Kagan.[662] By contrast, the

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audience of the top-four broadcast networks and less than half the size of the average primetime audience of the lowest-rated top-four broadcast network, which was Fox at approximately 3.45 million. The next-highest rated English-language broadcast network was the CW, which ranked sixth overall, with an average primetime audience of approximately 0.99 million households.

Another way to examine the difference in ratings between the top-four broadcast networks and cable networks is to look at the gap between the lowest-rated top-four broadcast network and the highest-rated non-sports cable network, which also increased between 2011 to 2014. In 2011, the average primetime audience of the lowest-rated top-four broadcast network (NBC) was nearly 4.26 million households, as stated above, while the average primetime audience of the highest-rated non-sports cable network (USA Network, which is owned by NBCUniversal) was approximately 2.15 million households, or approximately half the size of NBC's audience. In 2014, the average primetime audience for the lowest-rated top-four broadcast network (Fox) was approximately 3.45 million households, as stated above, while the average primetime audience of the highest-rated non-sports cable network (USA Network) was approximately 1.42 million, or less than half the size of Fox's audience. SNL Kagan Broadcast Networks by Average Prime Time TVHH Delivery June 8, 2016; SNL Kagan Basic Cable Networks by Average Prime Time TVHH Delivery June 8, 2016.

[657] *NPRM*, 26 FCC Rcd at 17542-43, para. 143 (citing FCC staff analysis of data from SNL Kagan).

[658] *FNPRM*, 29 FCC Rcd at 4476, para. 236 (citing FCC staff analysis of data from SNL Kagan).

[659] *Id.*

[660] *See* SNL Kagan, TV Network Summary, Basic Cable Networks by Calculated CPM ($) as of June 8, 2016 (SNL Kagan Basic Cable Networks by Calculated CPM June 8, 2016).

[661] *See* SNL Kagan, TV Network Summary, Broadcast Networks by Calculated CPM ($) as of June 8, 2016 (SNL Kagan Broadcast Networks by Calculated CPM June 8, 2016). CPM data for other broadcast networks is either not available, or it is not comparable because of their more limited schedules. For instance, the CW had a much higher calculated CPM of $31.77, but its programming schedule did not include same amount of programming as the major broadcast and cable networks. SNL Kagan Broadcast Networks by Calculated CPM June 8, 2016; CBS Corporation, *The CW* (*The CW*), http://www.cbscorporation.com/portfolio/the-cw/ (last visited June 8, 2016). The CW delivers a total of 20 hours of programming a week, half of which is original primetime entertainment programming. *The CW*. Advertising rates tend to be higher during primetime.

[662] *FNPRM*, 29 FCC Rcd at 4476, para. 236 (citing FCC staff analysis of data from SNL Kagan). Fox had the lowest net advertising revenues among the top-four broadcast networks in 2011, with approximately $2.72 billion. We note

four non-sports cable networks with the highest net advertising revenue totals (Nickelodeon, USA Network, TNT, and MTV) averaged just under $1 billion in estimated net advertising revenues, or less than a third of the average amount that the top-four broadcast networks are estimated to have received.[663] This gap between the net advertising revenue generated by the highest-earning cable networks and those generated by the top-four broadcast networks persists. In 2014, the four non-sports cable networks with the highest net advertising revenue totals (TNT, USA, TBS, and Nickelodeon/Nick At Nite) averaged approximately $1.07 billion in estimated net advertising revenues, or less than a third of the average amount that the top-four broadcast networks are estimated to have received, which is $3.46 billion.[664] These four cable networks are projected to have received the highest net advertising revenues in 2015 as well, averaging approximately $1.04 billion in estimated net advertising revenues, or less than a third of the average amount that the top-four broadcast networks are projected to have received, which is $3.31 billion.[665] We find that these data further support our conclusion that the top-four broadcast networks comprise a strategic group in the national advertising marketplace and compete largely among themselves for advertisers that seek to reach large, national mass audiences consistently.

229. Therefore, we retain the existing Dual Network Rule without modification in order to promote competition in the sale of national advertising time. We also agree with WGAW that the rule remains necessary to promote competition in the marketplace for primetime programming.[666] Specifically, we find that the top-four broadcast networks have a distinctive ability to attract, on a regular basis, larger primetime audiences than other broadcast and cable networks, which enables them to earn higher rates from those advertisers that are willing to pay a premium for such audiences. Thus, a

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that Fox has a more limited schedule of programming, which reduces its total advertising revenues. Meanwhile, Univision ranked fifth among broadcast networks, with approximately $0.71 billion in net advertising revenues, and the CW network ranked sixth, with approximately $0.44 billion. *Id.* at 4476, n.706. As we note above, the CW delivers a total of 20 hours of programming a week, half of which is original primetime entertainment programming, and advertising rates tend to be higher during primetime.

[663] *See FNPRM*, 29 FCC Rcd at 4476, para. 236 (citing FCC staff analysis of data from SNL Kagan). Nickelodeon had the highest net advertising revenues among non-sports cable networks, with approximately $1.09 billion.

[664] *See* SNL Kagan, TV Network Summary, Broadcast Networks by Net Advertising Revenue ($000) as of June 8, 2016 (SNL Kagan Broadcast Networks by Net Advertising Revenue June 8, 2016); SNL Kagan, TV Network Summary, Basic Cable Networks by Net Advertising Revenue ($000) as of June 8, 2016 (SNL Kagan Cable Networks by Net Advertising Revenue June 8, 2016). As in 2011, Fox had the lowest net advertising revenues in 2014, with approximately $2.72 billion in estimated net advertising revenues. Again, we note that Fox has a more limited schedule of programming, which reduces its total advertising revenues. Additionally, in 2014 Univision ranked fifth among broadcast networks, with approximately $0.78 billion in estimated net advertising revenues; Telemundo ranked sixth, with approximately $0.45 billion; and the CW network ranked seventh, with approximately $0.40 billion. *See* SNL Kagan Broadcast Networks by Net Advertising Revenue June 8, 2016. As we note above, the CW delivers a total of 20 hours of programming a week, half of which is original primetime entertainment programming, and advertising rates tend to be higher during primetime.

[665] *See* SNL Kagan Broadcast Networks by Net Advertising Revenue June 8, 2016; SNL Kagan Cable Networks by Net Advertising Revenue June 8, 2016. As in 2014, Fox ranked fourth among broadcast networks, with approximately $2.51 billion in estimated net advertising revenues; Univision ranked fifth, with approximately $0.73 billion; Telemundo ranked sixth, with approximately $0.48 billion; and the CW ranked seventh, with approximately $0.40 billion.

[666] WGAW FNPRM Comments at 11-13; WGAW NPRM Comments at 6-7. WGAW also proposed that the Commission consider other measures, in addition to the Dual Network Rule, to limit the amount of primetime entertainment programming owned by the top-four networks. WGAW NPRM Comments at 9. WGAW stated that, as a result of the repeal of the Commission's former financial interest and syndication (fin/syn) rules, the top-four broadcast networks now own a majority of the primetime entertainment programming that they provide to their affiliates. *Id.* at 6-8. The Commission's former fin/syn rules, which limited the amount of programming in primetime and syndication that the broadcast networks could own, were repealed in the mid-1990s. *Review of the Syndication and Financial Interest Rules*, Report and Order, 10 FCC Rcd 12165 (1995). We decline to revisit the Commission's decision to eliminate the fin/syn rules or to consider implementing a similar set of restrictions in the context of the 2014 Quadrennial Review.

combination between two top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences, which could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high-quality programming. We therefore conclude that the primetime entertainment programming provided by the top-four broadcast networks and national television advertising time are each distinct products—the availability, price, and quality of which could be restricted, to the detriment of consumers, if two of the top-four networks were permitted to merge.[667] Accordingly, we conclude that the Dual Network Rule remains necessary to foster competition in the sale of national television advertising time and the provision of primetime entertainment programming.[668]

230. *Localism*. In addition to furthering the Commission's competition goal, we conclude that, consistent with past Commission findings, the Dual Network Rule also continues to be necessary to foster localism.[669] Specifically, we find that eliminating the rule could increase the bargaining power of the top-four broadcast networks over their affiliate stations, thereby reducing the ability of the affiliates to influence network programming decisions in a manner that best serves the interests of their local communities. Typically, a critical role of a broadcast network is to provide its local affiliate stations with high-quality programming.[670] Because this programming is distributed nationwide, broadcast networks have an economic incentive to ensure that the programming both appeals to a mass, nationwide audience and is widely shown by affiliate stations. By contrast, a network's local affiliate stations provide local input on network programming decisions and air programming that serves the specific needs and interests of that specific local community. As a result, the economic incentives of the networks are not always aligned with the interests of the local affiliate stations or the communities they serve.

231. In the context of this complementary network-affiliate relationship, we agree with the CBS Affiliates and the NBC Affiliates that a top-four network merger would reduce the ability of a network affiliate station to use the availability of other top, independently owned networks as a bargaining tool to exert influence on the programming decisions of its network,[671] including the affiliate's ability to engage in a dialogue with its network over the suitability for local audiences of either the content or scheduling of network programming. Elimination of the Dual Network Rule would increase the economic leverage of the top-four networks over their affiliate stations, which would harm localism by diminishing the ability of the affiliates to serve their communities.[672] The Commission has recognized that affiliate stations play an important role in assuring that the needs and tastes of local viewers are

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[667] In addition, the Commission sought comment in the *NPRM* on the role of the top-four broadcast networks in the provision of national news content. *NPRM,* 26 FCC Rcd at 17544-45, para. 145. Although no comments were filed on this issue, we note that the audience size for each of the three broadcast network evening newscasts (ABC, CBS, and NBC) further distinguishes these networks from other cable and broadcast networks. For instance, during 2011, more than four times as many people watched the three broadcast network evening newscasts than watched the highest-rated primetime shows on the top three cable news networks (CNN, Fox News, and MSNBC). The Pew Research Center's Project for Excellence in Journalism, The State of the News Media 2012: An Annual Report on American Journalism, Network Essay (2012), http://www.stateofthemedia.org/overview-2012/. More recent data indicate that this gap has more than doubled. In 2014, the combined average viewership for the ABS, CBS, and NBC evening newscasts was more than eight times the combined median viewership for CNN, Fox News, and MSNBC. Pew State of the News Media 2015 at 33, 36.

[668] CBS questioned why a single entity is permitted to own multiple cable networks, including in conjunction with a top-four broadcast network, but is not permitted to own two of the top-four broadcast networks. CBS NPRM Comments, Attach. at 17. We note, however, that issues related to the consolidation of cable network ownership are outside the purview of the Dual Network Rule. Instead, the dual network rule effectively prohibits mergers among the top-four broadcast networks because we believe they possess distinctive characteristics, relative to other broadcast and cable networks, which justify a rule specific to them. *See supra* paras. 221-228.

[669] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2083-84, para. 141; *2002 Biennial Review Order*, 18 FCC Rcd at 13856, para. 615.

[670] *See supra* para. 222 (discussing the provision of primetime entertainment programming by the top-four broadcast networks).

[671] *See* CBS Affiliates FNPRM Comments at 1-2; NBC Affiliates FNPRM Comments at 1-2.

served.[673] We also agree with the ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates (collectively, Affiliates Associations) that the Dual Network Rule is "an important structural principle" that helps to maintain equilibrium between the top-four networks and their affiliate stations.[674] Accordingly, we conclude that the Dual Network Rule remains necessary to foster localism.[675]

232. *Dual Affiliation.* As noted previously, some commenters have urged the Commission to prohibit a TV station from affiliating with two or more top-four broadcast networks in a single market, claiming that dual affiliation allows a broadcaster to "do locally what the networks are forbidden from doing nationally," which is to consolidate the bargaining power of multiple top-four network signals under the control of a single entity.[676] We agree with Fox, however, that dual affiliation does not implicate the Dual Network Rule and that the rule should not be expanded to address dual affiliation practices.[677] The Dual Network Rule addresses harms to competition and localism that would result from a decrease in the number of networks competing for national advertisers and the reduced ability of local affiliate stations to use the availability of other top, independently owned networks as a bargaining tool to influence network programming decisions. Because dual affiliation does not reduce the number of network owners, we believe that dual affiliation does not give rise to either of these harms.[678] Accordingly, arguments related to dual affiliation are not relevant to our consideration of the Dual Network Rule. We believe that these issues are more relevant to the Local Television Ownership Rule, and we address them above in that context.[679]

233. *Minority and Female Ownership*. In this proceeding, we sought comment on the impact of our media ownership rules on minority and female ownership of broadcast stations.[680] No commenters, however, addressed the potential impact of the Dual Network Rule on minority and female ownership. Given the distinct nature of the Dual Network Rule and its focus on mergers involving the top-four broadcast networks, and not ownership limits in local markets, we do not believe that this rule would be expected to have any meaningful impact on minority and female ownership levels.

✋✞✍ DIVERSITY ORDER REMAND

234. In addition to assessing each of our broadcast ownership rules subject to quadrennial review pursuant to Section 202(h), we are considering in this proceeding the Third Circuit's remand of the Commission's 2008 *Diversity Order*, in particular the decision in that order to adopt a revenue-based

[672] *See* CBS Affiliates FNPRM Comments at 2-3; NBC Affiliates FNPRM Comments at 2; *see also* ABC Television Affiliates Association et al. NPRM Comments at 1-2 (Affiliates Associations) (stating that the rule maintains a proper balance in the network-affiliate relationship, which in turn protects the independent discretion of local affiliates to make programming decisions).

[673] *2002 Biennial Review Order*, 18 FCC Rcd at 13855, para. 611.

[674] *See* Affiliates Associations NPRM Comments at 2.

[675] In the *NPRM*, the Commission also sought comment on whether antitrust laws and our public interest standard are sufficient to address any harms to competition or localism that might result from a top-four network merger. *See NPRM*, 26 FCC Rcd at 17543-44, paras. 144, 146. As discussed above, our concern here is that a merger of two or more top-four networks would restrict the availability, price, and quality of primetime entertainment programming and the bargaining power and influence of network affiliate stations, harming consumers and localism. Because these harms to consumers and localism are not typically considered in a structural antitrust analysis, we do not believe that antitrust enforcement would adequately protect against these harms. *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2083, para. 141, n.451 (finding that antitrust enforcement would not protect against certain harms addressed by the Dual Network Rule: "reduce[d] program output, choices, quality, and innovation to the detriment of viewers, and with reduced affiliate power and influence").

[676] Time Warner Cable NPRM Reply at 13; ITTA NPRM Comments at 7-8.

[677] Fox NPRM Reply at 17-18.

[678] *See id.*

[679] *See supra* paras. 68-72.

[680] *See, e.g.*, *NOI*, 25 FCC Rcd at 6109, para. 75.

eligible entity definition as a race-neutral means of facilitating ownership diversity. In *Prometheus II*, the Third Circuit held that the Commission's decision to adopt the revenue-based definition was arbitrary and capricious because the Commission did not show how such a definition specifically would assist minorities and women, who were among the stated intended beneficiaries of that action.[1] In light of this conclusion, the Third Circuit remanded each of the measures that relied on the revenue-based eligible entity definition the Commission adopted in the *Diversity Order*.[2] The court also instructed the Commission to consider the other eligible entity definitions that the Commission discussed in the *Third Diversity FNPRM* accompanying the *Diversity Order*, including a proposal based on the socially disadvantaged business (SDB) definition employed by the Small Business Administration (SBA).[3] The *NPRM* sought comment on how the Commission should respond to the court's remand and on other actions that the Commission should consider to enhance the diversity of ownership in the broadcast industry, including minority and female ownership of broadcast stations.[4] The *FNPRM* offered tentative conclusions in response to the court's remand and sought comment on whether any of those conclusions should be reconsidered based on additional or new information in the context of the *2014 Quadrennial Review*.[5] In *Prometheus III*, the Third Circuit ordered the Commission "to act promptly to bring the eligible entity definition to a close" by "mak[ing] a final determination as to whether to adopt a new definition."[6]

235. We discuss below the actions that we believe are appropriate in response to the Third Circuit's remand of the *Diversity Order*. As a threshold matter, we discuss the Commission's ongoing initiatives to promote diversity of ownership among broadcast licensees and to expand opportunities for minorities and women to participate in the broadcast industry. We also discuss the Commission's ongoing improvements to the collection of data and other empirical evidence that are relevant to minority and female ownership issues. We next discuss the measures we are adopting today to enhance ownership diversity. Based on the record in this proceeding, the Third Circuit's remand instructions, and our analysis of the preexisting eligible entity standard and the measures to which it applied, we conclude that we should reinstate the revenue-based eligible entity standard and apply it to the regulatory policies set forth in the *Diversity Order*. We conclude that reinstating the previous revenue-based standard will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. We find that small businesses benefit from flexible licensing policies and that easing certain regulations for small business applicants and licensees will encourage innovation and enhance viewpoint diversity. We also believe that the benefits of reinstating the eligible entity standard and applying it to the regulatory measures set forth in the *Diversity Order* outweigh any potential costs of our decision to do so. Accordingly, we conclude that this action will advance the policy objectives that traditionally have guided the Commission's analyses of broadcast ownership issues.

236. This action does not, of course, preclude our consideration of other or additional eligibility standards that have been put forward as means to promote minority and women ownership of broadcast stations. As discussed further below, we decline to adopt an SDB eligibility standard, which expressly would recognize the race and ethnicity of applicants, or any other race- or gender-conscious measure in this proceeding. We have carefully studied the record, and the evidence does not establish a basis for race-conscious remedies. Thus, we do not believe that such measures would withstand review under the equal protection component of the Due Process Clause of the Constitution.[7] Finally, we evaluate additional measures that commenters have proposed as potential means of promoting diversity of

[1] *Prometheus II*, 652 F.3d at 469-72.

[2] *Id.* at 471-73.

[3] *Id.* at 471-72. The Third Circuit specifically instructed the Commission to consider the alternative eligibility standards it had proposed in the *Diversity Order* "before it completes its 2010 Quadrennial Review." *Id.* at 471.

[4] *NPRM*, 26 FCC Rcd at 17544-56, paras. 147-70.

[5] *FNPRM*, 29 FCC Rcd at 4478-4518, paras. 242-319.

[6] *Prometheus III*, 824 F.3d at 49. The court stated that it did not intend to "prejudge the outcome of this analysis." *Id.*

ownership, aside from the measures that the Third Circuit remanded in *Prometheus II*, including a proposal that the Commission adopt an Overcoming Disadvantage Preference (ODP) standard.

A. Commission Diversity Initiatives and Data Collection Efforts

1. Continuing Diversity Initiatives

237. *Diversity Rules and Policies*. The Commission strongly believes that a diverse and robust marketplace of ideas is essential to our democracy. As the Supreme Court has recognized, "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission."[8] The Commission has established numerous policies and rules intended to further the proliferation of diverse and antagonistic sources.[9] Toward this end, the Commission has a long history of promulgating rules and regulations intended to promote diversity of ownership among broadcast licensees, and thereby foster a diversity of voices, by facilitating the acquisition and operation of broadcast stations by small businesses, new entrants, and minority- and female-owned businesses.[10] As explained above, the Commission's broadcast ownership rules also help further this purpose. For instance, the Commission's Local Television Ownership Rule promotes opportunities for diversity in broadcast ownership by helping to ensure the presence of independently owned broadcast television stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants.[11]

238. The Commission and Congress previously adopted race- and gender-conscious measures intended specifically to assist minorities and women in their efforts to acquire broadcast properties, such as tax certificates and distress sale policies.[12] Following the *Adarand* decision, however, the Commission discontinued those policies and programs. Congress repealed the tax certificate policy in 1995 as part of its budget approval process.[13] Subsequently, the Commission continued its efforts to promote viewpoint diversity through a variety of race- and gender-neutral initiatives intended to promote diversity of broadcast ownership, and we currently have a number of such rules and initiatives in place. As discussed below, we are reinstating the revenue-based eligible entity standard and applying it to the regulatory policies set forth in the *Diversity Order* and remanded in *Prometheus II*. We address the concerns raised by the court in *Prometheus II* and find that reinstating the revenue-based eligible entity standard and the related regulatory policies will serve our broader goal of diversity of ownership, and thus viewpoint diversity, by facilitating small business and new entrant participation in the broadcast industry. In addition to these measures, the Commission also took a number of other actions in the *Diversity Order* to promote viewpoint diversity through diversity of ownership.[14] Because the Third Circuit expressly upheld

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[7] *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227-230, 235 (1995). The Supreme Court held in *Adarand* that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of judicial review. 515 U.S. at 229-30.

[8] *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567 (1990), *overruled in part on other grounds in Adarand*, 515 U.S. at 227.

[9] *See* Information Needs of Communities at 313. Furthermore, as noted by the Third Circuit in *Prometheus III*, 824 F.3d at 40-41, the Commission has a congressional mandate to disseminate spectrum licenses "among a wide variety of applicants, including . . . businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B). This statutory directive, however, does not mandate race- or gender-conscious initiatives. Furthermore, as discussed below and in the *FNPRM*, we would need to show that such action satisfies constitutional standards. *See infra* Section C; *FNPRM*, 29 FCC Rcd at 4497-4509, paras. 284-302.

[10] *See, e.g.*, *Statement of Policy on Minority Ownership of Broadcasting Facilities*, Public Notice, 68 FCC 2d 979, 980-81 (1978).

[11] *See supra* para. 75.

[12] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 855 (1982); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 983 (1978).

[13] *See* Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, § 2, 109 Stat 93, 93-94 (1995).

those other actions, they remain in place.[15] Those actions include, among others, a ban on discrimination in broadcast transactions,[16] a "zero tolerance" policy for ownership fraud,[17] and a requirement that non-discrimination provisions be included in advertising sales contracts.[18] Similarly, the *Prometheus II* opinion did not question the Commission's decision to reinstate the failed station solicitation rule (FSSR), which is intended to provide out-of-market buyers, including minorities and women, with notice of a sale and an opportunity to bid on stations before the seller seeks a waiver of certain ownership rules.[19] Accordingly, this measure has remained in place and is retained as part of our action today on the local television ownership rule.[20] In addition, we note that anecdotal evidence suggests that JSAs may have had the effect of enabling large station owners to foreclose entry into markets and that the Commission's decision to attribute JSAs has actually led to greater ownership diversity.[21]

239. *OCBO Initiatives*. Additionally, the Commission's Office of Communications Business Opportunities (OCBO) promotes diversity by serving as the principal advisor to the Chairman and the Commissioners on issues, rulemakings, and policies affecting small, women-owned, and minority-owned communications businesses. OCBO also hosts workshops and conferences designed to help promote

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[14] Beyond fostering viewpoint diversity, the Commission has taken steps to facilitate the entry of new participants into the broadcasting industry to promote innovation in the field also. *Diversity Order*, 23 FCC Rcd at 5924, para. 2. As discussed below, we believe that in addition to enhancing viewpoint diversity, easing certain regulations for small business applicants and licensees by reinstating the revenue-based eligible entity standard and applying it to the measures set forth in the *Diversity Order* will encourage innovation in the broadcasting industry. *See infra* Section B.

[15] *Prometheus II*, 652 F.3d at 471 n.41.

[16] *See* 47 CFR § 73.2090; *NPRM*, 26 FCC Rcd at 17545, para. 148; *Diversity Order*, 23 FCC Rcd at 5939-40, paras. 40-42 (adopting "a rule that bars discrimination on the basis of race or gender and related protected categories in broadcast transactions" and requiring certification of compliance).

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

[18] *See NPRM*, 26 FCC Rcd at 17545, para. 148; *Diversity Order*, 23 FCC Rcd at 5940-42, paras. 43-50; *see also id.* at 5941-42, paras. 49-50 (requiring broadcasters renewing their licenses to certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination). The Commission has revised its Form 303-S license renewal application form to include this certification requirement. FCC Form 303-S, Application for Renewal of Broadcast Station License, Section II, Item 7, http://transition.fcc.gov/Forms/Form303-S/303s.pdf; *Media Bureau Announces Revisions to License Renewal Procedures and Form 303-S*, Public Notice, 26 FCC Rcd 3809 (MB 2011). The court also expressly upheld several other measures adopted by the Commission in the *Diversity Order*, including the commissioning of longitudinal research on minority and women ownership trends, enabling the Commission's Office of Communications Business Opportunities to coordinate with the Small Business Administration to encourage local and regional banks to make loans through SBA's guaranteed loan programs, the holding of "Access to Capital" conferences, and the creation of a guidebook on diversity. *Prometheus II,* 652 F.3d at 471 n.41; *see also Diversity Order*, 23 FCC Rcd at 5939-45, paras. 40-64.

[19] The FSSR provides that, before selling a station to an in-market buyer, an applicant for a failed or failing station waiver of the local television ownership rule or the radio/television cross-ownership rule must demonstrate that the in-market buyer is the only entity ready, willing, and able to operate the station and that sale to a buyer outside the market would result in an artificially depressed price. 47 CFR § 73.3555, Note 7; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2069, para. 109; *1999 Ownership Order*, 14 FCC Rcd at 12936-37, para. 74. In the *2002 Biennial Review Order*, the Commission eliminated the FSSR, finding that the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. 18 FCC Rcd at 13708, para. 225. The *Prometheus I* court remanded the issue on the basis that the Commission did not consider the potential impact on minority owners when it eliminated the rule. 373 F.3d at 420-21. In the *2006 Quadrennial Review Order*, the Commission reinstated the FSSR. 23 FCC Rcd at 2068, para. 105.

[20] *See supra* para.67.

[21] *See supra* para. 76.

small business and minority participation in the communications marketplace. For example, based on a recommendation from the Advisory Committee on Diversity for Communications in the Digital Age, OCBO has hosted several capitalization strategies workshops in order to facilitate lending to and investment in minority- and women-owned entities.[22] OCBO has also hosted an Access to Capital Conference and Workshop featuring representatives from the angel investment community who discussed their investment strategies in the telecommunications, technology, and media-related industries.[23] In addition, OCBO has hosted multiple Supplier Diversity Conferences and Workshops, which have focused on private sector business opportunities for small, minority- and women-owned businesses.[24] At these events, industry panelists discussed their organizations' contracting procedures and provided insight on how to navigate the procurement process.

240. OCBO's efforts to promote small business participation and ownership diversity—in broadcast, telecommunications, and new media—have continued since the release of the *FNPRM*. In January and October 2015, OCBO hosted emerging technology events focused on small businesses, and particularly minority and women-owned tech start-ups.[25] These events included discussions on entity formation/incubation and early stage investment strategies; showcases of app designers, software/hardware manufacturers, and Internet-based business owners; and opportunities to pitch ideas and products to industry experts.[26]

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[22] The workshops featured panel discussions with finance experts that examined capitalization strategies for a range of media sectors, including broadcast television. *See, e.g.*, *Capitalization Strategies Workshop for Small, Minority- and Women-Owned Businesses Thursday, December 8, 2011, 9:00 a.m. – 4:30 p.m.*, Public Notice (OCBO Dec. 1, 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-311309A1.pdf; *Capitalization Strategies Workshop For Small, Minority- And Women-Owned Businesses Friday, November 12, 2010, 9:00 a.m. - 5:00 p.m.*, Public Notice (OCBO Nov. 1, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-302517A1.pdf.

[23] *FCC to Host Access to Capital Conference and Workshop for Small Businesses Thursday, July 11, 2013, 9:00 a.m. – 4:30 p.m.*, Public Notice (OCBO June 12, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-321559A1.pdf. The event showcased angel investment experts to discuss their investment strategies in the telecommunications, technology, and media-related industries; highlighted the distinctions between venture capitalists and angel investors; and discussed the criteria these investors use to select their projects. *See* FCC, *Official FCC Blog*, *FCC Hosts a Power-Packed Conference on Angel Investing for Small, Minority- and Women-Owned Businesses* (June 18, 2013), http://www.fcc.gov/blog/fcc-s-hosts-power-packed-conference-angel-investing-small-minority-and-women-owned-businesses. An "angel" investor is a wealthy individual willing to invest in a company at its earlier stages in exchange for an ownership stake, often in the form of preferred stock or convertible debt. Colleen Debaise, *What's an Angel Investor?*, Wall St. J. (Apr. 18, 2010), http://www.wsj.com/articles/SB10001424052702303491304575188420191459904.

[24] *See, e.g.*, *FCC to Host a Supplier Diversity Conference and Workshop for Small, Minority- and Women-Owned Businesses*, Public Notice (OCBO July 22, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-334513A1.pdf; *FCC to Host a Supplier Diversity Conference and Workshop for Small, Minority- and Women-Owned Businesses*, Public Notice (OCBO June 20, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-327775A1.pdf.

[25] *FCC to Host a Small Business & Emerging Technologies Fair in New York*, Public Notice (OCBO Sept. 15, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-335303A1.pdf; *FCC to Host a Small Business & Emerging Technologies Conference and Tech Fair*, Public Notice (OCBO Jan. 13, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-331472A1.pdf.

[26] While the Commission remains committed to promoting ownership diversity in broadcast services, new technologies also present growing opportunities for small, minority- and women-owned businesses in the media and telecommunications industries. Indeed, in recent years the MMTC conferences on access to capital, which previously focused on the broadcast industry, have been expanded to include telecommunications and new technologies. *See, e.g.*, MMTC, *MMTC's 13th Annual Access to Capital and Telecom Policy Conference*, http://mmtconline.org/accesstocapital/ (last visited June 17, 2016) (listing panel discussions that include "How to raise capital for new technology, content, and infrastructure businesses, with a special focus on opportunities for new entrants and incubated businesses" and "The latest developments in the future of broadband for communities of color, including a discussion of content, distribution platforms, and deployment").

241. Most recently, building off its Supplier Diversity Conference and Workshop, OCBO convened a Government Advertising Roundtable that addressed how women- and minority-owned businesses in broadcasting can participate in federal government procurements for advertising services, among other topics.[27] The March 2016 workshop featured broadcast industry and government procurement experts who discussed the procurement process for government advertising and how small businesses and minority- and women-owned businesses can position themselves to serve the advertising needs of the federal government.[28] This event, along with OCBO's many other initiatives, demonstrate both the Commission's continued dedication to promoting small business participation and ownership diversity, and the many ways in which the Commission can leverage its resources and reach to connect existing owners, new entrants, minority- and women-owned businesses, and entrepreneurs with the government and private industry representatives that can potentially help to facilitate station ownership and business development.

242. *Foreign Ownership.* The Commission has taken steps to help facilitate investment in the broadcast industry, which a number of commenters suggest would help to facilitate ownership diversity.[29] As discussed in the *FNPRM*, the Commission issued a *Declaratory Ruling* in November 2013 clarifying that Section 310(b)(4) of the Communications Act provides the Commission the authority to review on a case-by-case basis applications for approval of foreign investment in the controlling U.S. parent of a broadcast licensee above the 25 percent statutory benchmark.[30] The Commission stated that such an application may be granted unless it finds that a denial will serve the public interest.[31] In issuing the *Declaratory Ruling*, the Commission noted that limited access to capital is a concern in the broadcast industry, particularly for small entities, including entities owned by minorities and women, and further noted that a clear articulation of its "approach to Section 310(b)(4) in the broadcast context has the potential to spur new and increased opportunities for capitalization for broadcasters, and particularly for minority, female, small business entities, and new entrants."[32] The Commission also observed that greater capitalization may in turn yield greater innovation, particularly in programming directed at niche or minority audiences.[33]

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[27] *The Office of Communications Business Opportunities Will Host a Roundtable Discussion on Diversity and Government Advertising*, Public Notice (OCBO Mar. 4, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-338082A1.pdf.

[28] The panel included government representatives from the Department of Defense—the largest government advertiser—Department of Veterans Affairs, Department of Transportation, and FCC. The broadcast industry was represented by Sherman Kizart of Kizart Media Partners; Melody Spann-Cooper of Midway Broadcasting Corporation; Steve Roberts of the Roberts Companies; and James Winston, President of NABOB.

[29] *See, e.g.*, DCS Supplemental NPRM Comments at 7 ("[R]elaxation [of the Commission's foreign ownership restrictions for broadcast licensees] will . . . provide new funding opportunities for minority broadcast entrepreneurs . . . ."); Letter from David Honig, President, MMTC, to Marlene H. Dortch, Secretary, FCC, at 1 (filed June 7, 2013) ("[R]elaxing the foreign ownership broadcasting restrictions would enhance access to capital for minority broadcasters."); NAB 2012 323 Report Reply at 3-4 (stating that the Commission can provide new opportunities to promote greater diversity in broadcast ownership by clarifying that it will conduct a case-by-case analysis of proposed foreign ownership in excess of 25 percent of the parent company of a broadcast licensee).

[30] *FNPRM*, 29 FCC Rcd at 4513, para. 310 (citing *Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, Declaratory Ruling, 28 FCC Rcd 16244 (2013) (*Foreign Ownership Declaratory Ruling*)). The Communications Act establishes a 25 percent benchmark for foreign investment (by individuals, corporations, and governments) in U.S.-organized entities that control a U.S. broadcast, common carrier, or aeronautical radio licensee; any foreign ownership exceeding 25 percent must be approved by the Commission. *See* 47 U.S.C. § 310(b)(4).

[31] *Foreign Ownership Declaratory Ruling*, 28 FCC Rcd at 16249, para. 10.

[32] *Id.* at 16249, para. 10. As it has done in its review of foreign ownership of common carrier applicants and licensees, the Commission indicated that it will continue to afford appropriate deference to the expertise of the Executive Branch agencies on issues related to national security, law enforcement, foreign policy, and trade policy. *Id.* at 16251, para. 14. Additionally, the Commission affirmed that the controlling parent companies of licensees may not exceed the statutory benchmark without prior Commission approval. *Id.* at 16251, paras. 13-14.

243. Most recently, the Commission released a Notice of Proposed Rulemaking proposing to extend to broadcast licensees the same streamlined procedures and rules used to review foreign ownership in common carrier licensees, with certain tailored modifications.[34] These changes would, among other things, allow a broadcast licensee to request Commission approval for its U.S. controlling parent to have up to and including 100 percent foreign ownership and for any noncontrolling named foreign investor to increase its interest in the U.S. parent up to and including a noncontrolling interest of 49.99 percent.[35] The item also sought comment on whether and how to revise the methodology a licensee should use to assess its compliance with the 25 percent foreign ownership benchmark in Section 310(b)(4) in order to reduce regulatory burdens on applicants and licensees.[36] These proposed changes, if adopted, could facilitate investment from new sources of capital at a time of growing need for investment in the broadcast sector. Further, MMTC and others believe that these proposed changes could potentially benefit minority-owned broadcasters and facilitate diverse programming.[37]

244. *Tax Certificate Legislation.* Consistent with comments in the record, the Commission's most recent Section 257 Report to Congress includes a recommendation that Congress pass tax deferral legislation.[38] Specifically, the report proposes a new tax incentive program to spur ownership diversity among small businesses, including those owned by women and minorities.[39] The report notes that such a program could permit deferral of the taxes on any capital gain involved in the sale of communications businesses to small firms, as long as that gain is reinvested in one or more qualifying communications businesses, and states that such a program could permit tax credits for sellers of communications properties who offer financing to small firms.[40]

245. *AM Revitalization*. As discussed in the *FNPRM*, several of the Diversity and Competition Supporter's (DCS) proposals involve modifications to the AM broadcast service, and the *AM Revitalization NPRM* solicited comment on a number of the technical issues that DCS raised in this proceeding.[41] Given the nature of these proposals, it is important to consider them in the broader context of the Commission's efforts to revitalize the AM service. Since the release of the *FNPRM*, the Commission has adopted the six proposals set forth in the *AM Revitalization NPRM*, including a modified

[33] *Id.* at 16249, para. 10; *see also id.* at 16249, para. 9 ("Commenters . . . assert that access to additional capital will support the creation of more programming aimed at racial and ethnic minorities and bilingual speakers, and foster new entrants into broadcast ownership." (citation omitted)).

[34] *Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 30 FCC Rcd 11830 (2015) (*Foreign Ownership Policies NPRM*). Comments were due on December 21, 2015, and reply comments were due on January 20, 2016. *Review of Foreign Ownership Policies for Broadcast, Common Carrier, and Aeronautical Radio Licensees*, 80 Fed. Reg. 68815 (Nov. 6, 2015). This proceeding is ongoing.

[35] *Foreign Ownership Policies NPRM*, 30 FCC Rcd at 11831, para. 2.

[36] *Id.* at 11840-43, paras. 26-36.

[37] *See, e.g.*, MMTC Reply, GN Docket No. 15-236, at 3 (Jan. 20, 2016); MMTC Comments, GN Docket No. 15-236, at 1 (Dec. 21, 2015); NAB Comments, GN Docket No. 15-236, at 4 (Dec. 21, 2015).

[38] Groups such as NAA, the Alliance for Women in Media (AWM), NAB, and WGAW support reinstatement of the Tax Certificate Policy. Alliance for Women in Media, Inc. FNPRM Reply at 2 (AWM); NAA FNPRM Comments at 15; NAB FNPRM Comments at 91-92; WGAW FNPRM Comments at 15; Bonneville/Scranton July 27 *Ex Parte* Letter at 4; *see also Section 257 Triennial Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, Report, 26 FCC Rcd 2909, 2965-66, para. 155 (2011) (*2011 Section 257 Report*).

[39] *2011 Section 257 Report*, 26 FCC Rcd at 2965-66, para. 155.

[40] *Id.*

[41] Those technical issues included (1) a modified daytime community coverage standard for existing AM stations; (2) modified nighttime community coverage standards for existing AM stations; and (3) modified AM antenna efficiency standards. *FNPRM*, 29 FCC Rcd at 4516-17, para. 316 (citing *AM Radio Revitalization NPRM*, 28 FCC Rcd 15221).

daytime community coverage requirement for existing licensed AM facilities, a modified nighttime community coverage requirement for new and existing AM stations, and modified AM antenna efficiency standards.[42] We believe that our actions in the *AM Revitalization Order* will assist AM broadcasters to better serve the public, thereby advancing the Commission's fundamental goals of diversity, competition, and localism in broadcast media. These actions address some of the technical issues that DCS has raised in this proceeding with regard to the AM broadcast service.[43] In addition, the *AM Revitalization FNPRM* and *AM Revitalization NOI* seek comment on other technical issues that DCS has raised in this proceeding, including whether to require licensees with dual standard/Expanded Band authorizations to surrender one of the two authorizations by a certain time, whether to allow further utilization of the AM Expanded Band, and whether to modify the main studio rule.[44] We note that some commenters regard the AM radio service as a critical point of entry for women and minorities seeking to become broadcasters.[45]

246. *Hispanic Television Study*. In addition, the Commission conducted a study of Hispanic television viewing.[46] The study is the Commission's first systematic examination of the Hispanic television marketplace, which comprises a growing segment of the nation's population. The study incorporates comprehensive data from our Form 323 biennial ownership reports. Specifically, the study considers: (1) the impact of Hispanic-owned television stations on Hispanic-oriented programming and Hispanic viewership in selected local television markets; and (2) the extent of Hispanic-oriented programming on U.S. broadcast television. The study was released on May 12, 2016, with comments due on May 26, 2016, and replies on June 3, 2016; however, the Commission subsequently extended the deadlines to June 2, 2016, and June 9, 2016, respectively.[47]

247. The results of the study's regression analysis—which identifies correlations (but not necessarily causal relationships) between Hispanic-owned stations and programming and viewing choices—indicate that, among other things, Hispanic viewers favor the major Spanish-language networks, especially Univision (which is not Hispanic-owned); watch local, Spanish-language news at higher levels than English-language news; and watch more telenovelas than other program types.

248. With regard to programming, the study finds that Hispanic-owned stations are less likely to show telenovelas relative to other programming types; paid programming is strongly associated with Hispanic ownership; and Spanish-language programming and local programming are more likely to be shown on Hispanic-owned stations than other types of programming. For example, Spanish-language programs are nearly 30 times more likely to appear on Hispanic-owned stations than English-language programs, while local programs are nearly six times more likely than non-local. Additionally, paid programs are three times more likely to be shown on Hispanic-owned stations than other types of programs, while telenovelas are about 30 percent <u>less</u> likely to be found on Hispanic-owned stations and about 80 percent <u>less</u> likely to be on the Hispanic-owned independent stations.

249. The study finds some indication that Hispanic ownership is associated with higher ratings

[42] *AM Revitalization Order*, *AM Revitalization FNPRM*, *and AM Revitalization NOI*, 30 FCC Rcd 12145.

[43] *See* DCS Supplemental NPRM Comments at 52 (Proposal 23: Request the Removal of AM Nighttime Coverage Rules from Section 73.21(i)); *id.* at 56 (Proposal 24: Relax Principal Community Coverage Rules for Commercial Stations); *id.* at 58 (Proposal 25: Replace "Minimum Efficiency" Standard for AM Stations with a "Minimum Radiation" Standard).

[44] *See AM Revitalization FNPRM*, 30 FCC Rcd at 12176-77, paras. 75-76; *AM Revitalization NOI*, 30 FCC Rcd at 12177-81, paras. 77-88; *see also FNPRM*, 29 FCC Rcd at 4516, para. 316 & n.984.

[45] *E.g.*, Letter from James L. Winston, President, NABOB, Kim Keenan, President and CEO, MMTC, and Gordon H. Smith, President and CEO, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-249, at 1 (filed Oct. 1, 2015); MMTC Comments, MB Docket No. 13-249, at 13 (Jan. 22, 2014).

[46] *See* Press Release, FCC, FCC Announces New Study Examining Hispanic Television Viewing as Part of Commitment to Encourage Broadcast Diversity (Oct. 24, 2013), http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1024/DOC-323676A1.pdf.

[47] *See supra* para. 14.

among Hispanics, and in particular among Hispanics viewing Spanish-language local programming. This may suggest that the programming choices of Hispanic-owned stations may lead to increased viewership among Hispanics compared to their viewing of stations that are not Hispanic-owned. The study notes, however, that these results are only statistically significant when examining the viewing of individual programs. When averaging viewing across programs to examine the ratings of a television station, the study does not find a statistically significant effect of Hispanic-ownership, perhaps due to small sample size. The study also finds that markets with large Hispanic populations have more Hispanic programming available, as would be expected. In addition, while certain kinds of programming on Hispanic-owned stations seems to correspond with higher ratings, the results largely indicate that the ratings of Hispanic-owned stations are well below the ratings of the non-Hispanic-owned stations affiliated with the large Spanish-language networks such as Univision and Telemundo.

250. Numerous commenters supported the *Hispanic Television Study* and the Commission's efforts to analyze the relationships between Hispanic-owned television stations, programming, and viewership.[48] They recognize the difficulty and expense of undertaking such studies, and commend the Commission for conducting a study of important issues relevant to minority ownership and viewpoint diversity.[49] NHMC applauds the Commission's completion of the *Hispanic Television Study* and encourages an aggressive research agenda.[50]

251. Some commenters, however, expressed concern regarding the study design, including the focus on entertainment programming and the popularity of certain programming, such as telenovelas.[51] Because of the emphasis on program popularity and ratings, UCC et al. contend that the study does "little to assist" the Commission in its ongoing review of broadcast ownership rules pursuant to Section 202(h).[52] They argue that programming popularity is unrelated to the agency's longstanding goal of promoting viewpoint diversity.[53] Additionally, NHMC asserts that by primarily equating Spanish-language content with Hispanic-oriented content the study only focuses on a narrow subset of diverse content and fails to fully value English-language content that Hispanic viewers and the general public frequently access, including English-language content produced by Hispanic-owned stations.[54] NHMC further asserts that the Commission cannot rely on this study alone to justify the impact of a particular "eligible entity" definition or as evidence that it should move forward with relaxing any of its media ownership rules because the *Hispanic Television Study* does not speak to either issue.[55]

252. As noted above, many commenters support the Commission's undertaking of the *Hispanic Television Study*. We recognize, however, that no one study, including the *Hispanic Television Study*, will be responsive to the many and varied concerns raised by commenters. The objective of the study was to attempt to examine the nexus, if any, between Hispanic ownership of broadcast television

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[48] *See* NHMC Hispanic TV Study Comments at 1-2; Public Knowledge/Common Cause Hispanic TV Comments at 2; UCC et al. Hispanic TV Study Comments at 2.
[49] *See, e.g.*, Public Knowledge/Common Cause Hispanic TV Study Comments at 2.

[50] *See* NHMC Hispanic TV Study Comments at 1-2.
[51] MMTC Hispanic TV Study Comments at 2; UCC et al. Hispanic TV Study Comments at 2-3.

[52] UCC et al. Hispanic TV Study Comments at 2-3. To the contrary, the *Hispanic Television Study* did not analyze only ratings. It examined the availability of Hispanic-oriented programming, finding some limited evidence that certain types of programming are associated with Hispanic ownership. These findings go to the availability of programming to the entire audience and not solely to the nature of viewership.

[53] *Id.* at 3 (". . . whether a broadcaster is more or less likely to carry telenovelas is not of value in the current regulatory regime").

[54] NHMC Hispanic TV Study Comments at 2. NHMC observes that the study authors admit that using language as a criterion to determine whether programming is "Hispanic-oriented" is limited "because a large fraction of the U.S. Hispanic community is bilingual and one can easily imagine English-language content aimed at this community." *Id*. at 3 (citing *Hispanic Television Study* at 3-4, para. 9).

[55] *Id.* at 5.

stations and Hispanic-oriented program content.[56] In view of the fact that many of the Spanish-language television stations are not Hispanic-owned, the examination was challenging, and the study found only limited evidence to support a nexus between Hispanic ownership and Hispanic-oriented program content.[57] However, the study has improved the Commission's and the public's understanding of the potential relationship between ownership and content, particularly as it relates to Hispanic ownership of broadcast television stations.

253. We also reject criticisms that the study was too narrowly focused, i.e., focusing primarily on Spanish-language content and Hispanic audience members.[58] We clarify that there was not an assumption that Hispanic-oriented programming benefits only Hispanic viewers. Rather, the study noted that Hispanic viewers constitute virtually all of the viewers of Spanish-language programming. The study noted that for the non-Hispanic audience, 99 percent of viewing is English-language programming and 1 percent is of Spanish-language programming.[59] Thus, the impact of Spanish-language programming on the non-Hispanic market is apparently quite small. Further, as noted at Table 8 of the study, the Hispanic-owned stations provide predominantly Spanish-language programming.[60]

254. We similarly dispute the suggestion by Public Knowledge/Common Cause that the study is outdated because certain of the stations in the study may no longer be Hispanic-owned.[61] We reiterate that the study attempted to discern the relationship between Hispanic ownership and Hispanic-oriented programming. As such, the data and time period are appropriate for studying those possible relationships even if some of the stations are no longer Hispanic-owned. While having more recent data has its advantages, it is not clear that more recent data would provide a significantly larger database of Hispanic-owned stations, nor does it change the outcome of our analysis in the *Hispanic Television Study*, which was based on observations during the relevant time periods.

255. Finally, Hispanic-owned television broadcaster Media Vista claims that the *Hispanic Television Study* "does not present a complete picture" of Hispanic broadcast ownership because it fails to take into account the LPTV stations owned by Media Vista and other Hispanic-owned LPTV stations.[62] Media Vista adds that the Commission should not ignore data that it expressly deemed to be necessary and valuable to provide a complete ownership picture.[63] In constructing the dataset for the markets in which Nielsen measures Hispanic household viewing, Commission staff utilized the 2011 Form 323

[56] *Hispanic Television Study* at 1, para. 1.

[57] *Id.* at 1, para. 3.

[58] *See, e.g.*, NHMC Hispanic TV Study Comments at 2.

[59] *Hispanic Television Study* at 22, Tbl.9 – Share of All Spanish and English Language Programming Viewed by Hispanics and Non-Hispanics.

[60] *Id.* at 21, Tbl.8 – Hispanic-Owned Stations in 23 Station Database; *id*. at 9.

[61] Public Knowledge/Common Cause Hispanic TV Study Comments at 1-2; *see also* Media Vista Hispanic TV Study Comments at 5-6 (asserting that the study should have used more recent data). In response to Media Vista, we note that the *Hispanic Television Study* began in October 2013 and utilized the most recent broadcast television ownership information available at that time. Those data, providing a snapshot of ownership information as of October 1, 2011, had been released by the Commission on November 14, 2012. Building on the most recent ownership data then available, the Commission then purchased viewing data and programming data from The Nielsen Company and Tribune Media Service (now Gracenote), respectively, that matched the 2011 time period dictated by the ownership information. In order for the dataset to be consistent and ensure the quality and integrity of the results, it was critical that the time period covered by the various data sources match. Although newer data on ownership, viewing, and programming became available over the course of the study, any attempt to substitute additional data would have resulted in significant additional expense and delays due to the extremely intricate and complicated job of matching disparate data sets not designed to match one another.

[62] *See* Media Vista Hispanic TV Study Comments at 2, 4-5. Media Vista owns and operates LPTV stations in the Naples-Ft. Myers Nielsen DMA and the Minneapolis-St. Paul Nielsen DMA and the Kansas City Nielsen DMA. *Id.* at 2.

[63] *Id.* at 6-8.

ownership data. This was done in order to align station ownership information with available Nielsen ratings data from the November 2011 and May 2012 sweeps periods. There was no decision to exclude any particular class or type of television stations; rather, Nielsen ratings data is not available for all stations. For the period examined in the *Hispanic Television Study*, the stations identified by Media Vista did not have reportable Nielsen data and were thus excluded from the data set. And while the lack of Nielsen data precluded inclusion of the stations in this particular study, the Form 323 ownership data for these (and all) stations helps to inform the Commission's and the public's understanding of the ownership characteristics of the broadcast industry and may help inform subsequent efforts to study issues of ownership and programming.

2. Continuing Improvements to Data Collection

256. As explained in the *FNPRM*, the Commission actively has sought to improve its collection and analysis of broadcast ownership information.[64] We noted that the Commission had already implemented major changes to its Form 323 biennial ownership reports to improve the reliability and utility of the data reported on the form, including data regarding minority and female ownership of broadcast stations.[65] We acknowledged that previous shortcomings in the Form 323 data had impaired the ability of the Commission and interested parties to study and analyze issues related to minority and female ownership. However, we noted that the Commission had responded to Form 323-related criticisms and suggestions by substantially revising the form and making certain data from the 2009 biennial Form 323 report filings, as well as previous data collected by the Commission and third parties, available to the authors of the 11 peer-reviewed media ownership studies that are included in the record of this proceeding.[66] And as discussed in more detail below, the Commission recently adopted additional, significant improvements to its broadcast ownership data collection, including revisions to Form 323-E for noncommercial educational broadcast stations that will enhance the completeness of the data collection, promote data integrity, and ensure that the data are electronically readable and aggregable.[67]

257. In response to the *FNPRM*, several commenters take issue with the Form 323 collection process, including the response rate of respondents, completeness of the data collection (e.g., no requirement that noncommercial educational (NCE) broadcast stations provide race, ethnicity, and gender information), and analysis and presentation of the data.[68] For example, while acknowledging that the response rates have improved since 2009, multiple commenters raise concerns about the response rates for particular services, such as AM radio and LPTV stations.[69] These commenters urge the Commission to take steps to improve the response rates, including the use of enforcement actions against stations that fail to file.[70] UCC et al. urge the Commission to complete its initiatives to improve the completeness and

[64] *FNPRM*, 29 FCC Rcd at 4481-87, paras. 249-62.

[65] *Id.* at 4481, para. 249.

[66] *Id.* at 4482-84, paras. 252-53. These efforts are discussed below, as well as more recent actions that the Commission has taken to improve its broadcast ownership data collection. *See infra* paras. 259-270.

[67] *See infra* paras. 261-264.

[68] *See, e.g.,* Free Press FNPRM Comments at 16-17; Howard Media Group/Carolyn Byerly FNPRM Comments at 1-2, 4-5; Leadership Conference on Civil and Human Rights FNPRM Comments at 2 (LCCHR); UCC et al. FNPRM Comments at 16-23; Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Secretary, FCC, at 1 & Attach., Ownership diversity Data Form 323 Action Items for 2015, and Attach., Summary of Studies Recommended by UCC OC Inc. (filed Dec. 11, 2014) (UCC et al. Dec. 11, 2014 *Ex Parte* Letter); Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Nov. 25, 2014).

[69] *See* Howard Media Group/Carolyn Byerly FNPRM Comments at 5-6; LCCHR FNPRM Comments at 2; UCC et al. FNPRM Comments at 17-18. UCC et al. also suggests that filing rates for FM stations were lower than they should have been in 2013. UCC et al. FNPRM Comments at 17-18.

[70] *See, e.g.*, Howard Media Group/Carolyn Byerly FNPRM Comments at 5-6; UCC et al. FNPRM Comments at 18; UCC et al. Dec. 11, 2014 *Ex Parte* Letter, Attach., Ownership Diversity Data Form 323 Action Items for 2015, and Attach., Summary of Studies Recommended by UCC OC Inc.

accuracy of its Form 323 data collection.[71] WGAW asks the Commission to make various changes to the Consolidated Database System (CDBS) that, according to WGAW, would promote transparency.[72]

258. Commenters also restate earlier concerns that the reports that Commission staff issue summarizing 323 data present the Commission's ownership data in a format that commenters assert is difficult for researchers to use and with no analysis.[73] In addition, some commenters criticize the 323 Reports for failing to provide certain information about minority owners, such as call signs, broadcast location, and market information.[74] According to UCC et al., this information is essential for commenters to analyze how amending or retaining the Commission's media ownership limits would affect minority and female ownership.[75] As discussed below, we have taken significant steps to address these concerns.

259. *Collection of Biennial Ownership Data.* As discussed above, the Commission has

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[71] UCC et al. FNPRM Comments at 18-19; Letter from Andrew Jay Schwartzman, Counsel to UCC et al., to Marlene H. Dortch, Secretary, FCC, at 2 (filed Feb. 5, 2015) (UCC et al. Feb. 5, 2015 *Ex Parte* Letter); UCC et al. Dec. 11, 2014 *Ex Parte* Letter at 1 & Attach., Ownership Diversity Data Form 323 Action Items for 2015, and Attach., Summary of Studies Recommended by UCC OC Inc.; *see also* Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 1 (filed May 6, 2016) (urging the Commission "to remedy the errors of past quadrennial reviews, particularly with respect to the adequacy of data under consideration"); Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Mar. 24, 2016) (urging the Commission to "collect high-quality data and conduct appropriate studies to support action [to promote minority and female ownership of broadcast stations]"); Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Oct. 30, 2014) (noting "the importance of FCC improvements to [broadcast ownership] data"). In addition, UCC et al. urge the Commission to collect additional information to assess the impact of retaining or amending the media ownership limits on minority- and women-owned businesses, such as information about television SSAs, local news service agreements, and other joint ventures that station owners may be using to circumvent the local television rule. *Id.* at 24-25. As discussed below, we are adopting a definition of SSAs and requiring the disclosure of SSAs involving commercial television stations. *See supra* Section V.

[72] WGAW FNPRM Comments at 15 ("[T]he Commission should update [CDBS] to include all information collected in the station file and in the license application and make such data available in exportable file formats."); *id.* ("Information on SSAs and JSAs should be included in the CDBS and summarized in the Commission's annual video competition report."). These proposed changes, however, do not appear to improve the Commission's data collection efforts for diversity purposes, or otherwise promote ownership diversity, and are therefore outside the scope of this proceeding. In addition, we believe that the WGAW proposal would impose significant costs on the Commission that appear to exceed any possible benefits at this time. Prior to 2016, the Commission required only broadcast TV stations to upload public file documents to a central, FCC-hosted online database. The Commission recently expanded this obligation to broadcast radio stations and other entities, and at this time only certain radio stations are required to upload public file materials to the Commission's online public file database. Other radio stations are not required to upload their public file materials to the Commission's online database until March 2018. *See Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report and Order, 31 FCC Rcd 526 (2016). The FCC-hosted online public file is a separate database from CDBS, where the Commission currently receives and stores data from broadcast ownership filings. *See* FCC, *TV Station Profiles & Public Inspection Files*, https://stations.fcc.gov/ (last visited June 17, 2016); FCC, *CDBS Public Access*, http://licensing.fcc.gov/prod/cdbs/pubacc/prod/ cdbs_pa.htm (last visited June 17, 2016). However, as discussed below, complete raw data from the Commission's broadcast ownership filings, as well as CDBS public database files, are available for download on the Commission's website, and it is updated on a daily basis to account for new and amended filings. Researchers and other parties currently can download the data files from the Commission's website at any time and study, search, and manipulate the data in a wide variety of ways. *See infra* paras. 267-268. This suggests that developing an extensive catalog of complex query options within the public search functionality of our electronic filing system would impose unnecessary costs on the Commission. Also, we note that the Commission decided in the *Form 323/CORES Report and Order* to add a new positional interest category to Form 323 for parties that are attributable by virtue of a JSA or LMA. 31 FCC Rcd at 439, para. 84.

[73] *See* Free Press FNPRM Comments at 16; Howard Media Group/Carolyn Byerly FNPRM Comments at 1-4; LCCHR FNPRM Comments at 2; UCC et al. FNPRM Comments at 20; UCC et al. Dec. 11, 2014 *Ex Parte* Letter, Attach., Summary of Studies Recommended by UCC OC Inc. Howard Media Group/Carolyn Byerly also argue that

improved its collection and analysis of broadcast ownership information. Indeed, our recent efforts have largely addressed the concerns expressed by certain commenters. The Commission has been engaged in a sustained effort to improve the quality, utility, and reliability of broadcast ownership data it collects on FCC Forms 323 and 323-E. In 2009, the Commission substantially revised Form 323 to facilitate longitudinal comparative studies of broadcast station ownership.[76] The changes also addressed Form 323-related criticisms and suggestions from the United States Government Accountability Office (GAO)[77] and from researchers who had attempted to use the data submitted on previous versions of Form 323 to analyze broadcast ownership issues in the 2006 Quadrennial Review proceeding.[78]

260. To improve the quality of its broadcast ownership data, the Commission adopted several significant changes to Form 323 in the *323 Order*. The Commission established a new, machine-readable Form 323 that enabled for the first time electronic analysis of the reports filed by television and radio broadcasters. The Commission also set a uniform filing deadline of November 1 for biennial ownership reports on Form 323 and required filers to report their ownership interests as they exist on October 1 of the filing year.[79] These uniform dates make it possible to discern statistically valid trends in minority and female broadcast ownership over time, which was not possible using the previous rolling filing deadlines, and to ensure the timely collection of the data.[80] The Commission also expanded the requirement to file Form 323 biennially to include sole proprietors and partnerships of natural persons, as well as low power television (LPTV) and Class A television licensees.[81]

261. Most recently, the Commission in 2016 adopted a number of additional enhancements to

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the ethnic and racial categories used in the *2014 323 Report* create the impression that Hispanics/Latinos are not a minority group, which Howard Media Group/Carolyn Byerly believe makes the ethnic and racial categories "vague and confusing." *Id.* at 4-5. According to Howard Media Group/Carolyn Byerly, this obfuscates the ownership data and renders the *2014 323 Report* inaccurate and unreliable. *Id.* The gender, ethnicity, and race categories identified on Form 323 follow the guidance provided by the Office of Management and Budget. *See 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report on Ownership of Commercial Broadcast Stations, 29 FCC Rcd 7835, 7837, n.9 (MB 2014) (*2014 323 Report*) (citing Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782 (Oct. 30, 1997) (Race and Ethnicity Data Standards)); *2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report on Ownership of Commercial Broadcast Stations, 27 FCC Rcd 13814, 13816, n.5 (MB 2012) (*2012 323 Report*) (citing Race and Ethnicity Data Standards).

[74] Asian Americans Advancing Justice FNPRM Comments at 16-17 (AAJC); UCC et al. FNPRM Comments at 20.

[75] UCC et al. FNPRM Comments at 20.

[76] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896, 5902-04, paras. 11-13 (2009) (*323 Order and Fourth Diversity FNPRM*), *recon. granted in part*, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009) (*323 MO&O and Fifth Diversity FNPRM*).

[77] U.S. Gov't Accountability Office, GAO-08-383, Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and is Difficult to Assess (2008) (GAO Report). GAO cited several shortcomings with the Commission's data collection process: (1) exemptions from the biennial filing requirement for certain types of broadcast stations; (2) inadequate data quality procedures; and (3) problems with storage and retrieval. *Id.* at 5; *see also 323 Order*, 24 FCC Rcd at 5901, para. 10; *Promoting Diversification of Ownership in the Broadcasting Services*, Sixth Further Notice of Proposed Rulemaking, 28 FCC Rcd 461, 463, para. 4 (2013) (*Sixth Diversity FNPRM*).

[78] *See 323 Order*, 24 FCC Rcd at 5900-01, para. 7 & n.18.

[79] 47 CFR § 73.3615(a). In addition to the biennial filing of Form 323, licensees and permittees are required to file a non-biennial Form 323 (1) within 30 days of a grant of an application for original construction permit, (2) on the date the permittee applies for a station license, and (3) within 30 days of the consummation of authorized assignments or transfers of control of permits and licenses. *Id.* § 73.3615(b)-(c).

[80] *323 Order*, 24 FCC Rcd at 5908-09, para. 22; *Sixth Diversity FNPRM*, 28 FCC Rcd at 463, para. 4.

its broadcast ownership data collection in order to further improve the comprehensiveness and reliability of the data. These recent enhancements will enable more effective analysis of ownership trends in support of the Commission's policy initiatives. In particular, the Commission implemented a Restricted Use FCC Registration Number (Restricted Use FRN)—a new identifier within the Commission's Registration System (CORES)—that will allow for unique identification of individuals listed on broadcast ownership reports, without necessitating the disclosure to the Commission of individuals' full Social Security Numbers.[82] The Commission also eliminated the availability of the interim Special Use FRN for individuals reported on broadcast ownership reports, except in certain limited circumstances. Because the Special Use FRN offers no way for the Commission to identify individuals reliably, restricting its use will improve the integrity and utility of the Commission's broadcast ownership data.[83]

262. In addition, the Commission prescribed revisions to Form 323-E for NCE broadcast stations that will conform the reporting requirements for NCE stations more closely to those for commercial stations filing Form 323. Specifically, the Commission revised Form 323-E to collect race, gender, and ethnicity information for attributable interest holders; to require that CORES FRNs or Restricted Use FRNs be used; and to conform the biennial filing deadline for NCE station ownership reports to the biennial filing deadline for commercial station ownership reports.[84] These revisions to Form 323-E will enhance the completeness of the Commission's broadcast ownership data collection, promote data integrity, and ensure that the data are electronically readable and aggregable. These revisions address criticisms that the Commission's race, ethnicity, and gender data were incomplete because the Commission had not previously collected such data relating to NCE stations.[85]

263. The Commission also adopted a number of other changes to Forms 323 and 323-E that will streamline the filing process and improve data quality.[86] These changes are intended to provide filers with additional time for completing and submitting biennial ownership reports, while reducing the amount of time and resources required to address the mechanical aspects of the ownership report preparation and filing process, thereby allowing parties to spend more time focused on the accuracy and completeness of the ownership information they submit to the Commission.

264. Together, the further enhancements that we adopted in the *Form 323/CORES Report and Order* will enable the Commission to obtain data providing a more useful, accurate, and thorough picture of minority and female broadcast station ownership, while reducing filing burdens. These improvements also address the Third Circuit's directive that the Commission obtain more and better data concerning broadcast ownership to support its rulemaking decisions. Ultimately, we believe that these actions will assist efforts to study and analyze issues related to minority and female ownership, by both the Commission and third parties. And as explained in the following discussion, the Commission has also taken a number of other steps to improve its collection of ownership data.

265. *Improving Response Rates and Data Quality*. In addition to substantially revising Forms 323 and 323-E, the Commission has made ongoing outreach efforts to assist filers in an effort to improve response rates and to reduce common filing errors. Prior to the 2011, 2013, and 2015 biennial filing periods for Form 323, the Media Bureau released public notices to remind licensees of commercial AM, FM, TV, LPTV, and Class A television stations, as well as all entities with attributable interests in such

[81] 47 CFR § 73.3615(a); *see also 323 Order*, 24 FCC Rcd at 5904-05, paras. 14-16; *Sixth Diversity FNPRM*, 28 FCC Rcd at 463-64, para. 4.

[82] *Promoting Diversification of Ownership in the Broadcasting Services et al.*, Report and Order, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 398, 412-20, paras. 25-42 (2016) (*Form 323/CORES Report and Order*). Four parties have filed petitions for reconsideration of the *Form 323/CORES Report and Order*. *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 81 Fed. Reg. 31223 (May 18, 2016).

[83] *Form 323/CORES Report and Order*, 31 FCC Rcd at 413, para. 29.

[84] *Id.* at 420-28, 432-33, paras. 43-55, 64-67.

[85] *See, e.g.*, UCC et al. FNPRM Comments at 15.

[86] *Form 323/CORES Report and Order*, 31 FCC Rcd at 429-39, paras. 59-84.

stations, of their obligation to file a biennial ownership report.[87] To assist both novice and experienced filers, the Bureau has hosted information sessions regarding the filing of biennial ownership reports on Form 323. During the most recent session, which was held prior to the start of the 2015 biennial filing window, Bureau staff presented an overview of the form, conducted a filing demonstration, discussed common filing mistakes, and responded to questions from the public.[88] The Commission has made a video recording of this information session available on its website to assist filers.[89]

266. In addition to these efforts, the Media Bureau has established several online resources for filers. Those resources include a dedicated Form 323 webpage containing links to notices and other documents regarding Form 323,[90] a Frequently Asked Questions webpage providing useful information about the form and its electronic filing capabilities, and a webpage identifying some of the most common filing errors and ways to avoid them, which Bureau staff compiled based on experience during previous biennial filing periods. At Form323@fcc.gov, Bureau staff also respond to inquiries received from filers (e.g., licensees and attributable entities) and the public regarding the filing of commercial biennial ownership reports. We believe these ongoing outreach efforts will continue to further the Commission's objective of improving its broadcast ownership data collection, and we anticipate similar outreach efforts with respect to the modified Forms 323 and 323-E, as filers transition to the new forms and filing procedures.

267. *Analysis of Ownership Data*. In order to assist parties in their ability to access and analyze the ownership data, the Commission has ensured that the data submitted on Form 323 are incorporated into a relational database, the most common database format, which is standard for large, complex, interrelated datasets. Complete raw data from the Commission's broadcast ownership filings, both current and historical, are available for download from the Commission's website, and the data are updated on a daily basis to account for new and amended filings.[91] Researchers and other parties may download the data files from the Commission's website at any time and study, search, and manipulate the data in a wide variety of ways. The Commission has made explanatory documents publicly available and easy to find. Also, in response to requests from outside parties, the Commission now provides spreadsheets that contain additional ownership data, such as call signs, broadcast location, and market information. These spreadsheets are released with the 323 Reports to help present a broader picture of the biennial Form 323 data.

268. In addition, the Media Bureau hosted an all-day public workshop in September 2015 to assist individuals and organizations that wish to use and study the large amount of broadcast ownership data that is available to the public on the Commission's website.[92] The workshop addressed a number of topics concerning access to, and use of, the Commission's commercial broadcast ownership data, including relevant data that the Commission collects, how members of the public can access those data,

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[87] We note that in instances where a station fails to file a biennial ownership report as required by the Commission's rules, the Commission can use its enforcement authority to impose a forfeiture on the licensee of the station. 47 U.S.C. § 503(b). Enforcement decisions are made on a case-by-case basis based on the facts and circumstances of each unique case before the Commission.

[88] *Media Bureau Announces Biennial Form 323 Information Session*, Public Notice, 30 FCC Rcd 8455 (Aug. 20, 2015). The filing window for the 2015 Form 323 biennial ownership report filings closed on December 2, 2015. Commission staff is currently compiling a report based on those filings, and we expect that the forthcoming report will help inform future Commission proceedings.

[89] The video recording is available at https://www.fcc.gov/news-events/events/2015/09/biennial-form-323-information-session.

[90] The website is available at https://www.fcc.gov/media/ownership-report-commercial-broadcast-station-form-323.

[91] *See* FCC, *CDBS Database Public Files*, https://www.fcc.gov/media/radio/cdbs-database-public-files (last visited June 17, 2016); FCC, *Readme file for CDBS Public Files (Broadcast Database)* (Nov. 7, 2014), https://transition.fcc.gov/ftp/Bureaus/MB/Databases/cdbs/_readme.html.

[92] *Media Bureau Announces Workshop on Access to, and Use of, the FCC's Form 323 Data*, Public Notice, 30 FCC Rcd 8204 (MB 2015).

and mechanisms for querying, studying, and visualizing the data, including in combination with data available from non-FCC sources. The workshop, a video of which is available online, provides researchers with the tools and understanding to electronically search, aggregate, and cross reference the data in order to prepare their own analysis.[93]

269. We reiterate that the Commission does not consider the 323 Reports to be studies that would help support the adoption of race- or gender-based preferences or policies—indeed, they are not studies at all. These Reports, and the accompanying spreadsheets, contain valuable data about minority and female ownership of broadcast stations. The Reports aggregate the data and are not in and of themselves a study of ownership information. The Commission has used the data from the *2012* and *2014 323 Reports* to inform its analyses in this proceeding.[94] In addition, ownership data from Form 323 filings have been incorporated into multiple studies. As noted above, seven of the 11 peer-reviewed media ownership studies in the record as of the date of the *FNPRM* incorporated the 2009 Form 323 data, as well as previous data collected by the Commission and third parties.[95] These studies examine issues such as media quality, innovation, viewpoint diversity, local information programming, the provision of programming to minority audiences, and local television news.[96] These studies have been discussed extensively in the record, both in the context of individual media ownership rules and in the Commission's response to the remand issues from *Prometheus II*. We also note that the Hispanic Television Study included 2011 Form 323 data. The study is the Commission's first systematic examination of the Hispanic television marketplace and is one of the first to incorporate comprehensive data from the recently improved 323 ownership form.

270. The Commission's improved ownership data are already contributing to meaningful analysis and studies regarding media ownership and diversity policies. We are hopeful that interested parties will use the data to conduct further studies and analyses—particularly with respect to trends concerning broadcast station ownership by minorities and women—endeavors that should be aided by the Commission's research workshop, discussed above.

B. Remand Review of the Revenue-Based Eligible Entity Standard

1. Background

271. In the *NPRM* the Commission sought comment on a number of actions it could take with respect to the remanded eligible entity definition, including the possibility of reinstating the revenue-based definition to support policy objectives other than increased minority and female ownership of broadcast stations.[97] In particular, the Commission asked whether re-adoption of the revenue-based standard would serve the Commission's traditional goals of fostering viewpoint diversity, localism, and competition by enhancing opportunities in broadcasting for small businesses and new entrants.[98] Recognizing the Third Circuit's apparent skepticism that the Commission would be able to demonstrate on remand that the revenue-based eligible entity standard promotes increased ownership of broadcast stations by minorities and women, the Commission also asked commenters to supply any available evidence that would show a stronger connection between the revenue-based eligible entity definition and our goal of increasing minority and female ownership of broadcast stations.[99]

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[93] A video of the workshop is available on the Commission's website at https://www.fcc.gov/newsevents/events/2015/09/form-323-data-workshop.

[94] *See, e.g.*, *supra* paras. 77, 126 (using ownership data collected through 2013 to examine minority ownership trends following relaxation of the Local Television Ownership Rule and the Local Radio Ownership Rule).

[95] *FNPRM*, 29 FCC Rcd at 4483, para. 253.

[96] *Id.*

[97] *NPRM*, 26 FCC Rcd at 17550-51, paras. 159-62.

[98] *Id.* at 17550-51, paras. 160-61.

[99] *Id.* at 17550, para. 160.

272. The Commission adopted the revenue-based eligible entity definition in the *2002 Biennial Review Order* as an exception to the prohibition on the transfer of grandfathered station combinations that violated the local radio ownership limits.[100] The Commission adopted this flexible transfer policy to promote diversity of ownership in broadcasting by facilitating new entry by and growth of small businesses in the broadcast industry.[101] Thereafter, in the *Diversity Order*, the Commission concluded that additional uses of the eligible entity definition would advance its objectives of promoting ownership diversity by facilitating greater small business participation in the broadcast industry.[102] The Commission stated at that time that the adoption of new measures relying on this definition would "be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including minorities and women."[103]

273. In *Prometheus II*, the Third Circuit vacated and remanded each of the measures adopted in the *Diversity Order* that incorporated the eligible entity definition.[104] The court held that the Commission failed to show that measures based on the eligible entity definition "will enhance significantly minority and female ownership," which it found was a stated goal of the rulemaking proceeding culminating in the *Diversity Order.*[105] The court further observed that, in discussing its decision to adopt the eligible entity definition, the Commission had referred "only to 'small businesses,' and occasionally 'new entrants,' as expected beneficiaries."[106] Between 2002 and the Third Circuit's remand of the measures relying on the eligible entity definition in 2011, the Commission had used the revenue-based standard to support a range of measures intended to encourage ownership diversity.

274. In response to the *NPRM*, several commenters, including the Alliance for Women in Media (AWM) and NAB, supported reinstatement of the revenue-based eligible entity definition and the measures to which it previously applied as a means of enhancing ownership opportunities for small businesses and new entrants generally, regardless of race or gender.[107] In its comments, NAB noted that reinstating the pre-existing eligible entity standard and the measures that relied on that standard would further the Commission's statutory goal of eliminating market barriers for entrepreneurs and small businesses.[108] UCC et al. recommended that, instead of abandoning or repurposing the revenue-based definition, the Commission should assess whether the standard has had any measurable impact on minority and female ownership of broadcast stations.[109] In contrast, other commenters, such as DCS,

[100] *2002 Biennial Review Order*, 18 FCC Rcd at 13809-12, paras. 487-90. The exception permitted broadcast licensees to assign or transfer control of a grandfathered combination to an eligible entity, which the Commission defined as any entity that would qualify as a small business consistent with revenue-based standards for its industry grouping, as established by the SBA. The exception also allowed eligible entities to sell existing grandfathered combinations intact to new owners, subject to limited restrictions. *Id.* at 13810-12, paras. 488-90.

[101] *Id.* at 13810-11, para. 488.

[102] *Diversity Order*, 23 FCC Rcd at 5926, para. 7. The Commission adopted the following measures that relied on the eligible entity definition: (1) Revision of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rule; (3) Distress Sale Policy; (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity; (5) Extension of Divestiture Deadline in Certain Mergers; and (6) Assignment or Transfer of Grandfathered Radio Station Combinations. *Id*. at 5928-45, paras. 10-61.

[103] *Id.* at 5927, para. 9.

[104] *Prometheus II*, 652 F.3d at 437.

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

[106] *Id.* at 470.

[107] AWM NPRM Comments at 6-7; NAB NPRM Comments at 55-56; NAB NPRM Reply at 33.

[108] NAB NPRM Comments at 56 (citing 47 U.S.C. § 257(a)); NAB NPRM Reply at 33 (citing 47 U.S.C. § 257(a)).

[109] UCC. et al. NPRM Comments at 32-33.

argued that the pre-existing eligible entity definition should not be reinstated because it had no measurable impact on minority ownership.[110] According to DCS, no meaningful impact on minority ownership would be achieved by relying on a definition based solely upon the revenue limits that the SBA has established for small businesses.[111]

275. In the *FNPRM*, we tentatively concluded that reinstating the revenue-based eligible entity standard would serve the public interest by enabling more small businesses to participate in the broadcast industry, thereby encouraging innovation and expanding ownership and viewpoint diversity.[112] We tentatively concluded that such a standard is an appropriate and worthwhile approach for expanding ownership diversity regardless of whether the standard was also effective in promoting ownership of broadcast stations specifically by women and minorities.[113] Noting that the Commission has previously applied SBA standards to define eligible entities, we proposed to define an eligible entity as any entity—commercial or noncommercial—that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue.[114] We proposed to require an eligible entity to satisfy one of several control tests to ensure that ultimate control rests in an entity that satisfies the revenue criteria.[115] Further, we tentatively concluded that, if we chose to reinstate the eligible entity definition, it would be appropriate to re-adopt each of the previous measures that relied on this definition prior to remand in *Prometheus II*. We noted in the *FNPRM* that our records indicated that a significant number of applicants and permittees had previously availed themselves of one or more of those measures.[116]

276. Although no commenters challenge the *FNPRM*'s tentative conclusion that reinstating the revenue-based eligible entity standard will promote small business participation in broadcasting, some commenters assert that the standard has not been shown to increase ownership of broadcast stations by minorities and women specifically—something that the *FNPRM* explicitly acknowledges. MMTC states that the *FNPRM* fails to include any meaningful proposals to advance minority ownership and does not promote the creation of a meaningful eligible entities program pursuant to the Third Circuit's remand.[117] Rather, MMTC argues, the *FNPRM* reverts to a flawed eligible entities definition based on SBA size standards with little regard for whether this approach will promote minority media ownership effectively.[118] UCC et al. state that the Commission, by proposing to re-adopt a revenue-based eligible entity definition, fails to act on their prior suggestion that the Commission assess whether a small business definition had any impact on ownership by minorities and women.[119] UCC et al. acknowledge that in the *FNPRM* the Commission cited data to support its tentative conclusion that the revenue-based eligible entity standard promotes viewpoint diversity, but those commenters suggest that the Commission

[110] DCS NPRM Comments at 19. For this proposition, DCS quotes *Prometheus II*, which stated that the revenue-based definition does not increase minority ownership because "minorities comprise 8.5 percent of commercial radio station owners that qualify as small businesses, but [only] 7.78 percent of the commercial radio industry as a whole." *Id.* (quoting *Prometheus II*, 652 F.3d at 470).

[111] *Id.*

[112] *FNPRM*, 29 FCC Rcd at 4489, para. 267.

[113] *Id.*

[114] *Id.* at 4491, para. 272.

[115] *Id.* at 4491-92, para. 272. Specifically, we proposed that the eligible entity would have to hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interest; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company. *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6 n.14 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13811, para. 489).

[116] *FNPRM*, 29 FCC Rcd at 4489-90, paras. 269-71.

[117] MMTC FNPRM Comments at 4-5.

[118] *Id.*

should have also analyzed whether any entities controlled by women or minorities were among those that benefited from the policies relying on the eligible entity standard.[120] According to UCC et al., the fact that the Commission did not cite evidence demonstrating that the revenue-based eligible entity standard will specifically promote minority and female ownership of broadcast stations, combined with the low number of stations controlled by minorities or women while the revenue-based standard was in effect, confirms that the revenue-based standard lacks a sufficient analytical connection to promoting broadcast ownership by minorities and women.[121]

277. Native Public Media and the National Congress of American Indians (NPM/NCAI) agree with those commenters who oppose the tentative conclusion that re-adopting the previous eligible entity definition is an appropriate measure to further diversity in response to the court's remand.[122] NPM/NCAI argue that, in order to advance ownership diversity, the Commission could expand the definition of eligible entity to include Tribes and Tribal applicants until such time as sufficient evidence is developed to support a race-conscious eligible entity definition.[123] NPM/NCAI advocate this expansion of the eligible entity definition as an interim step that the Commission could take now while it conducts further studies on which race- and gender-specific actions could be taken.[124]

278. Although they object to the reinstatement of the revenue-based eligible entity standard, DCS urge the Commission not to abandon the policy of allowing the transfer of grandfathered radio combinations under certain conditions or the policy of affording eligible entities that acquire broadcast construction permits additional time to construct their facilities under certain circumstances.[125] Further, DCS and MMTC urge the Commission to broaden the construction deadline extension policy to include construction permits for major modifications of authorized broadcast facilities.[126] NAB similarly supports the policy regarding the transfer of grandfathered radio station combinations, as well as other race-neutral, incentive-based approaches that reduce barriers to entry, such as the reinstatement of the higher Equity Debt Plus (EDP) attribution threshold for eligible entities.[127] However, UCC et al. argue that without an alternative eligible entity definition that is reasonably and explicitly related to the specific goal of increasing ownership of broadcast stations by women and minorities, re-adopting the higher EDP

[119] UCC et al. FNPRM Comments at 15; UCC et al. FNPRM Reply at 23-24. UCC et al. state that the Commission does not analyze the race, gender, or ethnicity of any eligible entities that benefited from the transfer of construction permits policies even though the Commission has collected race and gender data at least since 2009. UCC et al. FNPRM Comments at 15. And, even though a majority (67 percent) of the eligible entities that utilized the construction permit transfer extension policy are noncommercial educational stations (NCEs), the Commission has never acted on its proposal to collect race, gender, and ethnicity data for NCEs, state UCC et al. UCC et al. FNPRM Comments at 15. UCC et al. FNPRM Comments at 15; UCC et al. FNPRM Reply at 23-24. As noted above, however, the Commission recently adopted revisions to Form 323-E to collect race, gender, and ethnicity data for NCE stations as part of the biennial ownership report filings. *Supra* Section 2.

[120] UCC et al. FNPRM Comments at 15.

[121] *Id*. at 16. UCC et al. FNPRM Comments at 15; UCC et al. FNPRM Reply at 23-24.

[122] Native Public Media and the National Congress of American Indians FNPRM Reply at 4-6 (NPM/NCAI).

[123] NPM/NCAI FNPRM Reply at 6-7. Specifically, NPM/NCAI request that the Commission alter the definition of eligible entities to include "any Tribe or Tribal applicant as defined by 47 CFR § 73.7000." *Id.* at 7.

[124] NPM/NCAI FNPRM Reply at 7. In support of this approach, NPM/NCAI state that the Commission has previously found that a classification based on Tribes or Tribal members would not trigger strict scrutiny. *Id*. According to NPM/NCAI, Tribal radio plays a crucial role in Native communities, because Tribal lands often do not have access to reliable cell service or broadband Internet. Consequently, NPM/NCAI assert that some Native communities depend on radio to provide not only cultural information but also news and public safety and health announcements. *Id.* at 8. We address this proposal below. *See infra* note Error: Reference source not found.

[125] DCS NPRM Comments at 14-15, 19, 31.

[126] MMTC FNPRM Comments at 8-9; DCS NPRM Comments at 31; DCS NPRM Supplemental Comments at 38-42.

[127] NAB FNPRM Comments at 92-94.

attribution threshold and the policy regarding the transfer of grandfathered radio combinations will not promote minority and female ownership.[128]

2. Discussion

279. We conclude that the Commission's prior revenue-based eligible entity definition should be reinstated and applied to the regulatory policies set forth in the *Diversity Order*. We find that reinstating the eligible entity definition and the measures to which it applied will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. As discussed below, we find that the record supports these conclusions. Accordingly, we reinstate our previous revenue-based eligible entity definition and the measures adopted in the *Diversity Order* that were vacated and remanded by the Third Circuit in *Prometheus II*.

280. We conclude that the revenue-based eligible entity standard is a reasonable and effective means of promoting broadcast station ownership by small businesses and potential new entrants. We continue to believe that small business applicants and licensees often have financial and operational needs that are distinct from those of larger broadcasters, and that they require greater flexibility with regard to licensing, construction, auctions, and transactions. By easing certain regulations for small business applicants and licensees, we believe we will increase station ownership opportunities for small businesses and new entrants, to the benefit of the public interest.

281. Moreover, we conclude that our traditional policy objectives will be served by enhancing opportunities for small business participation in the broadcast industry via the eligible entity standard. We continue to believe that enabling more small businesses to participate in the broadcast industry will encourage innovation and promote competition and viewpoint diversity. As the Commission has noted previously, greater small business participation in communications markets "will expand the pool of potential competitors" and "should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets."[129] We continue to believe that this is true. Furthermore, increasing opportunities for small businesses to participate in the broadcast industry will foster viewpoint diversity by facilitating the dissemination of broadcast licenses to a wider variety of applicants than would otherwise be the case. Competition and viewpoint diversity are two primary policy objectives that have traditionally guided the Commission's analysis of broadcast ownership issues.

282. The record supports these conclusions. Commenters, including AWM and NAB, agree that re-adopting the revenue-based eligible entity standard is an appropriate means of enhancing ownership opportunities for small businesses and new entrants.[130] Although UCC et al. criticize our proposal to reinstate the revenue-based standard, they also acknowledge the data we cited in the *FNPRM* to support our conclusion that the standard promotes viewpoint diversity.[131] UCC et al. and other commenters that criticize the revenue-based eligible entity standard do so based on their view that the standard is not an effective means of increasing ownership specifically by women and minorities.[132]

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[128] UCC et al. FNPRM Reply at 22-25.

[129] *2002 Biennial Review Order*, 18 FCC Rcd at 13637, para. 51.

[130] AWM NPRM Comments at 6-7; NAB NPRM Comments at 53, 55-56; NAB NPRM Reply at 32-33; *see also* NAB FNPRM Comments at 91-92 (supporting incentives-based measures that reduce barriers to entry into broadcasting for all small businesses).

[131] UCC et al. FNPRM Comments at 15.

[132] *See* MMTC FNPRM Comments at 4; UCC et al. FNPRM Comments at 15-16; UCC et al. FNPRM Reply at 23-24; NPM/NCAI FNPRM Reply at 6; DCS NPRM Comments at 19. As noted above, NPM/NCAI argue that, pending further action on a race- and gender-conscious eligible entity standard, the Commission "can take another significant step towards overcoming th[e] underrepresentation [of Native Americans in broadcast station ownership] by expanding the definition of eligible entity to include Native Nations." *See* NPM/NCAI FNPRM Reply at 6-8. As discussed above, we are re-instating the revenue-based eligible entity standard to promote broadcast station ownership by small businesses and new entrants. We do not believe it is necessary to expand our revenue-based eligible entity definition to include Tribes and Tribal Applicants in order to enable more small businesses to

However, this has no bearing on our conclusion that the standard will help promote small business and new entrant participation in the broadcast industry.

283. Our decision to reinstate the revenue-based eligible entity standard is also supported by the Commission's own records, which indicate that a significant number of broadcast licensees and permittees availed themselves of policies based on the revenue-based eligible entity standard between the implementation of that standard and its suspension following *Prometheus II.* One of those policies was to allow an eligible entity that acquired an expiring broadcast construction permit to obtain additional time to build out its facilities in certain circumstances.[133] In the *FNPRM*, we noted that many small businesses made use of this measure. Our records at the time indicated that Commission staff processed approximately 247 Form 314 construction permit assignment applications in which the assignee self-identified as an eligible entity during the period this measure was in use.[134] Those 247 initial applications resulted in the construction and operation of at least 132 new broadcast facilities.[135] A more recent review of our records indicates that nearly all of these stations remain on the air. Based on a recent staff review, of the 132 new stations that were built and commenced operation, 118 stations (approximately 89.4 percent) were still operating and an additional three eligible entities that previously were not licensed or had not built out their facilities had since been licensed.[136] In addition to the 247 Form 314 applications that sought Commission consent to the assignment of a construction permit to an eligible entity, our records indicate that during the relevant period Commission staff processed 21 Form 315 construction permit transfer of control applications in which the transferee self-identified as an eligible entity.[137] All but one of these facilities (95.2 percent) were constructed following approval of the transfer of control

participate in the broadcast industry. Moreover, as NPM/NCAI point out, the Commission has adopted measures in a separate proceeding that are intended to expand broadcast opportunities for Tribal Nations and Tribal entities. *Id.* at 6-7. To the extent that their proposal is intended to increase broadcast service to Tribal lands, we believe it is outside the scope of this quadrennial review proceeding. We note that, in the *Rural Radio* proceeding, the Commission adopted a Tribal Radio Priority in order to expand the number of radio stations owned or majority controlled by federally recognized American Indian Tribes and Alaska Native Villages, or Tribal consortia, broadcasting to Tribal lands. *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583 (2010); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (2011); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Third Report and Order, 26 FCC Rcd 17642 (2011).

[133] *See Diversity Order*, 23 FCC Rcd at 5930-31, paras. 15-16; *see also* 47 CFR § 73.3598(a) ("An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license.").

[134] *FNPRM*, 29 FCC Rcd at 4489-90, para. 269. FCC Form 314 requires that assignees in broadcast transactions indicate whether the assignee is an eligible entity as that term is defined in the *Diversity Order*. FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Section III – Assignee, Question 6(d), (e)(A)-(B), http://transition.fcc.gov/Forms/Form314/314.pdf. Specifically, the assignee must include a detailed showing demonstrating proof of status as an eligible entity.

[135] *FNPRM*, 29 FCC Rcd at 4489-90, para. 269. Eleven (4.5 percent) of the eligible entities were not yet licensed or had not built out the facilities specified on their construction permits, and at the time 104 of the construction permits held by eligible entities had been cancelled for various reasons. *Id.*

[136] Based on staff analysis of CDBS data as of August 25, 2015, the data reveal that 109 (90.1 percent) of these 121 stations are FM stations; 10 (8.3 percent) are AM stations; one (0.8 percent) is a digital TV station; and one (0.8 percent) is an FM translator station. Moreover, 82 (67.8 percent) of these stations are noncommercial educational (NCE) stations. We note that in the past NCE licensees have not been required to report information concerning the race, gender, or ethnicity of individuals who hold attributable interests in NCE stations. As discussed above, in January we updated our reporting requirements for NCE stations to more closely parallel the requirements for commercial broadcast stations, including by requiring that NCE licensees report race, gender, and ethnicity information for attributable interest holders in NCE stations. *Form 323/CORES Report and Order*.

and are now on the air.[138]

284. The data clearly suggest that providing additional time to construct broadcast facilities has facilitated market entry by small broadcasters. Further, we note that the data reflect the use of the prior eligible entity standard in a limited context and do not reflect the total number of applicants and permittees that benefited from all the various broadcast policies that relied on the revenue-based eligible entity standard. Even so, this information supports our conclusion that the revenue-based eligible entity standard has been used successfully by a significant number of small firms and has not only aided their entry, but also contributed to the sustained presence of small firms in broadcasting in furtherance of our public interest goals.

285. In addition to reinstating the revenue-based eligible entity standard, we believe it is in the public interest to apply the standard to the full range of construction, licensing, transaction, and auction measures to which it previously applied. AWM and NAB support reinstatement of these measures,[139] and DCS has urged the Commission to reinstate the measures concerning construction permit deadlines and transfers of grandfathered radio station combinations.[140] Commenters that have argued against reinstatement have done so based on whether the measures will specifically increase minority and female ownership of broadcast stations,[141] which again has no bearing on whether the measures will promote small business participation in the broadcast industry. Accordingly, the Commission hereby re-adopts each measure relying on this definition that was remanded in *Prometheus II*. Specifically, we reinstate the following measures: (1) Revision of Rules Regarding Construction Permit Deadlines;[142] (2) Modification of Attribution Rule;[143] (3) Distress Sale Policy;[144] (4) Duopoly Priority for Companies that Finance or

[137] Similar to Form 314, FCC Form 315 requires that transferees in broadcast transactions indicate whether the transferee is an eligible entity as that term is defined in the *Diversity Order*. FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, Section IV – Transferee(s), Question 8(d), (e)(A)-(B), https://transition.fcc.gov/Forms/Form315/315.pdf. The transferee must include a detailed showing demonstrating proof of status as an eligible entity.

[138] One of these 21 construction permits was cancelled. Of the 20 stations that have been built and are operating, 11 (55 percent) are FM stations; seven (35 percent) are AM stations; one (5 percent) is a low-power FM station; and one (5 percent) is a low-power TV station. All but one of these stations are commercial stations. FCC staff analysis of CDBS data as of August 25, 2015.

[139] AWM NPRM Comments at 6-7; NAB NPRM Comments at 53, 55-56; NAB NPRM Reply at 32-33.

[140] DCS NPRM Comments at 14-15, 31.

[141] *See, e.g.*, UCC et al. FNPRM Reply at 22-25.

[142] *Diversity Order*, 23 FCC Rcd at 5930, para. 15 (revising construction permit rules to allow the sale of an expiring construction permit to an eligible entity that pledges to build out the permit within the time remaining in the original construction permit or within 18 months, whichever period is greater); *see also* 47 CFR § 73.3598(a). In reinstating this measure, the Commission emphasizes that this exception to our strict broadcast station construction policy is limited to one 18-month extension based on one assignment to an eligible entity.

[143] *Diversity Order*, 23 FCC Rcd at 5936, para. 31 (relaxing the equity/debt plus (EDP) attribution standard for interest holders in eligible entities by "allow[ing] the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold set forth in [the EDP standard] without triggering attribution where such investment would enable an eligible entity to acquire a broadcast station provided (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity"); *see also* 47 CFR § 73.3555, Note 2(i)(2). In addition, pursuant to the new entrant bidding credits available under the Commission's broadcast auction rules, the modified EDP attribution standard was available to interest holders in eligible entities that are the winning bidders in broadcast auctions. *See* 47 CFR § 73.5008(c)(2). We also reinstate this application of the modified EDP standard.

[144] *Diversity Order*, 23 FCC Rcd at 5939, para. 39 (modifying the distress sale policy by allowing a licensee that has been designated for a revocation hearing or has a renewal application that has been designated for hearing on basic qualification issues to sell the station to an eligible entity prior to the hearing).

Incubate an Eligible Entity;[145] (5) Extension of Divestiture Deadline in Certain Mergers;[146] and (6) Assignment or Transfer of Grandfathered Radio Station Combinations.[147] Moreover, to ensure realization of our policy goals, in reviewing the sale of a permit to an eligible entity, we will assess the *bona fides* of both the arms-length structure of the transaction and the assignee's status as an eligible entity as proposed in the *FNPRM*.[148] In addition, we clarify that this exception to our broadcast station construction policy applies both to original construction permits for the construction of new stations and to construction permits for major modifications of authorized broadcast facilities.[149] We also lift any prior suspension of Commission rules implementing these measures and applying the eligible entity standard.[150]

286. Consistent with the Commission's pre-existing eligible entity definition, we define an eligible entity as any entity—commercial or noncommercial—that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue.[151] For all SBA programs, a radio or television station with no more than $38.5 million in annual revenue currently is considered a small business.[152] To determine qualification as a small business, the SBA considers the revenues of domestic and foreign affiliates, including the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations.[153] We will also require an eligible entity to satisfy one of several control tests to ensure that ultimate control rests in an entity that satisfies the revenue criteria. Specifically, the eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity

[145] *Id.* at 5943, para. 56 (giving an applicant for a duopoly that agrees to finance or incubate an eligible entity priority over other applicants in the event that competing duopoly applications simultaneously are filed in the same market).

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

[147] *Id.* at 5944-45, para. 61 (permitting the assignment or transfer of a grandfathered radio station combination intact to any buyer so long as the buyer files an application to assign the excess stations to an eligible entity or to an irrevocable divestiture trust for the ultimate assignment to an eligible entity within 12 months after consummation of the purchase of the grandfathered stations).

[148] *FNPRM*, 29 FCC Rcd at 4490, n.797.

[149] *See* MMTC FNPRM Comments at 8-9; DCS NPRM Comments at 31; DCS NPRM Supplemental Comments at 38-42. We agree with DCS that the purpose of this measure would be best served by applying it in the manner stated above. DCS Supplemental NPRM Comments at 40 (explaining that major modifications can be difficult and time-consuming and concluding that an 18-month extension of the construction deadline can be critical to the preservation of the modification permit and would encourage the sales of stations undergoing such major changes to small businesses and new entrants).

[150] *See Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (MB 2011); *see also* 47 CFR §§ 73.3555, Note 2(i)(2), 73.3598(a), 73.5008(c)(2). As of the effective date of the reinstated Eligible Entity measures, the suspension will no longer be in effect.

[151] *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6; *2002 Biennial Review Order*, 18 FCC Rcd at 13810-11, paras. 488-89. As the Commission previously held, going forward we will include both commercial and noncommercial entities within the scope of the term "eligible entity" to the extent that they otherwise meet the criteria of this standard. In the *FNPRM*, we sought comment on whether to use different eligible entity definitions for commercial and noncommercial entities, and no commenters have urged us to do so. *FNPRM*, 29 FCC Rcd at 4491, para. 272 & n.803.

[152] *See* 13 CFR § 121.201 (North American Industry Classification System (NAICS) code categories). The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the television industry is listed in NAICS code 515120.

[153] *Id.* §§ 121.103, 121.105.

owns or controls more than 25 percent of the outstanding stock or partnership interest; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.[154]

C. Remand Review of a Race- or Gender-Conscious Eligible Entity Standard

1. Background

a. *Prometheus II* and the *NPRM*

287. Our adoption of a revenue-based definition of eligible entity to promote small business participation in the broadcast industry does not, of course, preclude us from considering whether to adopt an additional standard designed specifically to promote minority and female ownership of broadcast stations. The Third Circuit in *Prometheus II* instructed the Commission to consider the other eligible entity definitions it had proposed when it adopted the revenue-based definition in the *Third Diversity FNPRM*, including a proposal based on the SDB definition employed by SBA.[155] The *NPRM* sought comment on the benefits and risks of adopting an SDB standard, which expressly would recognize the race and ethnicity of applicants. The *NPRM* also solicited input on other proposals that were included in the *Third Diversity FNPRM* and any other race- or gender-conscious standards the Commission should consider.[156]

288. In response to the *NPRM*, a number of commenters supported the adoption of a race- or gender-conscious standard as a means to increase minority and female ownership of broadcast stations.[157] Commenters asserted that, based on *Prometheus II*, the Commission must fully consider the feasibility of adopting an SDB standard in this proceeding and is not permitted to defer consideration of race- or gender-based action until a future proceeding.[158] Some commenters also asserted that, prior to the conclusion of this proceeding, the Commission must provide any further data and complete any additional empirical studies that may be necessary to evaluate or justify the adoption of an SDB standard.[159] Similarly, several commenters asked the Commission not to make any changes to any of the media ownership rules until it collects and analyzes data on broadcast ownership by women and minorities in a manner that they view as consistent with the court's remand of the eligible entity standard.[160]

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[154] *FNPRM*, 29 FCC Rcd at 4491-92, para. 272; *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6 n.14 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13811, para. 489). When the Commission, in the *2002 Biennial Review Order*, ruled that licensees would be allowed to transfer grandfathered station combinations to eligible entities, it required that control of the eligible entity purchasing the grandfathered combination must meet one of several control tests, as stated above, to meet the Commission's public interest objectives and ensure that the benefits of the exception flowed as intended. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13811, para. 489. We readopt these requirements for the same reasons.

[155] *Prometheus II*, 652 F.3d at 471-72. The Third Circuit specifically instructed the Commission to consider the alternative eligibility standards it had proposed in the *Diversity Order* "before it completes its 2010 Quadrennial Review." *Id.* at 471.

[156] *See NPRM*, 26 FCC Rcd at 17552-53, paras. 165-66.

[157] *See* UCC et al. NPRM Comments at 30; DCS NPRM Comments at 15-18; Free Press NPRM Comments at 12; Hawkins NPRM Reply at 4, 14-15; NHMC et al. NPRM Comments at 30-33; NABOB 2012 323 Report Comments at 3-6; s*ee generally* NABOB NOI Comments; LCCHR 2012 323 Report Comments at 4.

[158] *See* Hawkins NPRM Reply at 14-15; Free Press NPRM Comments at 6, 9; UCC et al. 2012 323 Report Comments at 4; NHMC 2012 323 Report Comments at 4; LCCHR 2012 323 Report Comments at 4; Media Alliance 2012 323 Report Comments at 3-4.

[159] *See* LCCHR 2012 323 Report Comments at 4; NHMC 2012 323 Report Comments at 4; UCC et al. 2012 323 Report Comments at 4, 10, 27. Several commenters further argued that the Commission's *2012 323 Report* does not satisfy the Third Circuit's directive for the Commission to fully consider the feasibility of adopting an SDB standard. *See* UCC et al. 2012 323 Report Comments at 10-16; NHMC 2012 323 Report Comments at 4-5.

[160] *See* Letter from Michael J. Scurato, Policy Counsel, National Hispanic Media Coalition, to Marlene H. Dortch, Secretary, FCC (filed July 2, 2012); UCC et al. NPRM Comments at 38; Free Press NPRM Comments at 10;

289. Several commenters further seemed to assert that *Prometheus II* not only obligates the Commission to consider fully the feasibility of implementing a race-conscious eligible entity standard in this proceeding, but also requires the Commission to adopt such a standard.[161] However, other commenters suggested that the Commission currently lacks evidence sufficient to implement a race- or gender-targeted standard.[162] In light of this perceived deficiency, one commenter suggested that the Commission promptly implement an ODP standard, which the commenter described as race- and gender-neutral, while the Commission develops the record necessary to adopt a constitutionally sustainable race-conscious definition.[163] The ODP proposal is based on a recommendation from the Diversity Advisory Committee that the Commission initiate a rulemaking proceeding to design, adopt, and implement a new preference in its competitive bidding process that would award bidding credits to persons or entities that demonstrate that they have overcome significant disadvantage.[164]

b. The *FNPRM*

290. In the *FNPRM*, we rejected assertions that the Commission is required to adopt an SBD standard or another race- or gender-conscious eligible entity standard in this proceeding based on *Prometheus II*.[165] We also rejected commenters' arguments that the Commission is not permitted to conclude this quadrennial review proceeding until we have completed any and all studies or analyses that might enable us to take such action in the future consistent with current standards of constitutional law.[166]

291. The *FNRPM* also provided a detailed discussion of the constitutional analysis that would apply to any race- or gender-conscious measure that the Commission might adopt.[167] The *FNPRM* first set forth a constitutional analysis of the Commission's interest in enhancing viewpoint diversity. We

LCCHR NPRM Comments at 1-4.

[161] *See, e.g.*, NABOB 2012 323 Report Comments at 10 ("The Court in *Prometheus II* made clear that it believes the Commission can adopt [a race-conscious] 'eligible entity' definition . . . and the Court expects that definition to be along the lines of the SDB definitions used by other Federal agencies."); NHMC 2012 323 Report Comments at 7 ("[B]efore completing the 2010 Quadrennial Review the Commission must develop a workable SDB definition. The court has been expecting such action since its [*Prometheus I* decision], and it renewed that expectation in [*Prometheus II*]." (footnotes omitted)) .

[162] *See* NHMC et al. NPRM Comments at 32-33 (indicating that the Commission has insufficient data to adopt a workable SDB definition); DCS NPRM Comments at 15, 17 (acknowledging that, in light of *Adarand,* the Commission would face a high hurdle in developing race-conscious remedies given current shortcomings in available data and a need to update existing studies); DCS 2012 323 Report Comments at 6-7 (recommending that the Commission adopt race-neutral policies while it conducts *Adarand* studies to develop a more complete record should race- and gender-conscious proposals prove to be necessary); LCCHR 2012 323 Report Comments at 3-4; UCC et al. NPRM Comments at 30.

[163] S*ee* DCS NPRM Comments at 18.

[164] *Id.* at 2. The Commission released a Public Notice in 2010 in response to the Diversity Advisory Committee's recommendation. *Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage*, Public Notice, 25 FCC Rcd 16854 (MB/WTB 2010) (*Auction Preference Public Notice*). In its comments on the *NPRM*, DCS also recommended that the Commission issue a Notice of Proposed Rulemaking to adopt an ODP standard in the context of the competitive bidding process for broadcast licenses. DCS NPRM Comments at 19-21. DCS asserted that the Commission should adopt a race-conscious standard that closely reflects the SBA's SDB standard once it gathers sufficient data to justify such an approach. *Id.* at 15-16. DCS opined that most minorities seeking ownership in the broadcast industry likely will fit within the SBA's definitions of a socially and economically disadvantaged business or individual. *Id.* Citing the current low levels of minority and female ownership of broadcast stations, DCS also asserted that an SDB standard is appropriate because certain groups face considerable challenges in attempting to access spectrum opportunities. *Id.* at 2, 6-8, 13-14.

[165] *FNPRM*, 29 FCC Rcd at 4497, para. 283.

[166] *Id.*

[167] *Id.* at 4496-4512, paras. 282-306.

noted that a race-conscious eligible entity standard would be subject to strict constitutional scrutiny and that, under strict scrutiny, such a standard must be justified by a compelling governmental interest and narrowly tailored to further that interest.[168]

292. Based on our preliminary analysis, we tentatively concluded that we did not have sufficient evidence to satisfy the constitutional tests that would apply to an SDB standard or any other race- or gender-conscious eligible entity standard that the Commission might adopt.[169] While we tentatively concluded that a reviewing court could deem the Commission's interest in promoting a diversity of viewpoints compelling, we tentatively concluded that the record evidence did not demonstrate that adoption of race-conscious measures would be narrowly tailored to further that interest.[170] We also tentatively found that the record did not reveal a feasible means of conducting the type of individualized consideration that the Supreme Court would be likely to require in order for a race-conscious measure to pass constitutional muster under strict scrutiny.[171]

293. We noted that gender-based diversity measures would be evaluated under an intermediate standard of review and upheld as constitutional if the government's actions are deemed substantially related to the achievement of an important objective.[172] We tentatively concluded that the record evidence does not establish a relationship between female ownership and viewpoint diversity that is as substantial as the Supreme Court is likely to require under intermediate scrutiny.[173]

294. We also identified significant issues that would need to be resolved prior to the implementation of an ODP standard—as had been proposed by DCS—such as (1) what social or economic disadvantages should be cognizable under an ODP standard, (2) how the Commission could validate claims of eligibility for ODP status, (3) whether applicants should bear the burden of proving specifically that they would contribute to diversity as a result of having overcome certain disadvantages, (4) how the Commission could measure the overcoming of a disadvantage if an applicant is a widely held corporation rather than an entity with a single majority shareholder or a small number of control persons, and (5) how the Commission could evaluate the effectiveness of the use of an ODP standard.[174] We noted that it is not entirely clear whether the proposed ODP standard would be subject to heightened scrutiny.[175] Further, we noted that the Commission may lack the resources necessary to conduct the type of individualized consideration that an ODP standard would require and that the Commission would have difficulty fully evaluating the potential diversity contributions of individual applicants without running afoul of First Amendment values.[176]

295. The *FNPRM* also provided a detailed constitutional analysis of the Commission's interest in remedying past discrimination. We tentatively concluded that the record contained some evidence that would support a finding of discrimination in the broadcast industry but that the evidence was not of

[168] *Id.* at 4480, 4492-93, 4496-97, paras. 246, 276, 282 (citing, *inter alia*, *Adarand*, 515 U.S. 200; *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). *See also Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) (*Fisher I*) ("[R]acial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" (quoting *Grutter*, 539 U.S. at 328)); *Fisher v. University of Texas at Austin*, No. 14-981, 2016 WL 3434399, at *7 (June 23, 2016) (*Fisher II*) ("Race may not be considered [by a university] unless the admissions process can withstand strict scrutiny." (quoting *Fisher I*, 133 S. Ct. at 2418)).

[169] *FNPRM*, 29 FCC Rcd at 4496-97, para. 282.

[170] *Id.* at 4497-4505, paras. 284-98.

[171] *Id.* at 4505-06, para. 299.

[172] *Id.* at 4508, para. 301 (citing *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003)).

[173] *Id.*

[174] *Id.* at 4506-07, para. 300.

[175] *Id.*

[176] *Id.*

sufficient weight to satisfy the constitutional standards that apply to race- and gender-based remedial measures.[177] In particular, we tentatively found that there was no evidence in the record demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms. We tentatively concluded that we could not demonstrate a compelling interest in remedying discrimination in the Commission's licensing process in the absence of such evidence.[178] We sought comment on these issues and our preliminary analysis, including any other factors or relevant precedent that we should consider.

296. As discussed in greater detail below, many commenters continue to support the adoption of a race- or gender-conscious eligible entity standard as a means of increasing minority and female ownership of broadcast stations.[179] While many commenters are critical of the Commission's analysis in the *FNPRM*, they generally do not provide additional evidence or new analysis that would support a departure from our tentative conclusion in the *FNPRM* that we cannot, as matters stand, adopt race- or gender-conscious measures. Nor do they propose specific, executable studies that plausibly might generate evidence that would support the adoption of race- or gender-conscious measures.

2. Discussion

297. We decline to adopt an SDB eligibility standard or other race- or gender-conscious eligible entity standard. As we further discuss below, we have studied this issue repeatedly and find that there is no evidence in the record that is sufficient to satisfy the constitutional standards to adopt race- or gender-conscious measures. And no commenter has proposed actionable study designs that would likely provide the evidence necessary to support race- and/or gender-conscious measures. While we find that a reviewing court could find the Commission's interest in promoting a diversity of viewpoints over broadcast media compelling, we do not believe that the record evidence sufficiently demonstrates that adoption of race-conscious measures would be narrowly tailored to further that interest. In particular, we find that the evidence in the record, including the numerous studies that have been conducted or submitted, does not demonstrate a connection between minority ownership and viewpoint diversity that is direct and substantial enough to satisfy strict scrutiny. The two recent studies that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.[180] Other studies in the record examine the relationship between minority ownership and other aspects of our diversity goal, such as programming or format diversity, rather than the viewpoint diversity that the Supreme Court has recognized as an interest "of the highest order" and that the Commission believes is most central to First Amendment values.[181] Many of the studies, too, demonstrate at most a limited relationship between minority ownership and other aspects of our diversity goal.[182]

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[177] *Id.* at 4509-12 paras. 302-06.

[178] *Id.*

[179] *E.g.*, AAJC FNPRM Comments at 2; Free Press FNPRM Comments at 14-15; LCCHR FNPRM Comments at 2-3; MMTC FNPRM Comments at 7-8; NABOB FNPRM Comments at 4-6; NPM/NCAI FNPRM Reply at 4-6; UCC et al. FNPRM Reply at 27; WGAW FNPRM Comments at 15. For example, NABOB advocates a policy approach to directly support industry entry by minorities akin to policies such as the former minority tax certificate, minority distress sale policy, and the minority credit in comparative hearings. NABOB FNPRM Comments at 4, 6. It asserts that from 1934 to 1978, when the Commission had no such specific policies, there was very little minority broadcast station ownership; from 1978 to 1995, the Commission had such policies and minority ownership saw rapid growth, asserts NABOB. Thereafter, following suspension of these policies, NABOB asserts, minority broadcast ownership experienced a severe decline. *Id.* at 4. As discussed above, however, NABOB's assertion that minority ownership has experienced a severe decline is contrary to the record evidence. *See supra* paras. 77, 126.

[180] *See FNPRM*, 29 FCC Rcd at 4501, para. 292 ("[Media Ownership Study 8A] finds that the relationship between minority ownership and viewpoint diversity is not statistically distinguishable from zero."); *id.* at 4501, para. 293 ("With respect to minority ownership in particular, the authors [of Media Ownership Study 8B] find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.").

[181] *Turner I*, 512 U.S. at 663 (internal quotations omitted); *see FNPRM*, 29 FCC Rcd at 4502-05, paras. 294-98.

[182] *See FNPRM*, 29 FCC Rcd at 4501-05, paras. 292-98.

298. In addition, we do not believe that the record evidence establishes a sufficiently strong relationship between diversity of viewpoint and female ownership of broadcast stations that would satisfy the constitutional standards for gender-based classifications. We find that the evidence in the record does not reveal that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations.[183] Because the studies in the record do not indicate that increased female ownership will increase viewpoint diversity, we believe that they do not provide a rationale for adopting gender-based diversity measures.[184]

299. Moreover, we do not believe that the record evidence is sufficient to establish a compelling interest in remedying past discrimination. We find that there is no evidence in the record demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms, and we lack a plausible way to determine the number of qualified firms owned by minorities and women.[185] We believe that we cannot demonstrate a compelling interest in remedying discrimination in the Commission's licensing process in the absence of such evidence.[186] Because the only statistical evidence in the record pertains to discriminatory access to capital and the rest is anecdotal evidence that is of more limited value for purposes of satisfying heightened scrutiny, we find that the record evidence of past discrimination in the broadcast industry—both by the Commission itself and by private parties with the Commission acting as a passive participant—is not nearly as substantial as that accepted by courts in other contexts as satisfying strict scrutiny.[187] Accordingly, we cannot adopt rules that explicitly rely on race or gender.[188]

a. Enhancing Viewpoint Diversity.

300. *Race-Based Diversity Measures*. In the *FNPRM*, we expressed our belief that the Commission's interest in promoting viewpoint diversity could be deemed sufficiently compelling to survive the first prong of the strict scrutiny test, and we sought comment on this analysis.[189] In response to the *FNPRM*, many commenters agree that the Commission's interest in promoting viewpoint diversity could be deemed sufficiently compelling under strict scrutiny, and we affirm this belief.[190] The U.S. Supreme Court to date has accepted only two justifications for race-based action as compelling for purposes of strict scrutiny: student body diversity in higher education and remedying past discrimination.[191] In *Metro Broadcasting*, the Court held, based on the application of intermediate constitutional scrutiny, that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective."[192] However, the D.C. Circuit held in *Lutheran Church* that broadcast diversity

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[183] *See id.* at 4508, para. 301.

[184] *See id.* at 4508-09, para. 301 n.923.

[185] *See id.* at 4509, para. 303.

[186] *See id.*

[187] *See id.* at 4509-12, paras. 302-06. As discussed below, some courts have held that evidence of a governmental role in past gender discrimination is not required for remedial gender-based measures, which are subject to intermediate scrutiny. *See infra* note Error: Reference source not found. Based on our evaluation of the record evidence, we also conclude that it is not of sufficient weight to support gender-based remedial action. *See infra* Section b.

[188] The *FNPRM* also contains a detailed and thorough analysis of these issues, and it reflects the Commission's extensive efforts to evaluate the current constitutional considerations and available evidence regarding the adoption of race- and gender-conscious measures.

[189] *FNPRM*, 29 FCC Rcd at 4497-4500, paras. 284-88.

[190] *See, e.g.*, AAJC FNPRM Comments at 14; UCC et al. FNPRM Comments at 25; UCC/Common Cause FNPRM Reply at 13-14.

[191] *See generally Grutter*, 539 U.S. 306; *Adarand*, 515 U.S. 200.

does not rise to the level of a compelling governmental interest.[193] Also, in 2007, the Supreme Court declined to recognize a compelling interest in diversity outside of "the context of higher education."[194] In the *FNPRM*, we tentatively found that the case law nevertheless supports our position that viewpoint diversity would be found to be compelling—even though the law is unsettled.[195] Regardless of whether viewpoint diversity is a compelling interest, however, we find that we still cannot adopt an SDB eligibility standard or other race- or gender-conscious eligibility standard, as discussed below.

301. Assuming a reviewing court could be convinced that diversity of viewpoint is a compelling governmental interest, we find that the record in this proceeding fails to satisfy the second prong of the strict scrutiny test, i.e., that there is a sufficient nexus between minority ownership of broadcast stations and viewpoint diversity. As we explained in the *FNPRM*, the two recent studies in the record that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.[196] Also, consistent with the *FNPRM*, we find that the body of evidence contained in the other 2010 Media Ownership Studies and the studies that commenters submitted in this proceeding largely concerns program or format diversity rather than viewpoint diversity, which we believe is the only kind of diversity likely to be accepted as a compelling governmental interest under strict scrutiny.[197] Moreover, as explained in the *FNPRM*, many of those studies support only limited conclusions.[198] Although we invited commenters to provide additional evidence and other information that might be relevant to our analysis,

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[192] *Metro Broad.*, 497 U.S. at 567. *See also Turner I*, 512 U.S. at 663 (finding that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment"); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion); *Associated Press v. United States*, 326 U.S. 1 (1945). In reaching its determination that broadcast diversity is, at the very least, an important governmental objective, the Court stated that "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission" and that the Commission's "'public interest' standard necessarily invites reference to First Amendment principles." *Metro Broad.*, 497 U.S. at 567 (quoting *Nat'l Citizens*, 436 U.S. at 795). In *Adarand*, the Court overruled the application of intermediate scrutiny in *Metro Broadcasting* but did not disturb other aspects of that decision, including the recognition of an important governmental interest in broadcast diversity. *See Adarand*, 515 U.S. 200.

[193] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-55 (D.C. Cir. 1998).

[194] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 703 (2007).

[195] *FNPRM*, 29 FCC Rcd at 4498-99, paras. 285-87.

[196] *See id.* at 4501, para. 292 ("[Media Ownership Study 8A] finds that the relationship between minority ownership and viewpoint diversity is not statistically distinguishable from zero."); *id.* at 4501, para. 293 ("With respect to minority ownership in particular, the authors [of Media Ownership Study 8B] find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.").

[197] As stated in the *FNPRM*, the Supreme Court's prior recognition of broadcast diversity as an interest "of the highest order" seems to pertain to viewpoint diversity. *FNPRM*, 29 FCC Rcd at 4502, para. 294 (citing *Turner I*, 512 U.S. at 663).

[198] *See, e.g.*, *FNPRM*, 29 FCC Rcd at 4502-03, para. 295 (tentatively finding that the evidentiary value of a 2006 study commissioned by the Benton Foundation in the context of a strict scrutiny analysis would be limited because it covered only three neighborhoods in one metropolitan area); *id.* at 4503-04, para. 297 (noting that the Turner Radio Study and Turner/Cooper TV Study commissioned by Free Press offer only limited analyses of the content provided by minority stations and do not provide any definitive analysis of viewpoint diversity issues). Commenters have not submitted any studies in this proceeding that provide the type of evidence that we previously indicated we believe would be necessary to satisfy the constitutional standards that apply to race- and gender-conscious measures. *See FNPRM*, 29 FCC Rcd at 4500-05, paras. 289-98 (evaluating the record evidence and tentatively finding that it does not demonstrate the "nearly complete" or "tightly bound" nexus between diversity of viewpoint and minority ownership that would be required to justify a race-based eligible entity definition); *id.* at 4508, para. 301 (tentatively finding that record evidence does not demonstrate that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations); *infra* paras. 304, 308.

some commenters merely dispute our assessment of known evidence, rather than submit additional information that we did not consider in the *FNPRM*.[199] We reject claims that, in tentatively finding that the evidence in the record does not demonstrate the requisite connection between minority ownership and viewpoint diversity, we relied on dissenting opinions to establish "an artificial and unofficial standard" for narrow tailoring or evaluated the record evidence inconsistently in order to "minimize" evidence of a connection between minority ownership and viewpoint diversity.[200] To the contrary, our narrow tailoring analysis included a discussion of relevant judicial precedent, and our tentative findings were based on a careful reading of that precedent, taken as a whole, and our assessment of the body of evidence in this proceeding.[201] We find no reason in the present record to depart from that analysis. Other commenters suggest additional topics that they believe the Commission should study but do not propose specific, executable studies or claim that the additional inquiries they propose would establish the requisite nexus between minority ownership and viewpoint diversity.[202]

302. Moreover, while we find that the *Hispanic Television Study* is an important contribution to the study of the impact of ownership on programming and viewership, we do not believe that the study's findings materially impact our constitutional analysis. Given the scope of the study (i.e., examining the nexus between ownership, programming, and viewing), many of the study's findings do not inform our viewpoint diversity analysis specifically, which focuses primarily on local news and public affairs programming. However, certain findings were instructive. Notably, the study found evidence suggesting that Hispanic viewers watch local, Spanish-language news at higher levels than English-language news and that Hispanic ownership is associated with local, Spanish-language news programming.[203] The study cautions that these results are only suggestive and that limitations in the data

[199] As discussed below, however, these commenters generally seem to accept our view that the record evidence does not provide a sufficient basis for the Commission to adopt race-conscious measures that will withstand strict scrutiny. *See infra* para. 304.

[200] *See* AAJC FNPRM Comments at 14-15; UCC/Common Cause FNPRM Reply at 6-14. *See also* AAJC FNPRM Comments at 15 (asserting that it is premature for the Commission to affirm its tentative conclusions on narrow tailoring without knowing "how it will actually implement race-conscious policies"); NABOB FNPRM Comments at 12-13 (asserting that the *FNPRM* identifies several studies that "clearly demonstrate" that minority audiences prefer minority programming and that based upon this measure, the Commission has a substantial amount of evidence demonstrating that minority ownership leads to viewpoint diversity); UCC/Common Cause FNPRM Reply at 14 ("AAJC correctly explains that, without a specific policy before [it], it is impossible for the Commission to use the four-prong *Grutter* test to evaluate [whether race-conscious measures would be narrowly tailored to further the Commission's interest in viewpoint diversity]."); UCC et al. FNPRM Comments at 25 (asserting that it is premature for the Commission to affirm its tentative conclusions on narrow tailoring). We disagree with assertions that it is premature for the Commission to reach any conclusions on narrow tailoring. The Third Circuit directed the Commission to consider the SDB eligibility standard and other eligible entity definitions proposed in the *Third Diversity FNPRM*, and we are complying with the court's instruction based on an extensive analysis of applicable judicial precedent and available empirical evidence.

In addition to criticizing the *FNPRM*'s assessment of the record evidence and the applicable evidentiary standard, UCC/Common Cause also criticize the *FNPRM* for "ask[ing] whether a theory of viewpoint diversity or remediation is viable, when in fact the Commission would likely need to pursue several legal theories jointly to succeed." UCC/Common Cause FNPRM Reply at 12. Because of the "complex relationships," the unique role of broadcasting in the U.S., and the nature of scholarship in this area, the Commission should consider "the cumulative justifications of viewpoint diversity, remediation, and the additional compelling interests that are also impacted by broadcasting," assert UCC/Common Cause. UCC/Common Cause FNPRM Reply at 12. As we explained in the *FNPRM* and continue to believe, we do not believe that any interest other than viewpoint diversity or remediation of discrimination (if established by the record) would be found to be a compelling governmental interest sufficient to satisfy the first prong of the strict scrutiny test. And we know of no case law, nor does UCC/Common Cause cite any, which analyzes justifications for race-conscious action on a "cumulative" basis. Consequently, we reject UCC/Common Cause's suggestion.

[201] *See FNPRM*, 29 FCC Rcd at 4500-05, paras. 289-98.

[202] *See, e.g.*, UCC/Common Cause FNPRM Reply at 9, 11.

[203] *Hispanic Television Study* at 74-75, paras. 136-37.

(such as the small sample size of Hispanic-owned stations) makes it difficult to identify statistically significant results.[204] Accordingly, while the study is a useful addition to the research into these issues, the suggestive results are insufficient for a final conclusion of the relationships examined.[205] Therefore, we do not believe that the study changes our constitutional analysis, though it has helped inform the study of these issues. Indeed, commenters generally agree with our assessment that the study has not provided a basis for the Commission to adopt race-conscious measures.[206]

303. Some commenters disagree with our analysis of case law involving judicial review of race-based classifications, as discussed above, but they do not cite any precedent that we did not consider in the *FNPRM*. As we explained there, we believe that empirical evidence of a stronger nexus between minority ownership and viewpoint diversity than was demonstrated in *Metro Broadcasting* would be required in order for a race-conscious rule to withstand strict scrutiny.[207] We are not persuaded by Asian Americans Advancing Justice (AAJC)'s assertions to the contrary, which we believe are substantially the same as those we considered and rejected in the *FNPRM*.[208]

304. And while some commenters disagree with the sufficiency of our efforts to study the connection between minority ownership and viewpoint diversity, the evidence in the record, our assessment of the evidence, and the applicable evidentiary standard in this proceeding,[209] they generally seem to accept our view that the evidence is not sufficient to enable the Commission to adopt race-based measures. For instance, NABOB acknowledges that additional studies may not provide evidence that could support race-conscious measures and "therefore [the Commission] cannot promise to create a policy that is specifically designed to promote minority ownership."[210] Similarly, UCC et al. suggest that the record evidence does not provide a sufficient basis for the Commission to adopt a race-conscious eligibility standard.[211] Other commenters also seem to concede, implicitly or explicitly, that the evidence in the present record is insufficient to support race-conscious action by the Commission.[212]

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[204] *Id.* at 2 para. 5.

[205] *Id.* at 1, para. 1.

[206] *See, e.g.*, NHMC Hispanic TV Study Comments at 5.

[207] *FNPRM*, 29 FCC Rcd at 4500, para. 290.

[208] AAJC FNPRM Comments at 15; *see also* NABOB FNPRM Comments at 5 ("Indeed, the Supreme Court has acknowledged and accepted that minority ownership leads to programming diversity, and the Third Circuit Court of Appeals has acknowledged that the Supreme Court's determination of the nexus between minority ownership and programming diversity is still the law of the land . . . ." (citing *Prometheus II*, 652 F.3d at 471, n.42)). These commenters do not cite any additional judicial precedent to support their argument here.

[209] As discussed above, we reject these assertions. *See supra* para. 301 & note Error: Reference source not found.

[210] NABOB FNPRM Comments at 17, n.39.

[211] UCC et al. FNPRM Comments at 23-24.

[212] *See, e.g.*, Free Press FNPRM Comments at 14-15 (accepting that the record evidence does not satisfy the constitutional standards for race- or gender-conscious measures); *id.* at 19 (stating that the Commission is "without evidence to support specific measures to enhance ownership by women and people of color"); LCCHR FNPRM Comments at 2 (stating that "the Commission must return its focus to producing *Adarand* studies"); NHMC FNPRM Comments at 13-14 (stating that collecting and analyzing data and conducting studies exploring barriers to entry "are important first steps that the Commission must take" in order to promote minority and female ownership); NPM/NCAI FNPRM Reply at 6 ("Although the FCC is committed to gathering evidence to support a race and gender conscious definition that would diversify ownership in radio, this record is not likely to be completed in the immediate future."); UCC/Common Cause FNPRM Reply at 11-12 (recommending a model for addressing "important evidentiary issues . . . that the Commission believes must be overcome . . . to take proactive steps to improve diversity in broadcasting"); WGAW FNPRM Comments at 15 (urging the Commission "to do the necessary work to develop a sound legal theory for policies that expressly recognize the importance of race and gender in broadcast licensing").

305. In addition, we continue to believe that implementing a program for awarding or affording preferences related to broadcast licenses based on the "individualized review" that the Supreme Court has required under strict scrutiny would pose a number of significant administrative and practical challenges for the Commission and would not be feasible. As we explained in the *FNPRM*, where race-conscious governmental action is concerned, the Supreme Court previously has found that narrow tailoring requires individualized review, serious, good-faith consideration of race-neutral alternatives, minimal adverse impacts on third parties, and temporal limits.[213] In particular, the Court found in *Grutter* that narrow tailoring demands that race be considered "in a flexible, non-mechanical way" alongside other factors that may contribute to diversity and that consideration of race was permissible only as one among many disparate factors in order to evaluate individual applicants for admission to an educational institution.[214] We find that the manner in which the Commission allocates broadcast licenses differs from university admissions in many important respects. For instance, the process of acquiring a new commercial broadcast license is dictated by statute and involves a highly structured, open, and competitive bidding process.[215] Individuals or entities must enter bids for broadcast allotments—a market-based regime—and must offer the highest monetary value for the allotment in order to acquire a construction permit.[216] As we explained in the *FNPRM*, we believe that this framework does not lend itself to the type of case-by-case consideration envisioned by *Grutter*.[217] Although the *FNPRM* sought comment on potential ways in which an individualized review process could be incorporated feasibly, effectively, and efficiently into any race-conscious measures adopted by the Commission, no commenter has offered such a proposal, nor has the Commission been able to develop one. Therefore, we conclude that the record reveals no feasible means of carrying out the type of individualized consideration that the Supreme Court has required under strict scrutiny.[218]

306. *ODP Proposal*. As we noted in the *FNPRM*, it is not entirely clear whether the proposed ODP standard would be subject to heightened constitutional scrutiny.[219] Even assuming that it is not subject to heightened review under the equal protection component of the Due Process Clause, we decline to adopt the proposed ODP standard in the absence of a feasible means of implementing such a standard without running afoul of First Amendment values. Several commenters express general support for the

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[213] *FNPRM*, 29 FCC Rcd at 4505, para. 299.

[214] *Grutter*, 539 U.S. at 334, 338-39; *see also id*. at 334 (stating that, to be narrowly tailored a race-conscious admissions program may consider race or ethnicity only as a "'plus' in a particular applicant's file," i.e., it must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight" (citing *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265, 315-17 (1978))).

[215] 47 U.S.C. § 309(j).

[216] *See Auction of FM Broadcast Construction Permits Scheduled for March 26, 2013 et al.,* Public Notice, 27 FCC Rcd 10830 (MB/WTB 2012) (seeking comment on, *inter alia*, simultaneous multiple-round auction design, bidding rounds, reserve price or minimum opening bids, bid removal/bid withdrawal, and post-auction payments); *see also Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15923-24, 15961, paras. 7-9, 112 (1998), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

[217] *FNPRM*, 29 FCC Rcd at 4505-06, n.911.

[218] UCC/Common Cause assert that the *FNPRM* confines its consideration of the proposed ODP standard to the Commission's viewpoint diversity interest without considering whether the proposed ODP standard could be applied as a remedial measure. UCC/Common Cause FNPRM Reply at 13. We disagree. The administrative, practical, and First Amendment issues that we have identified would need to be resolved prior to the implementation of an ODP standard regardless of whether that standard is used to further the Commission's interest in viewpoint diversity or remedy past or present discrimination. *See supra* paras. 293, 305. Moreover, as we discuss below, we do not believe that available evidence of discrimination in the broadcast industry is of sufficient weight to demonstrate a compelling interest in remedying discrimination in the Commission's broadcast licensing process. *See infra* Section b.

proposed ODP standard but none have proposed a method for the Commission to provide the type of individualized consideration that an ODP standard would require without being unduly resource-intensive and inconsistent with First Amendment values. Commenters also have not addressed other specific issues that the *FNPRM* indicated would need to be resolved prior to implementation of the ODP proposal.[220] In particular, no commenter has proposed a means for the Commission to validate claims of eligibility for ODP status. Based on available information about the proposal, we believe that validating a claim of eligibility for ODP status would require a finding that the applicant has faced and overcome a "substantial disadvantage"—a determination that inherently would be prone to some degree of subjectivity—as well as a finding that the applicant would likely contribute to viewpoint diversity by virtue of him or her facing and overcoming a substantial disadvantage. We do not believe that there is a means for the Commission to administer such a program in a manner that is sufficiently objective and consistent,[221] and that would ensure that the Commission does not evaluate applicants based on a subjective determination as to whether a particular applicant would be likely to contribute to viewpoint diversity.[222] In addition, no commenter has offered input on (1) what social or economic disadvantages should be cognizable under an ODP standard,[223] (2) whether applicants should bear the burden of proving specifically that they would contribute to diversity as a result of having overcome certain disadvantages, (3) how the Commission

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Contrary to the assertions of UCC/Common Cause, the *FNPRM* did not tentatively conclude that the Commission "must emulate university admissions in order to pursue viewpoint diversity." UCC/Common Cause FNPRM Reply at 13; *see* Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed May 25, 2016) (UCC May 25, 2016 *Ex Parte* Letter). Rather, the *FNPRM* noted that the Supreme Court relied in part on the concept of "critical mass" to find the requisite nexus between student body diversity and race-based admissions and that this concept is not easily transferable to broadcasting. *FNPRM*, 29 FCC Rcd at 4504, n.905.

[219] *FNPRM*, 29 FCC Rcd at 4506-07, para. 300. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 912-13 (1995) (facially race-neutral electoral districting plan triggers strict scrutiny if predominantly motivated by racial concerns); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1997) (developer failed to carry its burden of proving that racial discrimination was a motivating factor in local authorities' zoning decision that prevented the construction of racially integrated low-cost housing); *Fisher II*, 2016 WL 3434399, at *16-17 (petitioner cannot assert simply that increasing university's reliance on facially neutral component of admissions policy would make it more race neutral when its purpose is to boost minority enrollment). MMTC asserts that the *FNPRM* "mischaracterized" the ODP standard as a race-conscious measure that would be subject to heightened scrutiny. MMTC FNPRM Comments at 5-6. We disagree. The *FNPRM* did not describe the proposed ODP standard as a race-conscious measure. Rather, the *FNPRM* noted that it is not entirely clear whether the proposed ODP standard would be subject to heightened constitutional scrutiny. *FNPRM*, 29 FCC Rcd at 4506, para. 300 & n.915; *see* UCC/Common Cause FNPRM Reply at 13 ("[W]e do not disagree with the Commission's conclusion that [an ODP standard] would likely receive strict scrutiny if an individual's race[] … or ethnicity could be used to presume eligibility for preferences."). We explained that an ODP standard that does not facially include race-conscious criteria, yet is constructed for the purpose of promoting minority ownership, might be subject to heightened scrutiny. *FNPRM*, 29 FCC Rcd at 4506 n.915. *See Miller*, 515 U.S. at 912-13; *Fisher II*, 2016 WL 3434399.

[220] *See, e.g.*, MMTC FNPRM Comments at 5; NAB FNPRM Comments at 92-93; Bonneville/Scranton FNPRM Reply at 9.

[221] *See, e.g., Auction Preference Public Notice*, 25 FCC Rcd at 16864 (Diversity Advisory Committee Recommendation on Preference for Overcoming Disadvantage) ("Importantly, a qualifying disadvantage would have to be 'substantial.' The definition of what constitutes a substantial disadvantage would be addressed in the rulemaking and would be further refined on a case-by-case basis. To the extent possible, it is desirable to reduce subjectivity and achieve consistency among individualized determinations."); *id.* at 16864-65 ("This requirement does not contemplate that successful applicants necessarily will have fully and finally overcome the disadvantages they faced. . . . The degree of success required to show that a disadvantage has been sufficiently overcome would be further refined in a rulemaking and case-by-case determinations.").

[222] *See Metro Broad.*, 497 U.S. at 585 n.36 (noting that the Commission eschews involvement in licensees' programming decisions to avoid constitutional issues that would be raised if it "denied a broadcaster the ability to carry a particular program or to publish his own views, if it risked government censorship of a particular program, or if it led to the official government view predominating public broadcasting") (citations and internal quotations omitted).

could measure the overcoming of a disadvantage if an applicant is a widely held corporation rather than an entity with a single majority shareholder or a small number of control persons, and (4) how the Commission could evaluate the effectiveness of the use of an ODP standard. Accordingly, we are not adopting the proposed ODP standard.

307. *Gender-Based Diversity Measures*. Gender-based measures are subject to a less restrictive Constitutional standard—intermediate scrutiny—than race-based measures. Under intermediate scrutiny, a gender-based classification must be substantially related to the achievement of an important objective.[224] While *Metro Broadcasting* established that viewpoint diversity is at least an important government objective, *Lamprecht v. FCC* found that available evidence failed to demonstrate a statistically meaningful link between ownership of broadcast stations by women and programming of any kind.[225] As a result, the D.C. Circuit, in *Lamprecht*, overturned the Commission's former gender preference policy.[226] In order to overcome *Lamprecht*, the Commission must be able to establish the requisite connection between viewpoint diversity and ownership by women; however, in the *FNPRM* we stated that, based on our evaluation of relevant studies, we did not believe there was evidence to demonstrate that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations.[227]

308. In response to the *FNPRM*, UCC et al. question the tentative conclusion that women-controlled stations do not substantially contribute to viewpoint diversity in a manner that differs from other stations or otherwise varies significantly from that provided by other stations, arguing that the Commission has done little to no research on this issue.[228] Commenters, however, did not provide any additional evidence, studies, proposed study designs, or other information that is relevant to our analysis of this issue. The Commission has similarly been unable to identify such evidence or devise study designs that are likely to provide such evidence.[229] While commenters still express general support for gender-based initiatives,[230] such support is not sufficient absent evidence to establish a connection between viewpoint diversity and ownership by women. And while we acknowledge that the data show that women-owned stations are not represented in proportion to the presence of women in the overall population, we do not believe that the evidence reveals that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other

[223] In its recommendation concerning a preference for overcoming disadvantage, the Diversity Advisory Committee identified "a non-exhaustive list of disadvantages which, if substantial, would likely qualify an individual for a preference." *Auction Preference Public Notice*, 25 FCC Rcd at 16860-71 (Diversity Advisory Committee Recommendation on Preference for Overcoming Disadvantage); DCS NPRM Comments at 2 (urging the Commission to adopt the Diversity Advisory Committee's ODP proposal). No commenters in this proceeding have offered additional input on the social or economic disadvantages that should be cognizable under an ODP standard.

[224] *FNPRM*, 29 FCC Rcd at 4508, para. 301 (citing *Virginia*, 518 U.S. at 531-33; *Hibbs*, 538 U.S. 721).

[225] *Id.* (citing *Lamprecht*, 958 F.2d 382, 396-98 (D.C. Cir. 1992)).

[226] *Id.* (citing generally *Lamprecht*, 958 F.2d 382).

[227] *Id.* at 4508-09, para 301 & n.923.

[228] UCC et al. FNPRM Comments at 25 n.103.

[229] In its efforts to create specific study designs (which includes reaching out to experts in the field), the Commission has identified a number of issues that significantly impede study of the connection between ownership and viewpoint diversity. These issues include, for example, the lack of a reliable measure of viewpoint; small sample size; accounting for potential variations from differences in the way the data were collected rather than actual changes in the marketplace when combining old and new sets; and the lack of relevant data sets from before and after policy changes or marketplace developments (if any can be identified) that would help demonstrate causation regarding the impact of ownership on viewpoint diversity.

[230] AAJC FNPRM Comments at 2; WGAW FNPRM Comments at 15; Free Press FNPRM Reply at 21; UCC et al FNPRM Reply at 21.

stations or otherwise varies significantly from that provided by other stations.[231] Therefore, we conclude that there is insufficient evidence to satisfy the constitutional standards that apply to gender-based measures.

b. Remedying Past Discrimination

309. Similarly, we conclude that, although we have studied extensively the question, there is no "strong basis in evidence"[232] of discrimination in the award of broadcast licenses or other discrimination in the broadcast industry in which the government has actively or passively participated that would satisfy the constitutional standards that apply to race- or gender-based remedial measures. In the *FNPRM*, we noted that the Commission never has asserted a remedial interest in race-or gender-based broadcast regulation.[233] We explained that the evidence of discrimination offered in the studies that commenters cited, while informative, was not nearly as substantial as that accepted by courts in other contexts.[234] In response, commenters are generally critical of the Commission's analysis but most do not cite any additional relevant precedent or data that we did not discuss in the *FNPRM*.[235] Although UCC/Common Cause identify additional information that they believe is relevant to an analysis of the Commission's interest in remedying past discrimination, they do not assert that such information is sufficient to satisfy the relevant constitutional requirements.[236] We have evaluated the evidence in the

[231] As we explained in the *FNPRM*, the only study included in the record of this proceeding that analyzes the relationship between female ownership and broadcast content is the Turner Radio Study, which finds that markets that contain radio stations with either female or minority ownership are more likely to broadcast certain progressive and conservative talk shows. We do not believe that this study demonstrates a causal relationship between female or minority ownership and the diversity of viewpoints or content available, as it does not control for other factors that may explain both the presence of a greater diversity of talk shows and a higher percentage of female or minority ownership in certain markets. Other studies in the record establish that female ownership of broadcast stations is well below the proportion of women in the population, a fact that is not in dispute in this proceeding. *See FNPRM*, 29 FCC Rcd at 4508-09, n.923.

[232] *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Less evidence is required for gender-based measures, although an "exceedingly persuasive justification" is still necessary. *Virginia*, 518 U.S. at 530; *see also Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 909 (11th Cir 1997). The question of whether governmental participation is required is unsettled. Some courts have held that private discrimination need not be linked to governmental action under intermediate scrutiny. *See Concrete Works of Colo., Inc. v. City and Cty. of Denver*, 321 F.3d 950, 959-60 (10th Cir.), *cert. denied*, 540 U.S. 1027 (2003) (citing *See Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994); *Coral Cons. Co. v. King Cty.*, 941 F.2d 910, 932 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992)). As discussed in this section, we also conclude that the record evidence is not of sufficient weight to support gender-based remedial action.

[233] *FNPRM*, 29 FCC Rcd at 4509, para. 302.

[234] *Id.* at 4509-12, paras. 302-06.

[235] *See, e.g.*, MMTC FNPRM Comments at 7 (encouraging the Commission to "review the record, particularly the 2010 Initial Comments of the Diversity and Competition Supporters," which, according to MMTC, details "the Commission's history of erecting market entry barriers that kept minorities out of the media industry and validating [the] discriminatory practices of segregationist licensees."); UCC/Common Cause FNPRM Reply at 3-6 (arguing, *inter alia*, that the *FNPRM* incorrectly rejects the 2000 Historical Study because the study does not show that the Commission itself engaged in discrimination, even though such evidence is not the standard; rejects evidence of discrimination in the 2000 Capital Markets Study without adequately explaining why the study's focus on non-broadcast industry information makes it less probative of discrimination in the broadcast industry; ignores the 2000 Auction Utilization Study, in which UCC/Common Cause believe there is evidence of discrimination in wireless auctions; ignores Part 3 of the 2000 Broadcast Licensing Study, in which UCC/Common Cause find "useful indicators" that might show that the Commission acted as a passive participant in private discrimination in the broadcast industry; wrongly states that the Commission never has asserted a remedial interest in race- or gender-based broadcast regulation and that commenters have not focused on establishing a case for remedial measures; and indicates a need for a large number of studies, such as those found in *Adarand*, but then "dismisses the value of studies conducted in the 1980s").

[236] *See supra* note Error: Reference source not found. There is no inconsistency, as UCC/Common Cause claim, between our conclusion in this proceeding that we lack the strong basis in evidence of racial discrimination in the

record, and we find that it is not of sufficient weight to support race- or gender-based remedial measures.

310. We disagree with UCC/Common Cause's assertion that we raised the bar in our remedial interest tentative conclusions and that we incorrectly rejected or ignored evidence of discrimination in the broadcast industry.[237] Rather than rejecting evidence because it does not prove that the Commission itself has engaged in discrimination, the *FNPRM* tentatively found that existing evidence of past discrimination is not nearly as substantial in this case as the evidence that courts have required in other contexts. In particular, we noted the absence of evidence demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms. We asked commenters to address whether evidence of a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms is ascertainable. As discussed below, we find that the current research model employed in existing disparity studies is unlikely to produce meaningful results in the broadcast context.[238] In the *FNPRM*, we also observed that the only statistical evidence of discrimination in the record at the time pertained to discriminatory access to capital and that the rest of the evidence was anecdotal and therefore of more limited value in light of the heightened evidentiary requirements of strict scrutiny.[239] As we explained there, the Capital Markets Study found statistical evidence of discrimination in U.S. capital markets, but the study indicates that its results are not fully conclusive.[240] Also, its focus on wireless auctions and other non-broadcast industry information makes it less probative of discrimination in the broadcast licensing process.[241] Even considering the Capital Markets Study together with available anecdotal evidence in other studies,[242] we find that the evidence of past discrimination in the Commission's broadcast licensing process is not nearly as substantial as that accepted by courts in other contexts.[243]

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broadcast industry in which the FCC has been complicit that is necessary to adopt *race-conscious remedial action* and the Commission's adoption of bans on discrimination in advertising contracts and in private transactions. *See* UCC/Common Cause FNPRM Reply at 3. The latter actions are not race-conscious measures and therefore did not require an evidentiary foundation sufficient to withstand strict scrutiny. They were simply measures designed to combat private discrimination in the marketplace.

[237] UCC/Common Cause FNPRM Reply at 3-6; *see* UCC May 25, 2016 *Ex Parte* Letter at 2.

[238] *See infra* para. 312.

[239] *FNPRM*, 29 FCC Rcd at 4511-12, para. 306. As noted above, UCC/Common Cause assert that the *FNPRM* ignored "useful indicators" in part 3 of the 2000 Broadcast Licensing Study that "might indicate passive participation" but do not claim that this study would enable the Commission to adopt race- or gender-based remedial measures that would satisfy the relevant constitutional requirements. UCC/Common Cause Reply at 5; *see* KPMG LLP, Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC (2000).

[240] *FNPRM*, 29 FCC Rcd at 4510-11, para. 305.

[241] *Id.* (citing *Croson*, 488 U.S. at 498). In *Croson*, the Supreme Court found that the factual predicate for race-based action was deficient where, among other things, the government failed to make findings specific to the market to be addressed by the remedy. 488 U.S. at 498. Because broadcasting is the industry that would be addressed if we were to adopt remedial measures here, and neither the 2000 Capital Markets Study nor the Auction Utilization Study contains conclusive findings that reveal a governmental role in discrimination in the broadcast industry, we do not believe these studies establish a factual predicate for race-based action that the Court would deem sufficient. *Id.*; *see* William D. Bradford, Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes (2000) (Capital Markets Study); Ernst & Young LLP, FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions (2000).

[242] *See FNPRM*, 29 FCC Rcd at 4510-12 paras. 304-06 (discussing Capital Markets Study and studies that contain anecdotal evidence).

[243] For instance, in *Adarand v. Slater*, a leading public contracting case in which the Tenth Circuit found the requisite strong basis in evidence, the record contained 39 studies revealing an aggregate 13 percent disparity between minority business availability and utilization in government contracting, a figure which the court found to

311. We also disagree with suggestions that it is legally permissible for the Commission to infer past discrimination based on the disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population.[244] As explained in the *FNPRM*, the Supreme Court has held that an inference of discrimination may arise when there is a significant statistical disparity between the number of *qualified* minority contractors willing and able to perform a particular service and the number of such contractors actually engaged.[245] Although UCC et al. suggest that no special qualifications are necessary to own a broadcast station, the Commission has long required that broadcast applicants meet certain character, financial, and other qualifications to operate a station.[246] And, of course, not all members of the population are interested in operating a broadcast station. Accordingly, we do not believe that evidence of a significant statistical disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population would be sufficient by itself to overcome the constitutional hurdle that has been established for race- and gender-based remedial measures. Instead, we continue to believe that, absent evidence showing a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms,[247] we cannot demonstrate a compelling interest in remedying discrimination in the Commission's broadcast licensing process.

312. UCC/Common Cause assert that the Commission is required to fund research to identify whether such disparities exist.[248] Based on our review of existing disparity studies, we do not believe that

be "significant," if not overwhelming, evidence of discrimination. In reaching that determination, the court relied on evidence of private discrimination. The evidence was similar in nature to the evidence in this case—denial of access to capital, as well as the existence of exclusionary "old boy" networks and union discrimination that prevented access to the skills and experience needed to form a business—but it was substantially greater in extent and weight. The court had the benefit of a Department of Justice report, prepared in response to the Supreme Court's decision in *Adarand*, summarizing 30 congressional hearings and numerous outside studies providing both statistical and anecdotal evidence of such private discrimination. *See FNPRM*, 29 FCC Rcd at 4511, para. 306 (discussing *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000)).

[244] UCC et al. FNPRM Comments at 23; *see also Croson*, 488 U.S. at 501 ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.").

[245] *See FNPRM*, 29 FCC Rcd at 4509-10, para. 303; *Croson*, 488 U.S. at 509.

[246] *See Policy Regarding Character Qualifications in Broadcast Licensing*, Memorandum Opinion and Order, 7 FCC Rcd 6564 (1992); *Policy Regarding Character Qualifications in Broadcast Licensing et al.*, Memorandum Opinion and Order, 6 FCC Rcd 3448 (1991); *Policy Regarding Character Qualifications in Broadcast Licensing et al.*, Policy Statement and Order, 5 FCC Rcd 3252 (1990); *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, Public Notice, 2 FCC Rcd 2122 (1987); *Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Report, Order and Policy Statement, FCC 85-648 (Jan. 14, 1986), 1986 WL 292574; *New Financial Qualifications Standard for Broadcast Television Applicants*, Public Notice, FCC 79-299 (May 11, 1979), 1979 WL 44120; *Financial Qualifications Standards for Aural Broadcast Applicants*, Public Notice, FCC 78-556 (Aug. 2, 1978), 1978 WL 35972.

[247] As discussed below, the record does not reveal a method of identifying such firms. *See infra* para. 312.

[248] *See* UCC/Common Cause FNPRM Reply at 4, 13; *see also* AAJC FNPRM Comments at 15 (recommending that the Commission "conduct the necessary statistical disparity studies" to establish a compelling interest in remedying past discrimination in the allocation of licenses); UCC et al. FPRM Comments at 25 (asserting that there is no basis for concluding that the existing evidence of discrimination in the broadcast industry is insufficient to satisfy constitutional standards, because the Commission has conducted very little investigation of the impact of past discrimination on women and minorities). According to UCC et al., the Commission should refrain from making any tentative conclusions until its work is complete, including examining its own records and history to evaluate evidence in order to show that remedying past racial (or gender) discrimination is a compelling (or substantial) governmental interest. *Id.* at 25-26.

is true. In particular, UCC/Common Cause identify no method of studying this question that would produce meaningful results in the broadcast context. For existing studies, often employed in government contracting cases, there is generally a ready database of minority or female contractors that are willing and able to perform a particular service—or an established methodology to identify such contractors—that can be compared to the number of such contractors that are actually engaged by the government. Indeed, in most industries one need not be a government contractor in order to operate a business that provides the services that the government seeks (e.g., construction or advertising). This provides an ample pool of available contractors for the researchers to identify, both nationally and locally, depending on the nature of the program. And Supreme Court precedent instructs that the appropriate comparison is to the number of qualified firms that would be interested in being engaged by the government. However, there are no broadcast station owners other than those already licensed to be broadcasters, and the record does not reveal any method for identifying otherwise qualified firms that are not already broadcast licensees. In these circumstances, there is no pool of qualified non-licensee minority- or women-owned broadcast firms to compare against existing minority- or women-owned broadcast stations. Without such evidence or a methodology for ascertaining such evidence, we find that a disparity study similar to those relied on by other agencies for government contracting purposes is not feasible in the broadcast context. Given our determination of the infeasibility of this research, the lack of any support in the record indicating that it would be feasible, and the very substantial funds and time it would take to conduct it—likely millions of dollars and several years—we do not believe it is in the public interest for the Commission to undertake a disparity study.

c. Other Issues

313. Several commenters state that the *FNPRM* falls short of what these commenters assert to be the Third Circuit's directive that the Commission gather relevant ownership data and develop policies to address the paucity of female and minority owners among broadcast licensees.[249] As we stated previously, we disagree with arguments that the *Prometheus II* decision requires that we adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that we continue this proceeding until the Commission has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law.[250] By evaluating the feasibility of implementing a race- or gender-conscious eligibility standard based on an extensive analysis of the available evidence, we have followed the Third Circuit's direction in *Prometheus II* and *Prometheus III.* We note that over the course of this proceeding, the Commission has performed or commissioned a dozen studies. The *FNPRM* provides a detailed analysis of the relevant studies that were available at the time, and we discuss herein more recent evidence and pertinent information that commenters submitted in response to the *FNPRM*.[251] The Third Circuit court in *Prometheus III* stated that it did not intend to prejudge the outcome of our analysis of the evidence or the feasibility of implementing a race- or gender-conscious standard that would be consistent both with applicable legal standards and the Commission's practices and procedures.[252]

314. Moreover, we do not believe that any relevant statutory directive requires the adoption of race- or gender-conscious measures in order to promote ownership diversity. The Commission has

[249] Free Press FNPRM Comments at 16; Free Press FNPRM Reply at 20; MMTC FNPRM Comments at 3-4; NABOB FNPRM Comments at 9-10; NHMC FNPRM Comments at 5-6; NPM/NCAI FNPRM Reply at 4-6; UCC et al. FNPRM Comments at 12-26; UCC et al. Feb. 5, 2015 *Ex Parte* Letter at 2; *see* Howard Media Group/Carolyn Byerly FNPRM Comments at 3; Letter from James L. Winston, President, NABOB, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Aug. 4, 2016).

[250] *See, e.g.*, NABOB FNPRM Comments at 15. NABOB requests that the Commission delay the issuance of a report and order in this proceeding until the Commission has initiated all of the studies necessary to meet the strict scrutiny standard and has adopted a definition of "eligible entity" that can be used to implement rule and policy changes that have the potential to specifically promote minority ownership of broadcast facilities. NABOB FNPRM Comments at 4, 9. We decline to do so for the reasons discussed herein.

[251] *See supra* Sections a-b; *FNPRM*, 29 FCC Rcd at 4496-4511, paras. 282-306.

[252] *Prometheus III*, 824 F.3d at 49-50.

previously determined that it has a general mandate to promote ownership diversity under Section 257 of the 1996 Act and Section 309(j) of the Act, which includes promoting ownership by small businesses, new entrants, and minority- and women-owned businesses.[253] But this authority does not mandate specific outcomes or ownership levels or race- or gender-conscious action to foster diversity, nor does it permit the adoption of rules and policies that are not supported by the record or that conflict with the Constitution. Therefore, we find the suggestion that the Commission is compelled, either by the Third Circuit or by statute, to adopt race- or gender-conscious measures to be untenable. The Third Circuit ordered the Commission to make a final determination as to whether to adopt a new eligible entity definition (including consideration of SDB- and ODP-based definitions), and we have done so. As discussed herein, the Commission continues to take significant steps to improve its ownership data and to promote ownership diversity, and our determination that we cannot take race- or gender-conscious action at this time does not mean that the Commission has failed to act appropriately in furtherance of its goal to promote ownership diversity.

315. Some commenters criticize the Commission based on their perception that the Commission has not made a substantial effort to gather evidence that would support race- and gender-conscious measures.[254] UCC et al. assert that it is inappropriate for the Commission to place the burden of providing additional evidence on commenting parties without describing what it believes is necessary to withstand strict scrutiny.[255] As discussed above, however, the Commission has not only commissioned a number of studies, none of which provided it a constitutional basis to take race- or gender-conscious action; it has also taken a number of steps to improve the quality of its broadcast ownership data and to facilitate future additional studies that commenters, academics, or others believe might provide a constitutional basis to adopt race- and gender-conscious measures. Further, we have provided a detailed and thorough analysis of what is necessary to meet the relevant constitutional standards and identified the reasons we believe that, having studied the question, we do not have evidence that would allow us to meet those standards.[256]

316. In addition, while some commenters have suggested study topics or broad research frameworks, none has provided actionable study designs that the Commission or private researchers could execute.[257] The Commission has expended considerable time and effort throughout the course of this proceeding in an effort to create such study designs; and it has commissioned or performed a dozen studies that it was able to develop over the course of the proceeding.[258] At present, neither the record in

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[253] *See, e.g.*, *1998 Biennial Regulatory Review Order*, 13 FCC Rcd at 23095, para. 96.

[254] *See, e.g.*, NABOB FNPRM Comments at 4, 12; Free Press FNPRM Comments at 17-19; Letter from Wade Henderson, President & CEO, LCCHR, and Nancy Zirkin, Executive Vice President, LCCHR, to Tom Wheeler, Chairman, FCC, at 1-3 (filed Mar. 22, 2016). Free Press notes that an analysis of ownership diversity would be useful even if it fell short of justifying race- and gender-based policies. One "basic assessment" that the Commission has not made is "a study of the types of market and ownership structures that correlate with women's and people of color's entry into the market, success in the market, or exit from the market." Free Press FNPRM Comments at 17; *see also id.* at 19 ("Assessing what types of market structures are more likely to support new entrants and ownership by diverse and independent owners, and promulgating Commission policy to encourage or mirror those structures, does not implicate equal protection issues or require strict scrutiny."). We disagree. As discussed herein, the Commission has made significant efforts to analyze issues of ownership diversity and market structure. *See supra* paras. 246-255, 267-270; *infra* para. 316 & note Error: Reference source not found.

[255] UCC et al. FNPRM Comments at 25-26; *see* NHMC FNPRM Comments at 17. *See also* NABOB FNPRM Comments at 16-17 (stating that the report and order should identify existing studies and any new studies that must be prepared to meet the requirements of *Adarand*, and provide a timetable for the Commission's completion of such additional studies).

[256] *See FNPRM*, 29 FCC Rcd at 4496-4512, paras. 282-308.

[257] *See, e.g.*, UCC/Common Cause FNPRM Reply at 11-12; UCC July 20, 2016 *Ex Parte* Letter, Attach., Summary of Studies Recommended by UCC OC Inc.

[258] The media ownership studies commissioned by the Commission and the Commission's *Hispanic Television Study* are instructive examples of the type of study design that is required to effectively analyze issues of ownership and viewpoint, which includes identifying a question, a data set that permits analysis of the question, defining key

this proceeding nor the Commission's own efforts have produced additional study designs that we expect would develop the evidence necessary to support race- and/or gender-conscious measures. Therefore, our decision today that the record does not support the adoption of race- or gender-conscious measures reflects the inability of the Commission and commenters—including many groups and individuals experienced in research methodology—to identify relevant study designs that, if implemented, would be likely to support such measures. While we believe it worthwhile to continue to explore these issues and to monitor the relevant constitutional jurisprudence, we are exercising today our responsibility to pass on the race- and gender-based proposals before us at this time. Our action today does not prevent the Commission from reassessing these measures in the future if changed circumstances suggest a different outcome. Indeed, this decision does not preclude a different finding in the future, including the adoption of a race- and/or gender-conscious measure, based on new information. Additionally, the Commission will be on alert to any such data that may support such a finding and/or that may suggest steps that may lead to the collection of other relevant data.

D. Additional Proposals Related to Minority and Female Ownership

317. As discussed in the *FNPRM*, several commenters asked the Commission to consider additional measures that they believed would foster ownership diversity. Those measures include: (1) relaxing the foreign ownership limitations under Section 310(b)(4) of the Communications Act; (2) encouraging Congress to reinstate and update tax certificate legislation; (3) granting waivers of the local radio ownership rule to parties that "incubate" qualified entities; and (4) migrating AM radio to VHF Channels 5 and 6.[259] We also sought comment on various proposals that AWM asserted would help to promote ownership opportunities for women.[260] We noted that some of these measures have already been implemented by the Commission and tentatively concluded that the other measures would raise public interest concerns, might not provide meaningful assistance to the intended beneficiaries, or are outside the scope of this proceeding.

318. Since the release of the *FNPRM*, the Commission has implemented more of these measures, including several of the proposals regarding the AM band as discussed above.[261] We also note that the *2008 Diversity Order* considered a number of DCS's earlier diversity proposals and adopted a dozen of those proposals, some with modifications.[262] A number of commenters continue to support the Commission's race-neutral efforts to promote ownership diversity. For example, Bonneville/Scranton state that they agree with other commenters that the Commission should take concrete steps to address the problem of broadcast station financing for new entrants.[263] Similarly, Morris recommends that the Commission seek targeted solutions that directly address disparities in ownership for women and minorities.[264] By contrast, UCC et al., while supportive of efforts to promote ownership diversity, state that the race-neutral solutions that certain commenters support are unlikely to increase ownership opportunities for women and minorities and/or would raise public interest concerns.[265] We discuss the

concepts (e.g., Hispanic-oriented programming), and a theory by which the data could demonstrate causation or correlation between a policy and an outcome. Absent this level of specificity, general calls to "conduct *Adarand* studies" or to study the impact of the Commission's rules on ownership diversity do not help advance the Commission's research in these areas.

[259] *FNPRM*, 29 FCC Rcd 4512, para. 307. Foreign ownership and tax certificate legislation are discussed above in Section 1.

[260] *FNPRM*, 29 FCC Rcd at 4517-18, paras. 318-19.

[261] *See supra* Section 1.

[262] *See 2008 Diversity Order*, 23 FCC Rcd at 5928-57, paras. 10-101.

[263] Bonneville/Scranton FNPRM Reply at 9.

[264] Morris FNPRM Comments at 44-45. Morris notes that it previously identified six specific proposals for the Commission to consider. Morris FNPRM Comments at 44-45 (citing Morris Communications 2012 323 Report Reply at 5-6 (supporting six of the DCS proposals, including two of the measures that we are reinstating with the revenue-based eligible entity standard above)).

[265] UCC et al. FNPRM Reply at 22, 25.

specific proposals below.

1. Incubation

319. In the *FNPRM*, we stated our concern that proposals like DCS's incubation proposal, which would allow blanket waivers of the local radio ownership rule to broadcasters that finance or incubate an SDB or "valid eligible entity," would allow for more consolidation in local radio markets than our rules currently permit without sufficient offsetting benefits.[266] In addition, we stated that implementation of an incubator program would pose other concerns and administrative challenges, including challenges relating to the need to monitor over time the types of complex financing and other arrangements that would qualify an entity for an incubation waiver under DCS's incubation proposal.[267]

320. In response to the *FNPRM*, NAA continues to support an incubator program for broadcasters to finance disadvantaged businesses.[268] NAB also urges the Commission to remain open to proposals for a voluntary incubation program, despite the Commission's concerns about DCS's incubation proposal. NAB recommends that the Commission use an incubator program as a means of reexamining and testing an ODP standard, as MMTC has proposed.[269] AWM and Bonneville/Scranton also support this approach.[270] UCC et al., however, share the Commission's concern that an incubator program that uses a broad definition of qualifying entity would be difficult to administer and could create a substantial loophole in the Commission's ownership rules without having any significant impact on minority and female ownership.[271]

321. We do not believe that our concerns are addressed by the incubator program that NAB proposes, which would rely on an ODP standard to define the class of entities eligible to benefit from incubation. As discussed above, we find that the type of individualized consideration that would be required under an ODP standard would be administratively inefficient, unduly resource-intensive, and potentially inconsistent with First Amendment values.[272] Therefore, limiting the incubator program in the manner that NAB suggests would not address our concern that implementation of an incubator program would pose administrative challenges, such as the need to monitor continually the complicated legal and financial agreements between broadcasters and the entities they seek to incubate. Other commenters that urge the Commission to adopt an incubator program similarly do not address the policy and practical concerns we identified above. Therefore, we decline to adopt an incubator program as proposed by NAB and others.

2. Migration of AM Radio to VHF Channels 5 and 6

322. In the *FNPRM*, we sought comment on our tentative conclusion not to adopt the proposal that most AM radio be migrated to VHF Channels 5 and 6 in this proceeding. In response to the *FNPRM*, commenters did not express opposition to this tentative conclusion. No commenters dispute that implementation of this proposal would involve extensive changes to the Commission's current licensing rules and spectrum policies. As noted in the *FNPRM*, Congress directed the Commission to conduct an incentive auction of broadcast television spectrum—which is ongoing—in order to make additional spectrum available for wireless use.[273] We find that implementation of the Channel 5 and 6 proposal has a realistic potential to interfere with the Commission's implementation of the incentive auction and is

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[266] *FNPRM*, 29 FCC Rcd at 4515, para. 313.

[267] *Id.* at 4515-16, paras. 313-14.

[268] NAA FNPRM Comments at 15.

[269] NAB FNPRM Comments at 92-93 (citing Letter from David Honig, President, MMTC, and Jane E. Mago, Executive Vice President & General Counsel, Legal & Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC (filed Jan. 30, 2013)).

[270] AWM FNPRM Reply Comments at 2; Bonneville/Scranton FNPRM Reply at 9.

[271] UCC et al. FNPRM Reply at 25.

[272] *See supra* Section a.

therefore contrary to the spectrum policies established by Congress. Accordingly, we decline to adopt this proposal.

3. Additional DCS Proposals

323. The *FNPRM* identified numerous other DCS proposals that involved changes to various Commission licensing, service, and engineering rules and policies.[274] It also noted that some of the proposals related to the AM band were already being considered in a separate proceeding.[275] MMTC continues to urge the adoption of these proposals, while NAA expresses support for the relaxation of the main studio rule (Proposal 16).[276]

324. As noted above, certain of these proposals regarding the AM band have already been addressed in another proceeding, so we need not address them herein.[277] Moreover, we note that relaxation of the main studio rule—among other DCS proposals—is being explored in the AM Revitalization Proceeding.[278] While there is some general support for the remaining proposals—primarily from MMTC—we do not believe that the record establishes that these changes to Commission licensing, service, and engineering rules and policies would provide meaningful benefits to the intended beneficiaries. Commenters have had multiple opportunities to voice support for these proposals and explain the potential benefits that would arise from their implementation, but the record contains almost no support for the vast majority of these proposals.

325. The Commission has reviewed these proposals multiple times throughout the course of this proceeding. Those proposals that, based on our analysis, warranted additional consideration have been explored in relevant proceedings, such as the AM Revitalization Proceeding. However, upon review, we determine that many of these proposals would be ineffective or insufficient to address the diversity issues under consideration in this proceeding. Despite multiple opportunities for comment, the record reflects little support for the majority of these proposals or evidence that would cause us to reconsider our determination that these proposals warrant additional consideration or adoption. Accordingly, consistent with our tentative conclusion in the *FNPRM*, we decline to adopt these proposals.[279]

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[273] *FNPRM*, 29 FCC Rcd at 4516-17, para. 316.

[274] *Id.*

[275] *Id.*

[276] *See* MMTC FNPRM Comments at 8-12 (listing the proposals it continues to support); NAA FNPRM Comments at 15 (supporting relaxation of the main studio rule); *see also* Letter from Jacqueline Clary, Senior Counsel and Assistant Policy Director, MMTC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 1-2 (filed Nov. 10, 2014) (urging the Commission to consider the DCS proposals MMTC continues to support).

[277] *See supra* para. 245. We also note that DCS asks the Commission to clarify that the 18-month construction extension policy applies both to original construction permits (for the construction of new stations) and to construction permits for major modifications of authorized broadcast facilities (Proposal 17). This is not a new diversity-related proposal, but a request for a clarification of an existing policy, which we have provided herein. *See supra* para. 285 & note Error: Reference source not found.

[278] *AM Revitalization NOI*, 30 FCC Rcd at 12179-81, paras. 85-88. And while we decline to adopt a specific waiver standard for the main studio rule in this proceeding, we note that currently licensees are able to seek waiver of the rule under the Commission's general wavier standard. 47 CFR § 1.3.

[279] The proposals that we decline to adopt are as follows: (1) Bifurcate Channels for Share-Times with SDBs; (2) Use the Share-Time Rule to Allow Broadcasters to Share Frequencies to Foster Ownership of DTV and FM Subchannels; (3) Extend the Three-Year Period for New Station Construction Permits for Eligible Entities and SDBs; (4) Create Medium-Powered FM Stations; (5) Authorize Interference Agreements; (6) Harmonize Regional Interference Protection Standards; Allow FM Applicants to Specify Class C, CO, C1, C2 and C3 Facilities in Zones I and IA; (7) Relax the Limit of Four Contingent Applications; (8) Create a New Local "L" Class of LPFM Stations; (9) Redefine Community of License as a "Market" for Section 307 Purposes; (10) Remove Non-Viable FM Allotments; and (11) Issue a One-Year Waiver, on a Case-by-Case Basis, of Application Fees for Small Businesses

326. In the *FNPRM*, we also tentatively concluded that certain DCS proposals are outside the scope of this proceeding.[280] We explained that some of those proposals extend into areas that are beyond the Commission's authority and ultimately would require legislative action or action by other federal entities aside from the Commission in order to create changes in rules or policies.[281] We further explained that other proposals involve non-broadcast services that are outside the scope of our quadrennial review proceedings.[282] While we stated that we that we did not anticipate taking further action on these proposals within this or successive quadrennial review dockets, we also noted that some of these proposals may warrant further consideration.[283]

327. MMTC challenges the Commission's decision not to consider these 24 proposals in this proceeding.[284] According to MMTC, these proposals were squarely within the scope of the 2010 Quadrennial Review proceeding and "unquestionably" within the scope of the Diversity proceeding; thus, states MMTC, the Commission appears to have declined to consider these proposals for no valid reason.[285] MMTC also raised this issue in the appeal of the *FNPRM*.[286] In the course of the *Prometheus III* litigation, the court issued a letter to MMTC asking it to "address which, if any, of the 24 proposals . . . met **both** of the following criteria: 1) the FCC can adopt them without actions by Congress or other regulators and 2) they relate to the broadcast industry."[287] In response, MMTC identified 17 proposals that it asserted met both criteria;[288] in a reply letter to the court, the Commission indicated that it would address the proposals in this item.[289] In *Prometheus III*, the court declined to act on MMTC's challenge, but indicated that it expected the Commission to adhere to its representations to the court.[290]

328. Following the release of *Prometheus III*, MMTC met with Commission staff to discuss the 17 proposals identified for the court. Following these discussions, MMTC now requests that the Commission address five of these proposals in this Order; the remaining 12 proposals are being withdrawn from consideration in the context of this proceeding, though MMTC asserts that it may pursue some of these proposals in other proceedings.[291] In addition, MMTC is also withdrawing from consideration in this proceeding the seven proposals that it did not identify to the Third Circuit, which

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and Nonprofits. *See* MMTC FNPRM Comments at 9-11; DCS Supplemental NPRM Comments at 17-18, 24-25, 28-33, 42-52, 61-62, 63-65, 76-77; *see also* Letter from Kurt Wimmer, Counsel to NAA, to Marlene H. Dortch, Secretary, FCC, Attach. at 1 (filed June 30, 2016) (NAA June 30, 2016 *Ex Parte* Letter) (supporting proposal to issue a one-year waiver of application fees to small businesses and nonprofits).

[280] *FNPRM*, 29 FCC Rcd at 4517, para. 317.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] MMTC FNPRM Comments at 3.

[285] *Id.* at 2-4; Letter from David Honig, President, MMTC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Apr. 25, 2014). MMTC filed a petition for clarification requesting that the Commission issue an erratum clarifying that MMTC's proposals remain under consideration in the Diversity proceeding and will be ruled upon within a year. MMTC Petition for Clarification. MMTC subsequently withdrew its petition. MMTC Withdrawal of Petition for Clarification.

[286] MMTC Motion for Leave to Intervene, *Prometheus III*, 824 F.3d 33 (No. 15-3866).

[287] Letter from Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit, to Angela J. Campbell, Counsel to Prometheus Radio Project, et al. (Apr. 20, 2016), *Prometheus III*, 2016 WL 3003675 (No. 15-3866) (emphasis in original).

[288] Letter from David Honig, President Emeritus and Senior Advisor, MMTC, to Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit (Apr. 26, 2016), *Prometheus III*, 824 F.3d 33 (No. 15-3866).

[289] Letter from David M. Gossett, Deputy General Counsel, FCC, to Marcia M. Waldron, Clerk, U.S. court of Appeals for the Third Circuit (May 2, 2016), *Prometheus III*, 824 F.3d 33 (No. 15-3866).

[290] *Prometheus III*, 824 F.3d at 50 n.11.

largely were legislative recommendations.[292] Consistent with the direction from the Third Circuit and the revised request from MMTC, we will now address the five remaining proposals, as follows.[293]

329. *Proposal 5*. MMTC requests that the Commission consider how to promote minority ownership as part of all of its media-related proceedings.[294] At the outset, we note that OCBO "currently provides outreach services to assist small businesses and new entrants into the communications industry and input on how our proposed rules impact minority ownership."[295] While OCBO already plays an important role in this process, we find there is potentially room to do more to help inform our consideration of these important issues. Accordingly, going forward, the Commission will consider how to promote minority ownership in relevant media-related rulemaking proceedings and include an inquiry in any appropriate rulemaking to inform that question.

[291] The five proposals are: (1) Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings; (2) Extend the Cable Procurement Rule to Broadcasting; (3) Mathematical Touchstones: Tipping Points for the Non-Viability of Independently Owned Radio Stations in a Consolidating Market and Quantifying Source Diversity; (4) Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests; and (5) Create a New Civil Rights Branch of the Enforcement Bureau. Letter from Kim Keenan, President and CEO, MMTC, and David Honig, President Emeritus and Senior Advisor, MMTC, to Hon. Tom Wheeler, Chairman, FCC, at 1-8 (filed June 24, 2016) (MMTC June 24, 2016 *Ex Parte* Letter); NABOB July 11, 2016 *Ex Parte* Letter at 1 (supporting the five MMTC proposals). The remaining 12 proposals presented to the Third Circuit are: (1) Collect, Study and Report on Minority and Women Participation in Each Step for the Broadcast Auction Process; (2) Increase Broadcast Auction Discounts to New Entrants; (3) Require Minimum Opening Bid Deposits on Each Allotment for Bidders Bidding for an Excessive Proportion of Available Allotments; (4) Only Allow Subsequent Bids to Be Made Within No More than Six Rounds Following the Initial Bid; and (5) Require Bidders to Specify an Intention to Bid Only on Channels with a Total Minimum Bid of Four Times Their Deposits; (6) Grant Eligible Entities a Rebuttable Presumption of Eligibility for Waivers, Reductions, or Deferrals of Commission Fees; (7) Designate a Commissioner to Oversee Access to Capital and Funding Acquisition Recommendations; (8) Develop an Online Resource Directory to Enhance Recruitment, Career Advancement, and Diversity Efforts; (9) Study the Feasibility of a New Radio Agreement with Cuba; (10) Must-Carry for Certain Class A Stations; (11) Create a Media and Telecom Public Engineer Position to Assist Small Businesses and Nonprofits with Routine Engineering Matters; and (12) Conduct Tutorials on Radio Engineering Rules at Headquarters and Annual Conferences. *Id.* at 9-10; *see also* NAA June 30, 2016 *Ex Parte* Letter, Attach. at 1-2 (supporting MMTC's proposals to conduct radio engineering tutorials at FCC headquarters and annual conferences and to develop an online resource directory to enhance recruitment, career advancement, and diversity efforts).

[292] These legislative recommendations include: (1) Legislative Recommendation to Expand the Telecommunications Development Fund (TDF) Under Section 614 and Finance TDF with Auction Proceeds; (2) Legislative Recommendation to Amend Section 257 to Require the Commission to Annually Review and Remove or Affirmatively Prohibit Known Market Entry Barriers; (3) Legislative Recommendation to Clarify Section 307(b) to Provide that Rules Adopted to Promote Localism are Presumed to be Invalid if They Significantly Inhibit Diversity; (4) Legislative Recommendation to Amend the FTC Act (15 U.S.C. §§ 41-58) to Prohibit Racial Discrimination in Advertising Placement Terms and Advertising Sales Agreements; (5) Legislative Recommendation to Amend Section 614 to Increase Access to Capital by Creating a Small and Minority Communications Loan Guarantee Program; (6) Legislative Recommendation to Amend Section 614 to Create an Entity to Purchase Loans Made to Minority and Small Businesses in the Secondary Market; (7) Legislative Recommendation to Provide Tax Credit for Companies that Donate Broadcast Stations to an Institution Whose Mission is or Includes Training Minorities and Women in Broadcasting. *Id.* at 10-11; *see* MMTC FNPRM Comments at 11-12; DCS Supplemental NPRM Comments at 71, 75-76, 78-91; *see also* NAA June 30, 2016 *Ex Parte* Letter, Attach. at 2 (supporting the legislative recommendations to create a small and minority communications loan guarantee program and to provide tax credits to companies that donate broadcast stations to institutions that train minorities and women in broadcasting).

[293] While these proposals were originally submitted in this proceeding as part of the DCS Supplemental NPRM Comments, we note that MMTC submitted the comments on behalf of DCS; accordingly, we find that it is appropriate to rely on MMTC's assertions regarding the preferred treatment of these proposals in this proceeding. Moreover, consistent with the Third Circuit's letter, we are generally limiting our consideration of these proposals to the extent that they relate to the broadcast industry. *See supra* para. 327.

330. *Proposal 10*. MMTC also proposes that the Commission extend the cable procurement requirements to broadcasters and other regulated communications industries.[296] We note that the Commission's OCBO has already implemented various initiatives consistent with this proposal, holding multiple supplier diversity conferences and a government advertising workshop—and we anticipate that there will be more such events in the future.[297] However, we find that there is merit in exploring whether, and if so, how, to extend the cable procurement requirements to the broadcasting industry. Therefore, we will evaluate the feasibility of adopting similar procurement rules for the broadcasting industry.

331. *Proposal 33*. MMTC proposes two formulas it asserts are aimed at creating media ownership limits that promote diversity. Specifically, it suggests a "Tipping Point Formula" that would be applied in the local radio rule context, and a "Source Diversity Formula" that appears to be more broadly applicable.[298] At present, neither of these proposals is sufficiently defined. As MMTC itself notes, the Tipping Point Formula rests on "admittedly rough assumptions," and the record does not provide us with sufficient information to justify or refine the formula for general application across all radio markets.[299] Similarly, the Source Diversity Formula "would require field-testing before it could be applied," and we do not believe that the record provides us with the information necessary to rely on the formula to adopt media ownership limits. We therefore direct the Media Bureau to consider these proposals further and to solicit input on these ideas in the document initiating the next quadrennial review of the media ownership rules.

332. *Proposal 37*. MMTC also proposes that the Commission engage economists to "develop a model for market-based tradable diversity credits" that would serve as an alternative method for adopting ownership limits.[300] Broadly speaking, this proposal involves issuing "Diversity Credits" that

[294] MMTC FNPRM Comments at 8 (Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings); *see also* DCS Supplemental NPRM Comments at 13; MMTC June 24, 2016 *Ex Parte* Letter at 2-3 (urging the Commission to extend the proposal to "all FCC general rulemaking proceedings"); NABOB July 11, 2016 *Ex Parte* Letter at 1 (supporting MMTC proposal to extend cable procurement rule to broadcasting).

[295] *Diversity Order*, 23 FCC Rcd at 5948, para. 74.

[296] DCS Supplemental NPRM Comments at 21 (Extend the Cable Procurement Rule to Broadcasting); *see also* MMTC FNPRM Comments at 8; MMTC June 24, 2016 *Ex Parte* Letter at 3-6 (urging the Commission to extend the procurement requirements to "all Commission regulates"); Letter from Hon. Reed Hundt, et al., to Hon. Tom Wheeler, Chairman, FCC (filed Aug. 5, 2016) (supporting the proposal to extend the procurement requirements to "all communications technologies"). Pursuant to Section 634 of the Communications Act, as amended, the Commission adopted what DCS and MMTC refer to as the "cable procurement rule," which generally requires that a cable system "encourage minority and female entrepreneurs to conduct business with all parts of its operation," for example, by "[r]ecruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests." 47 CFR § 76.75(e); *see* 47 U.S.C. § 554(d)(2).

[297] *See supra* Section 1.

[298] DCS Supplemental NPRM Comments at 69-70 (Mathematical Touchstones: Tipping Points for the Non-Viability of Independently Owned Radio Stations in a Consolidating Market and Quantifying Source Diversity); *see also* MMTC FNPRM Comments at 10; MMTC June 24, 2016 *Ex Parte* Letter at 6-7. The "Tipping Point Formula" would be applied in the local radio rule context to determine the tipping point in the distribution of radio revenue in a market between independent owners and owners of multiple stations in that market. The theory is that the independent stations would no longer be able to survive once the combined revenues of the owners of multiple stations exceed the tipping point. DCS Supplemental NPRM Comments at 69-70. The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale, and is intended to express "the consumer benefit derived from marginal increases in source diversity." *Id.*

[299] DCS Supplemental NPRM Comments at 70.

[300] DCS Supplemental NPRM Comments at 75 (Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests); *see also* MMTC June 24, 2016 *Ex Parte* Letter at 7-8.

could be traded in a market-based system and redeemed by a station buyer to offset increased concentration that would result from a proposed transaction.[301] While the Commission's authority to adopt such a system is, at best, unclear, we think there is merit in evaluating the underlying proposal. We therefore direct the Media Bureau to consider this proposal further and to solicit input on this idea in the document initiating the next quadrennial review of the media ownership rules.

333. *Proposal 40*. MMTC recommends the creation of a new Civil Rights Branch of the Enforcement Bureau that would enforce Media Bureau Equal Employment Opportunity rules, as well as other rules impacting the broadcasting, cable, satellite, wireless, and wireline industries.[302] We have evaluated this proposal, and we find it warrants further consideration. Though we do not see a need to denominate a separate branch, enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau's existing mission and expertise in the enforcement of the Commission's regulations. We in no way, however, believe that the Media Bureau has failed to effectively enforce these rules. Accordingly, we direct the appropriate Commission Bureaus and Offices, including the Media Bureau, Enforcement Bureau, and Office of the Managing Director, to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau.

4. AWM Proposals

334. In response to the *NPRM*, AWM proposed that the Commission (i) prepare a primer on investment in broadcast ownership for smaller and regional lenders willing to provide loans to new broadcast entrants; (ii) prepare a primer for new entrants that provides guidance on how to find financing; (iii) establish a link on the Commission's website to provide information on stations that may be available for sale to small businesses; and (iv) allow sellers to hold a reversionary interest in a Commission license in certain circumstances.[303] We sought comment on these proposals in the *FNPRM*.[304] NAB, in its *FNPRM* comments, states that it has previously urged the Commission to sponsor primers on investment and financing of broadcast properties and allow sellers to hold reversionary interests in broadcast licenses in certain circumstances.[305]

335. We believe we have acted to achieve the purposes of these proposals to the extent appropriate for the industry and the regulatory agency. As we noted in the *FNPRM*, OCBO currently engages in a number of activities that provide broadcasters and potential investors with resources that are similar in substance to primers on investment and financing.[306] We discuss these activities above.[307] Beyond those activities, we continue to believe that specific advice about investment and financing is more appropriately provided by private parties that are directly involved in the financial marketplace than by the Commission. In particular, no additional commenters have urged us to adopt AWM's proposal that the Commission create a public listing of stations that may be available for sale to small businesses, and,

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[301] *Id*.

[302] DCS Supplemental NPRM Comments at 80-81 (Create a New Civil Rights Branch of the Enforcement Bureau); *see also* MMTC FNPRM Comments at 11; MMTC June 24, 2016 *Ex Parte* Letter at 8; Letter from David Honig, President Emeritus and General Counsel, MMTC, to Marlene H. Dortch, Secretary, FCC, at 1-2 (filed Dec. 12, 2014).

[303] AWM NPRM Comments at 6 (urging the Commission to consider "[a]llowing sellers to hold a reversionary interest in a Commission license if Seller paper is involved").

[304] *FNPRM*, 29 FCC Rcd at 4517-18, paras. 318-19 (discussing AWM proposals).

[305] NAB FNPRM Comments at 93-94. AWM urges the Commission to further explore the various proposals advanced and supported by NAB to encourage ownership of broadcast stations by women and minorities. AWM FNPRM Reply at 1-2.

[306] *FNPRM*, 29 FCC Rcd at 4518, para. 318.

[307] *See supra* Section 1.

as we explained in the *FNPRM*, the Commission currently does not have at its disposal the information that would be necessary to create such a resource.[308]

336. With regard to the proposal to allow sellers to hold reversionary interests in Commission licenses in certain circumstances, we previously noted that AWM's proposal does not address the Commission's historical concerns about reversionary interests and is insufficiently developed to warrant departure from the Commission's longstanding policy against the holding of such interests. The Commission has traditionally held that no right of reversion can attach to a broadcast license and that a station licensee is fully responsible for the conduct of the station and its operation in the public interest—a responsibility that cannot be delegated by contract.[309] While NAB notes that it has previously urged the Commission to allow sellers to hold reversionary interests in certain circumstances, NAB does not address the specific concerns we discussed in the *FNPRM* regarding this proposal.[310] Other commenters have not contributed to building a record on our reversionary interest policy in this proceeding.[311] Accordingly, we decline to adopt these proposals.[312]

✞✍ SHARED SERVICE AGREEMENTS

A. Introduction

337. Today we bring transparency to the use of sharing agreements between independently owned commercial television stations. Through these agreements, competitive stations in a local market are able to combine certain operations, with effectively the same station personnel handling or facilities performing functions for multiple, independently owned stations. While such combined operations no doubt result in cost savings—savings that could be reinvested in improved programming and other public interest-promoting endeavors—we have an obligation to ensure that these agreements are not being used to circumvent the Commission's broadcast ownership rules and are not otherwise inconsistent with the Commission's rules and policies. Today's decision is an important step in that process.

338. Specifically, in this Order and as discussed in greater detail below, we adopt a comprehensive definition of SSAs and a requirement that commercial television stations disclose these agreements by placing them in the stations' online public inspection files. This method of disclosure will place a minimal burden on stations, while providing the public and the Commission with easy access to the agreements. Accordingly, we find that the benefits of this rule outweigh the minimal burdens associated with disclosure.

B. Background

339. The potential disclosure of SSAs has been considered in multiple Commission proceedings. In the *Enhanced Disclosure FNPRM*, the Commission sought comment on whether the disclosure of sharing agreements that were not already defined and required to be disclosed under the Commission's rules (e.g., local marketing agreements (LMAs) and JSAs)[1] would serve the public interest

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[308] *FNPRM*, 29 FCC Rcd at 4518, para. 319.

[309] *See, e.g.*, *Applications of Kidd Communications*, 19 FCC Rcd 13584 (2004); *see also* 47 CFR § 73.1150 ("In transferring a broadcast station, the licensee may retain no right of reversion of the license. . . .").

[310] *FNPRM*, 29 FCC Rcd at 4518, para. 319.

[311] *See* AWM FNPRM Reply at 1-2; Morris FNPRM Comments at 44-45 & n.150.

[312] If presented with appropriate evidence or analysis regarding the Commission's historical concerns, the Commission may consider in a future proceeding a general review of its reversionary interest policy, subject to resource constraints.

[1] The Commission's rules define local marketing agreements, also known as "time brokerage agreements," as agreements where a licensee sells discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it. 47 CFR § 73.3555, Note 1(j). JSAs (joint sales agreements) are defined as agreements with a licensee of a "brokered station" that authorizes a "broker" to sell advertising time for the "brokered station." 47 CFR § 73.3555, Note 1(k).

and whether to require stations to include such agreements in their public files.[2] Ultimately, the Commission declined to adopt any new disclosure requirements for sharing agreements in that proceeding but indicated that it would continue to monitor the issue and revisit the disclosure requirement in the future.[3] Concurrent with the pendency of the Enhanced Disclosure proceeding, the Commission sought comment in the *NPRM* in the 2010 Quadrennial Review proceeding about various types of sharing agreements, noting that commenters to the *NOI* in that proceeding had specifically identified sharing agreements involving commercial television stations and a subcategory of such agreements, local news sharing (LNS) agreements, as matters of concern, but acknowledging that these terms were not defined in Commission rules.[4] The *NPRM* invited views on the potential impact of such agreements on the Commission's ownership rules and fundamental policy goals, invited submissions of further information about how to define such agreements, and sought comment on whether they should be attributed or disclosed.[5]

340. Building on the comments filed in response to the *NPRM*, the *FNPRM* focused the inquiry onto whether and how to require the disclosure of certain SSAs. Specifically, the *FNPRM* proposed a comprehensive definition of SSAs designed to encompass the universe of agreements that parties broadly referred to as "sharing agreements." The *FNPRM* also sought comment on whether the proposed definition was too expansive and on ways in which the definition could be limited without negatively impacting the public's and the Commission's interest in understanding the breadth and prevalence of these agreements.[6] In addition, the *FNPRM* asked whether disclosure of SSAs by commercial television stations was necessary to enable the public and the Commission to evaluate the impact of these agreements, and if so, what method of disclosure would best serve the public interest (e.g., placing SSAs in each station's online public file, or creating a new form to be filed with the Commission).[7] The item also sought comment on related issues, such as whether to apply the disclosure requirement to other services (e.g., commercial radio stations, noncommercial television and radio stations) and whether to permit the redaction of confidential or proprietary information, as is permitted with respect to the filing of LMAs and JSAs.[8]

C. Discussion

341. We find that commenters have raised meaningful concerns regarding the potential impact of sharing agreements involving commercial television stations on our competition, localism, and diversity policy objectives, particularly with respect to our local broadcast ownership rules. At the same time, resource sharing can deliver meaningful public interest benefits, and the sharing of certain resources may have no negative impact on any of our policy goals. At present, however, consideration of these issues is impeded because so little is known by the Commission and the public about the content, scope, and prevalence of sharing agreements.[9] In order to assess these issues, we first adopt a clear definition of SSAs—substantially similar to the definition proposed in the *FNPRM*—in order to identify the agreements between stations that are relevant to our improved understanding of how stations share

[2] *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 26 FCC Rcd 15788, 15805-06, para. 35 (2011).

[3] *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Second Report and Order, 27 FCC Rcd 4535, 4575, para. 84 (2012) (*Enhanced Disclosure Order*).

[4] *NPRM*, 26 FCC Rcd at 17564-70, paras. 194-208.

[5] *Id.* at 17569, paras. 204-05.

[6] *FNPRM*, 29 FCC Rcd at 4522-24, paras. 329-34.

[7] *Id.* at 4524-26, paras. 335-39.

[8] *Id.* at 4524, 4526, paras. 334, 339.

[9] This is not the case, however, with respect to LMAs and JSAs, which are well-known and understood subsets of sharing agreements that are already attributable in certain circumstances. 47 CFR § 73.3555, Note 2(k).

services and resources. Next, we adopt a mechanism for making such arrangements involving commercial television stations transparent to the public and the Commission.[10] Specifically, commercial television stations will now be required to disclose these agreements by placing them in the participating stations' online public inspection files. Through our actions today, the public and the Commission will be able to better evaluate the impact of these agreements, if any, on our policy goals.

1. Definition of Shared Service Agreement

342. *Scope of definition*. In the *FNPRM*, we proposed to define an SSA as any agreement or series of agreements, whether written or oral, in which (1) a station, or any individual or entity with an attributable interest in the station, provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not under common ownership (as defined by the Commission's attribution rules); or (2) stations that are not under common ownership (as defined by the Commission's attribution rules), or any individuals or entities with an attributable interest in those stations, collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations.[11]

343. Many commenters express support for the definition proposed in the *FNPRM*, asserting that it is important to adopt a definition broad enough to ensure that all types of sharing agreements are identified (and ultimately disclosed).[12] In addition, Free Press asserts that a narrower definition would invite legal gamesmanship, whereby agreements would be drafted in such a way as to avoid disclosure.[13]

344. Broadcast commenters, however, assert that the definition is overbroad.[14] The Smaller Market Coalition, for example, asserts that the proposed definition of SSA greatly expands on the type of agreements commonly known as sharing agreements and would apply to even minor collaborations between stations, including community service initiatives and breaking news coverage.[15] Similarly, NAB argues that the definition is overbroad because it covers agreements that are not tied to a station's core operations and are not "reasonably related to any regulatory concern."[16] For example, NAB states that sharing agreements covering administrative support or other back-office services do not raise attribution or transfer of control concerns; therefore, they should not be included in the definition of SSAs for disclosure purposes.[17] NAB also objects to the definition because it encompasses other types of agreements that are already defined by the Commission and subject to various regulations.[18] Although the *FNPRM* requested possible alternatives to the proposed definition, no commenter submitted an alternate definition for consideration.[19]

345. We find that the definition proposed in the *FNPRM*, with a minor modification discussed below, best comports with the informational needs that support our efforts to define SSAs. Contrary to broadcaster assertions, we do not believe it is appropriate to exclude certain resource sharing, such as administrative support or other back-office services, from the definition based on premature assessments

[10] As discussed below, we decline to extend the SSA disclosure requirement to include agreements involving radio stations and/or noncommercial television stations.

[11] *FNPRM*, 29 FCC Rcd at 4523, para. 330.

[12] CWA FNPRM Comments at 6-7; Free Press FNPRM Comments at 23; UCC et al. FNPRM Comments at 6-7; UCC et al. FNPRM Reply at 8; WGAW FNPRM Comments at 13.

[13] Free Press FNPRM Comments at 23.

[14] Smaller Market Coalition FNPRM Comments at 17; NAB FNPRM Comments at 95-98.

[15] Smaller Market Coalition FNPRM Comments at 17.

[16] NAB FNPRM Comments at 96-97.

[17] *Id*.

[18] *Id.* at 99-101.

[19] *FNPRM*, 29 FCC Rcd at 4524, para. 333 ("We encourage those who disagree with our proposed definition to provide specific alternative language to define SSAs for purposes of this proceeding.").

of the potential future regulatory treatment of such activities. In addition, we agree with Free Press that a definition narrower than the one we adopt today would invite legal gamesmanship whereby parties would be able to draft sharing agreements to fall outside of the established definition to avoid disclosure.[20] For this reason, we will not adopt exclusions from the definition of SSA, such as those based on the duration of the agreement or a set dollar amount. Otherwise, an entity wishing to circumvent the disclosure requirement could merely break down an SSA into a series of shorter or smaller agreements that would each fall below the established parameters. Similarly, as noted in the *FNPRM*, a financial exclusion would omit otherwise significant sharing agreements that involve in-kind contributions. We do not believe that excluding these types of agreements from the definition of SSA would further our objectives or serve the public interest.

346. In order to address concerns expressed by certain commenters, however,[21] we emphasize that the definition we adopt limits the scope of agreements to those that involve station-related services. We also provide non-exhaustive examples in the definition for guidance, consistent with the proposal in the *FNPRM*.[22] Indeed, it is not our goal to adopt a definition of SSAs that encompasses station interactions that do not relate to station operations or that are incidental in nature. For example, community service initiatives and charity events, while worthwhile in their own regard, do not relate to the operation of the broadcast station; accordingly, charitable collaborations involving independently owned broadcast stations would not fit within the definition of SSAs that we adopt here.

347. Similarly, we clarify that ad hoc or "on-the-fly" arrangements during breaking news coverage are also outside the definition of SSAs. While such interactions may involve a station-related service, namely news-gathering, such informal, short-term arrangements are typically precipitated by unforeseen or rapidly developing events. Absent a covering agreement that facilitates such cooperation, we do not believe that these types of interactions demonstrate that the stations are working together; rather, they are acting in a manner that allows each station to separately pursue its own ends (e.g., the production of an independent news story).[23] By contrast, such conduct would be evidence of collaboration, and included in the definition of SSAs, if the stations were parties to an LNS agreement (or similar agreement) that governs the terms of news coverage, even if the stations retain the ability to produce their own segments.

348. *Text of Definition*. While we find that a clear definition of SSAs is appropriate, one technical change to the text proposed in the *FNPRM* is necessary. In the *FNPRM*, the proposed definition of SSAs was designed to identify the universe of agreements for the provision of station-related services involving stations that are not under common control.[24] Stations under common control do not "share" services or collaborate in the same way as stations that operate independently for purposes of this definition. After review, we believe that the proposed language failed to appropriately reflect our intent regarding the scope of the requirement, which covers agreements between stations "not under common ownership." Specifically, the phrase "not under common ownership (as defined by the Commission's attribution rules)," in the absence of context, could be read to exclude from the definition those stations that simply share a single attributable interest holder, which was not our intent for purposes of this rule. To rectify this, we will replace this phrase with one used by Congress in the STELA Reauthorization Act of 2014, in which Congress banned all joint retransmission negotiations by stations in the same market

[20] Free Press FNPRM Comments at 23.

[21] Smaller Market Coalition FNPRM Comments at 17; NAB FNPRM Comments at 96-97.

[22] *FNPRM*, 29 FCC Rcd at 4523, para. 330. Station-related services include, but are not limited to, administrative, technical, sales, and/or programming support. *Id*.

[23] For example, if two news trucks from independently owned broadcast television stations arrive at the scene of an accident at the same time and agree to set up their camera shots from different angles or to rely on the footage shot by only one of the stations due to limited space and safety concerns, this agreement does not evidence actual collaboration between the stations to produce the news segments. Instead, the news teams are reacting to unforeseen circumstances and ensuring that each news team can safely and effectively create its own news story.

[24] *See, e.g.*, *FNPRM*, 29 FCC Rcd at 4523, para. 331.

that are not under common *de jure* control.[25] In the statute, Congress defined stations as commonly owned when they were "directly or indirectly under common *de jure* control permitted under the Commission's regulations." Adopting this revised language will define SSAs as agreements between stations that are not under common *de jure* control, which was our purpose in the *FNPRM*.

349. Accordingly, we define an SSA as any agreement or series of agreements, whether written or oral, in which (1) a station provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common *de jure* control permitted under the Commission's regulations; or (2) stations that are not directly or indirectly under common *de jure* control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations. For purposes of this rule, the term "station" includes the licensee, including any subsidiaries and affiliates, and any other individual or entity with an attributable interest in the station.[26] Consistent with previous Commission rules, the substance of oral agreements shall be reduced to writing.[27]

2. Disclosure of Shared Service Agreements

350. *Justification for disclosure*. Many commenters support the Commission's proposed disclosure requirement.[28] According to these commenters, broad disclosure of SSAs is necessary to provide the public and the Commission with the information necessary to evaluate the potential impact of these agreements on the Commission's rules and policies, as well as in license renewal proceedings.[29] In addition, Free Press asserts that the disclosure requirement should apply both to the brokered station and the brokering station.[30]

351. Multiple broadcast commenters oppose the disclosure requirement based on concerns that the disclosure requirement is unduly burdensome.[31] These commenters argue that the requirement will—and is, in fact, designed to—discourage stations from entering into SSAs, which will lead to a reduction in investment in local programming and station improvements.[32] NAB also raises First Amendment

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[25] Pub. L. No. 113-200, 128 Stat. 2059 (2014); *see* 47 U.S.C. § 325(b)(3)(C) (as amended by Section 103 of the STELAR).

[26] We emphasize that sharing agreements to which non-licensee entities are a party (e.g., an operating subsidiary of the ultimate parent company) fall within the definition we adopt herein. We find that including such entities within the term "station" is necessary to foreclose the possibility that stations could use operating subsidiaries or similar entities to evade the SSA disclosure requirement. This is consistent with our proposal in the *FNPRM* that we should not limit the definition of SSAs to only those agreements to which licensees are parties. *See FNPRM*, 29 FCC Rcd at 4523, para. 332 (stating that limiting the definition of SSAs to agreements between licensees would exclude existing agreements intended for inclusion and afford a means to evade disclosure requirements).

[27] *See* 47 CFR § 73.3613 (requiring the substance of oral contracts to be reported in writing).

[28] *See* Block FNPRM Comments at 6-11; CWA FNPRM Comments at 6-7; Free Press FNRPM Comments at 23-24; Free Press FNPRM Reply at 14; LCCHR FNPRM Comments at 3; MMTC FPRM Comments at 6; Morgan Wick FNPRM Reply at 5; SAG-AFTRA FNPRM Comments at 3; UCC et al. FNRPM Comments at 1-2; UCC et al. FNPRM Reply at 7; WGAW FNPRM Comments at 13-14; *see also* NAB FNPRM Comments at 95 (supporting disclosure of SSAs in some circumstances, but opposing the specific requirements proposed in the *FNPRM*).

[29] *See* CWA FNPRM Comments at 6-7; LCCHR FNPRM Comments at 3; SAG-AFTRA FNPRM Comments at 3; UCC et al. FNPRM Comments at 5; WGAW FNPRM Comments at 13-14.

[30] Free Press FNRPM Comments at 24-25.

[31] NAB states generally that the cost of compliance with the proposed disclosure requirement will be significant, though it provides no cost estimates or specific information.

[32] *See* NAB FNRPM Comments at 95, 104-05; NAB FNPRM Reply at 13; Smaller Market Coalition FNPRM Comments at 16-17, 18; Sinclair FNPRM Comments at 12; Surtsey Media FNPRM Comments at 1-6.

concerns by asserting that the disclosure requirement represents an intrusion into the day-to-day operations of broadcast station—the newsroom, in particular.[33]

352. While NAB states that it does not oppose disclosure of sharing agreements if the transparency would promote the Commission's policy goals, NAB argues that the proposed broad disclosure requirement fails to do so.[34] While NAB concedes that the Commission "can properly solicit information from private parties in order [to] better fulfill its statutory mandate," NAB contends that the Commission has failed to tie the "broad-ranging" disclosure requirement to any identified regulatory issue, statutory mandate, or proposed regulation.[35] According to NAB, the Commission must first identify a specific problem or regulatory action before requiring disclosure of SSAs.[36]

353. Free Press and UCC et al. reject the claims that the proposed disclosure requirement is too broad and not sufficiently connected to specific regulatory concerns. They argue that commenters have identified potential concerns associated with these agreements, and the Commission has determined that it lacks information on the breadth and substance of SSAs, which hinders its ability to evaluate the commenters' concerns.[37] According to UCC et al., NAB is wrong to suggest that the Commission must identify regulatory violations before requiring disclosure, as disclosure is first necessary to allow the public and the Commission to review and analyze the agreements.[38] Similarly, Free Press disputes NAB's assertion that certain SSAs, such as those involving back-office or administrative services, should not be disclosed because they do not pose any attribution or other regulatory concerns. According to Free Press, this is precisely the question at issue and such determinations cannot be made until the agreements have been disclosed and analyzed.[39] According to UCC et al., these agreements are not available from any other source, so the disclosure requirement is necessary to facilitate this analysis.[40] These commenters also reject contentions that the disclosure requirement is overbroad because certain subsets of SSAs, such as LMAs and JSAs, are already defined and regulated by the Commission and the disclosure requirement would have no impact on these agreements (i.e., an agreement need only be disclosed once).[41]

354. We require the disclosure of SSAs in each participating station's online public inspection file, as explained in greater detail below. The SSA disclosure requirement shall apply regardless of whether the agreement involves stations in the same market or in different markets. This approach

[33] NAB FNPRM Comments at 103 (asserting that the disclosure requirement is subject to intermediate scrutiny under the First Amendment and that the proposed disclosure requirement would likely not satisfy that test).

[34] *Id.* at 95. According to NAB, the only potential problems raised by SSAs identified by the *FNPRM* are already covered by existing regulations, so disclosure is not necessary. *Id.* at 99-100. For example, NAB states that LMAs and JSAs—types of sharing agreements—are already regulated, station staffing issues are addressed by the main studio rule, and issues of control can be addressed under the Commission's *de facto* control standards. *Id.* at 100.

[35] NAB FNPRM Comments at 97; NAB FNRPM Reply at 12-13; *see also* Smaller Market Coalition FNPRM Comments at 17 (asserting that the Commission has failed to provide a rational justification for imposing this burden).

[36] *See* NAB FNPRM Comments at 97-99. NAB argues that the record demonstrates that SSAs are not problematic, and therefore, that the disclosure requirement runs counter to the evidence before the Commission. *Id.* at 99 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also* NAB FNPRM Comments at 101-03. However, UCC et al. assert that the Commission has broad authority—both statutory and under relevant case law—to adopt appropriate record-keeping requirements and to require the disclosure of information necessary for the Commission to discharge its functions. *See* UCC et al. FNPRM Reply at 12-13 (citing *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942) (*Stahlman*); *United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985); and Sections 303(j), 303(r), 308(b), and 309(a) of the Communications Act).

[37] Free Press FNPRM Reply at 15, 16-18 (providing examples of potential harms associated with SSAs); UCC et al. FNPRM Reply at 8.

[38] UCC et al. FNPRM Reply at 8-9.

[39] Free Press FNPRM Reply at 16.

[40] UCC et al. FNPRM Reply at 8-9.

[41] Free Press FNPRM Reply at 15-16; UCC et al. FNPRM Reply at 9.

follows the approach taken with the public file disclosures for JSAs and LMAs and is consistent with our intent to learn more about how commercial television stations use these agreements.[42] We find that this disclosure requirement is tied to a clear regulatory purpose. Commenters in the proceeding have raised meaningful issues regarding the potential impact of the joint operation of independently owned commercial broadcast television stations pursuant to SSAs on the Commission's rules and policy goals, including, but not limited to, the Commission's local broadcast ownership rules and rules regarding unauthorized transfer of control.[43] These commenters have identified specific provisions in sharing agreements that, according to the commenters, convey a significant degree of influence over the core operating functions of an independent commercial television station (and potentially *de facto* control over the station).[44] In addition, commenters have also provided examples of markets in which sharing agreements have been executed and of the asserted impact of these agreements on the market (e.g., job losses and reductions in independently produced local news programming).[45] According to these commenters, such sharing agreements impact the Commission's competition, localism, and diversity goals, as well as suggest violations of the Commission's rules against unauthorized transfers of control. The disclosure of these agreements is necessary for the public and the Commission to evaluate these potential impacts.

355. Moreover, the Commission's rules have long required that television and radio broadcast stations enable public inspection of certain documents to provide information both to the public and to the Commission about station operations.[46] The public and the Commission rely on information about the nature of a station's operations and compliance with Commission rules to verify that a station is meeting its fundamental public interest obligations. The Commission has consistently found that disclosure requirements facilitate the Commission's regulatory purposes while imposing only a minimal burden on licensees.[47]

356. Additionally, we disagree that the Commission must first address the appropriate regulatory status of sharing agreements (e.g., make them attributable) prior to requiring their disclosure. For example, we agree with Free Press and UCC et al. in rejecting NAB's assertion that back-office or administrative agreements—agreements that clearly relate to station operations within the definition of SSAs we adopt herein—should be excluded from disclosure because they currently do not raise any attribution or other regulatory concerns. Disclosure itself informs such decisions, and the Commission has wide latitude to impose such a requirement.[48] Moreover, such agreements may also help inform

[42] *See* 47 CFR § 73.3526(e)(14), (e)(16).

[43] Free Press FNPRM Reply at 16-18; Block FNPRM Comments at 6-7; LCCHR FNPRM Comments at 3; *see also FNPRM*, 29 FCC Rcd at 4520, para. 323 (summarizing commenters' SSA concerns from the 2010 quadrennial review proceeding).

[44] *See, e.g.*, CWA FNPRM Comments at 9-20; Free Press FNPRM Reply at 18-19.

[45] *See, e.g.*, CWA FNPRM Comments at 12-15.

[46] *See* 47 CFR §§ 73.3526, 73.3527, 73.1943.

[47] *See, e.g.*, *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/Mds Interests*, Report and Order, 14 FCC Rcd 12559, 12601, para. 92 (1999) (*1999 Attribution Order*). As discussed in greater detail below, we find that broadcast commenters have failed to provide any evidence to substantiate claims that the disclosure requirement is unduly burdensome.

[48] *Enhanced Disclosure Order*, 27 FCC Rcd at 4575, para. 84; *see also 1999 Attribution Order*, 14 FCC Rcd at 12612-13, para. 123 (declining to change Commission attribution policies regarding JSAs but requiring broadcasters to place JSAs in their public inspection files to facilitate monitoring of JSAs by the public, competitors, and regulatory agencies); *Stahlman*, 126 F.2d at 127 ("[F]all authority and power is given to the Commission with or without complaint to institute an inquiry concerning questions arising under the provisions of the Act or relating to its enforcement. This . . . includes authority to obtain the information necessary to discharge its proper functions, which would embrace an investigation aimed at the prevention or disclosure of practices contrary to public interest.") (citing 47 U.S.C. § 403); *Stahlman*, 126 F.2d at 128 (Commission inquiry was "within the administrative powers of the Commission to initiate the proposed investigation for the purpose of ascertaining the facts for its guidance in making reasonable and proper public rules, for application to existing stations, and in the consideration

allegations involving unauthorized transfers of control. In the past, the Commission has first required the disclosure of certain agreements that relate to station operations prior to making a determination that such agreements should be subject to additional regulation.[49] Our action today is consistent with this precedent. Indeed, the Commission could hardly fulfill its obligation to ensure that station operations are consistent with Commission rules and policies if it were required to determine the regulatory status of certain agreements *before* obtaining the information necessary to evaluate the agreements. We do not think the public interest would be served by adopting such a constricted view of the Commission's authority.

357. Furthermore, we are not persuaded that the disclosure requirement adopted today will discourage stations from entering into SSAs. First, the adopted method for disclosure minimizes the cost of compliance and utilizes a procedure with which commercial television broadcasters already have extensive experience.[50] It cannot be credibly stated that the burden associated with disclosure would exceed the benefits of the agreements. Second, we find it instructive that there is no evidence that the disclosure requirements for JSAs and LMAs, specific types of SSAs, have inhibited the formation of those agreements. To the contrary, the Commission first required the public filing of television JSAs in 1999, and the prevalence of these agreements increased significantly after the disclosure requirement was adopted.[51] Ultimately, we do not find any evidence to support the contention that disclosure of SSAs would discourage stations from executing such agreements, particularly if the agreements are as beneficial as broadcast commenters contend.

358. Finally, we reject NAB's assertion that the SSA disclosure requirement would violate the First Amendment because the Commission is "immersing itself in broadcasting stations' day-to-day operations."[52] The cases cited by NAB in support of its theory are readily distinguishable from the disclosure requirement adopted today, as neither case involves simply requiring disclosure of contracts relating to station operations.[53] Contrary to NAB's claims, the Commission is not interfering with

of future requests."); 47 CFR § 1.1 ("The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpoena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings."); 47 U.S.C. § 303(r) (authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter"); 47 U.S.C. § 303(j) (Commission has "authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable"); 47 U.S.C. § 154 ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[49] *1999 Attribution Order*, 14 FCC Rcd at 12601, 12612-13, paras. 94, 123. We note that our action today does not predetermine that any such additional regulation will be forthcoming for SSAs; rather, the disclosure is necessary for the Commission to make such a determination.

[50] *See Enhanced Disclosure Order*, 27 FCC Rcd at 4536, para. 2; *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Notice of Proposed Rulemaking, 29 FCC Rcd 15943, 15944, para. 1 (2014) (*Expansion of Online Public File Obligations NPRM*).

[51] *1999 Attribution Order*, 14 FCC Rcd at 12601, 12612-13, paras. 94, 123; *FNPRM*, 29 FCC Rcd at 4528, para. 342 & n.1048 (citing Jonathan Make, *Widespread, Cost-Saving TV JSAs Lead Executives to Question Why FCC Would Attribute Them*, Communications Daily, Nov. 29, 2012 (reporting that its own survey showed over 100 stations that were party to a television JSA and noting the increased prevalence of such agreements in recent years)).

[52] NAB FNPRM Comments at 103.

[53] *See CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (involving regulation of editorial decisions, specifically whether broadcasters must accept paid editorial advertisements); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 366 (1984) (concerning whether noncommercial educational broadcasters may be prohibited from "engag[ing]

broadcasters' editorial discretion.[54] Rather, the Commission is simply requiring that commercial television stations place certain contracts in their public file, just as the Commission has done numerous times in the past.[55] In particular, we are not restricting broadcasters' discretion to determine what content to offer, nor are we mandating or prohibiting any particular contractual terms. Thus, the disclosure requirement does not burden broadcasters' speech.[56] Further, there is no evidence that previous disclosure requirements have resulted in such involvement. For example, television LMAs or JSAs that include local news programming and/or production have long been subject to disclosure, but there is no evidence that the Commission has subsequently become immersed in the day-to-day production of local news or that disclosure of the agreements has otherwise impacted station operations. Indeed, the Commission has a long history of deferring to a "licensee's good faith discretion" in programming decisions—particularly news programming—and we believe that the SSA disclosure requirement is consistent with this precedent.[57] In this case, we are not even proposing to regulate SSAs beyond the bare disclosure requirement.

359. NAB further argues that the disclosure requirement fails to satisfy the constitutional standards for regulations that require businesses to disclose factual information, stating that the agency must show that there is a "substantial government interest" that is "directly and materially advanced by the restriction" and that the restriction is narrowly tailored to achieve the government interest.[58] On the contrary, even assuming that the disclosure requirement burdens broadcasters' speech to any extent (which we conclude above is not the case), the requirement would be subject, at most, to rational basis review, which is the same standard that courts have applied to the Commission's ownership rules.[59] Under this standard of review, a rule does not violate the First Amendment if it is "a reasonable means of promoting the public interest in diversified mass communications."[60]

360. Our SSA disclosure requirement satisfies this standard. SSAs relate to a broadcast station's core operational functions and thus could have the effect of lessening competition, diversity, or localism by creating a commonality of interests. They could also have beneficial effects. Public interest commenters and broadcasters have conflicting viewpoints about whether SSAs should be deemed attributable for purposes of our ownership rules and whether they negatively or positively affect our public interest goals of competition, diversity, and localism. Without an industry-wide disclosure rule, we lack the information necessary to determine the extent to which SSAs may affect diversity, competition, and localism and whether SSAs in fact confer significant influence or control warranting attribution for purposes of our ownership rules or raising unauthorized control concerns. Although broadcasters have

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in editorializing").

[54] *See* NAB FNPRM Comments at 103.

[55] *See, e.g.*, *1999 Attribution Order*, 14 FCC Rcd at 12601, 12612-13, paras. 94, 123; NAB FNPRM Comments at 103; *see also* 47 CFR § 73.3526 (requiring placement of various agreements in station public file).

[56] In particular, we are not compelling broadcasters to express a message or viewpoint. *See United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (finding that IRS summons did not require plaintiff to "disseminate publicly a message with which he disagrees" and First Amendment therefore did not prevent enforcement of the summons).

[57] *See ABC, Inc.*, Memorandum Opinion and Order, 83 FCC 2d 302, 305 (1980) (stating that the Commission will not review a licensee's news judgment absent evidence of news suppression or distortion or evidence that the licensee has ignored matters of significant local concern); *see also Shareholders of Univision, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 5842, 5855-56, para. 28 (2007) ("Because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's free press guarantee, licensees are entitled to the broadest discretion in the scheduling, selection and presentation of news programming.").

[58] NAB FNPRM Comments at 103 (quoting *Nat'l Ass'n of Mfgs.v. SEC*, 748 F.3d 359, 371 (D.C. Cir. Apr. 2014), *aff'd on reh'g.* 800 F.3d 518 (D.C. Cir. 2015), and citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564-66 (1980)).

[59] *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 167-69 (D.C. Cir. 2002).

[60] *Prometheus I*, 373 F.3d at 401-02 (quoting *FCC v. Nat'l Citizens Comm. for Broad*., 436 U.S. 775, 802 (1978)).

disclosed SSAs in connection with individual license assignments/transfers of control applications, we do not know what types of SSA are in place between stations that are not parties to such pending Commission applications, nor do we know the extent to which broadcasters across the industry utilize SSAs that are not already required to be disclosed. Thus, we believe industry-wide disclosure is necessary to allow the Commission and public to evaluate in a comprehensive manner the extent to which broadcasters use various types of SSA, the nature of the contractual relationships, and the manner in which specific types of agreements affect competition, diversity, or localism.[61] Broadcasters hold licenses issued by the Commission and are obligated to operate in the public interest, and thus they have no right to withhold from the Commission or the public agreements that may significantly affect their service to the public. Therefore, our rule is a reasonable means of promoting the Commission's diversity, competition, and localism goals and assuring that SSAs do not raise unauthorized control concerns and satisfies the criteria for First Amendment rational basis review.

361. The case law NAB cites in support of a higher standard of review concerns requiring a regulated entity to undertake new speech,[62] and presents the question of whether a restriction on commercial speech, normally subject to intermediate scrutiny, satisfies the criteria for rational basis review under the exception applicable to compelled commercial speech that is strictly factual.[63] Here, in contrast, the Commission is simply requiring broadcasters to publicly disclose contracts they have already executed, not undertake new speech. Further, although the SSA disclosure rule does nothing more than require placement of SSAs in the broadcasters' public inspection file, it is subject to rational basis review for a different reason (i.e., because it is a content-neutral rule that furthers our scheme of broadcast ownership regulation and the policy goals supporting such regulation).[64] Thus, if the SSA disclosure requirement burdens speech at all, the rational basis review applicable to structural broadcast regulations —not the intermediate scrutiny standard applicable to commercial speech—applies to the disclosure requirement.

362. Finally, even assuming that the intermediate scrutiny standard of *Central Hudson* applies, which we conclude is not the case, the rule "directly and materially" advances governmental interests that the Supreme Court has recognized as substantial.[65] The purpose of the rule is to provide information that is directly relevant to our regulation of broadcast ownership and the policy goals that underlie our ownership rules. The filing of SSAs will further our goal of collecting the necessary information. We have tailored the requirement to exclude agreements that are already subject to disclosure in a station's public file and to exclude agreements that are not likely to implicate our policy concerns. The rule does not restrict or dictate the ways in which broadcasters may share resources but simply requires them to disclose contracts that already exist. The filing requirement is therefore narrowly

[61] UCC et al. FNPRM Reply at 8-9; *see also* GAO, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Media Ownership: FCC Should Review the Effects of Broadcaster Agreements on its Policy Goals, GAO-14-558, at 29 (June 2014) (concluding that the "lack of analysis and information [about the prevalence and nature of SSAs] could undermine [the] FCC's efforts to ensure its media ownership regulations achieve their intended goals.").

[62] *Nat'l Ass'n of Mfgs.*, 748 F.3d at 363 (concerning a requirement that mining firms investigate and disclose the origin of minerals extracted from a conflict zone). Ultimately, NAB seems to be relying on *Central Hudson* for the proposition that restrictions on commercial speech are subject to intermediate scrutiny. *Central Hudson*, 447 U.S. at 557. In *Central Hudson*, the Court invalidated a state regulation that prohibited public utilities from promoting the use of electricity in their advertising and marketing materials. *Id.* at 557-58.

[63] *Nat'l Ass'n of Mfgs.*, 748 F.3d at 370-71.

[64] *See Sinclair*, 284 F.3d at 168.

[65] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("Likewise, assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); *id.* at 664 ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.") (citations omitted); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 160 (2d Cir. 2013).

tailored to achieve the regulatory objective, and the burden is minimal. Accordingly, we find that the disclosure requirement does not violate the First Amendment even under the higher standard of review that NAB advocates.

363. *Disclosure in station's online public inspection file*. We will require commercial broadcast television stations to post SSAs to each participating station's online public inspection file that is hosted by the Commission. Multiple commenters support SSA disclosure in a station's public inspection file (online, physical, or both).[66] According to Free Press, the nominal cost of scanning and uploading an SSA into a station's online public inspection file would be exceeded by the benefits of disclosure.[67] UCC et al. oppose limiting disclosure of SSAs to just the physical public inspection file or by filing directly with the Commission, as these methods would make it difficult for members of the public to access the agreements; rather, UCC et al. argue that disclosure in the stations' online public inspection files is the right approach.[68] In addition, they support the creation of a permanent docket in ECFS for all new SSAs and material amendments thereto, which would be updated by the Commission each time a filing is uploaded to the station's online public inspection file.[69]

364. We find that the online public filing requirement, pursuant to Section 73.3526 of the Commission's rules, best facilitates the disclosure of SSAs.[70] In the *Enhanced Disclosure Order*, the Commission updated the disclosure requirements to make information concerning broadcast service more accessible to the public by having stations post their public files online in a central, Commission-hosted database.[71] Consistent with our findings in that order, we find that an online public filing requirement best comports with Commission policy to modernize the procedures that television broadcasters use to inform the public about how stations are serving their communities.[72] Having stations post their SSAs online in a central, Commission-hosted database utilizes existing technology to make information concerning broadcast service more accessible to the public and reduces broadcasters' costs of compliance over time.[73] We are not convinced that other disclosure methods, such as an ECFS docket or filing with the Commission pursuant to Section 73.3613 of the Commission's rules, are less burdensome than the online public file requirement or that such methods provide meaningful advantages to the public and the Commission in terms of identifying and accessing SSAs.

365. NAB asserts that under the *State Farm* decision the Commission must consider less-restrictive alternatives than those proposed in the *FNPRM* and proposes that stations instead submit an aggregate list of SSAs in their biennial ownership reports, which, according to NAB, would give the Commission the ability to evaluate, over time, whether these agreements have a negative impact on the

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[66] *See* Free Press FNRPM Comments at 25 (supporting disclosure in both the online and physical public inspection file); SAG-AFTRA FNPRM Comments at 3 (supporting disclosure in a station's public inspection file); UCC et al. FNRPM Comments at 7 (advocating for disclosure in a station's online public file); WGAW FNPRM Comments at 14. Free Press asserts that television LMAs and JSAs must be placed both in a station's online and physical public inspection files, so it would be consistent to require the same for SSAs. *See* Free Press FNPRM Comments at 25. This, however, is not consistent with the public file rule, which requires only that television LMAs and JSAs be placed in the online public file.

[67] Free Press FNPRM Comments at 25; Free Press FNPRM Reply at 18.

[68] UCC et al. FNPRM Comments at 8. We note that the Commission recently proposed to eliminate the correspondence file requirement for commercial broadcast stations; if adopted, these stations would no longer be required to maintain local public inspection files. *See generally Revisions to Public Inspection File Requirements – Broadcaster Correspondence File and Cable Principal Headend Location*, Notice of Proposed Rulemaking, FCC 16-62 (May 25, 2016).

[69] UCC et al. FNPRM Comments at 6-7.

[70] *See* 47 CFR § 73.3526.

[71] *Enhanced Disclosure Order*, 27 FCC Rcd at 4536, para. 1.

[72] *See id*.

[73] *See id*.

Commission's policy goals.[74] In reply, however, UCC et al. assert that NAB's proposal is insufficient, as an aggregate list of agreements would not provide the public or the Commission with information regarding the content or the scope of the agreements—information that is critical for an analysis of the impact of SSAs on the Commission's rules and policy goals.[75] UCC et al. also assert that the Commission is not required to consider other solutions to a problem, so long as the option selected is not irrational.[76] Moreover, UCC et al. state that NAB's reliance on *State Farm* is misplaced, because NAB's proposal does not address the problems identified by the Commission—i.e., a lack of information regarding the breadth, content, and scope of SSAs—therefore, NAB's proposal cannot be considered a significant alternative worthy of Commission consideration.[77]

366. We decline to adopt NAB's proposed alternative to require that stations submit an aggregate list of SSAs as part of the biennial ownership reports. We agree with UCC et al. that a mere list of agreements would be insufficient for the purpose we seek.[78] Such a limited disclosure would not permit the public or the Commission to develop a full and complete understanding of SSAs and their impact on the broadcast television industry. Simply submitting a list of agreements would not provide the public or the Commission with any information about the nature and scope of the agreements, only that the agreements exist. While the prevalence of SSAs is of some importance, the terms of the agreements and their impact on station operations are far more critical to an analysis of the potential impact of SSAs on the Commission's rules and policy goals. In addition, disclosure only in biennial ownership reports would not result in timely disclosure of these agreements, which would frustrate continued efforts to study SSAs. Moreover, searching for SSAs disclosed in biennial ownership reports would be a more laborious task for the public and the Commission than searching the online public files. Indeed, a significant benefit of the online public file is that it improves public access to documents while minimizing burdens on stations. NAB's proposal ignores this significant benefit without identifying any meaningful benefits in return.

367. *Disclosure by noncommercial stations, radio, and newspapers*. In the *FNPRM*, we proposed to apply the disclosure requirement to commercial television stations only but sought comment on whether agreements involving other entities, such as radio stations and noncommercial television stations, should also be included in the disclosure requirement.[79] Some commenters urge the Commission to expand the disclosure requirement beyond full-power commercial television stations. These commenters argue that expanding the disclosure requirement will allow the public and the Commission to analyze whether these SSAs are impacting the Commission's rules and policies with regard to other media platforms. Specifically, the Communications Workers of America (CWA) asks the Commission to require disclosure of SSAs involving noncommercial television stations as well as broadcast radio stations; SAG-AFTRA advocates expanding the requirement to commercial radio stations; and UCC et al. support expanding the disclosure requirement to SSAs involving same-market television stations and daily newspapers, and those involving same-market radio stations.[80]

368. We decline to expand the SSA disclosure requirement beyond commercial television stations, as commenters have not provided sufficient justification for such an expansion at this time.[81] Commenters provided the Commission with numerous examples of sharing agreements involving

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[74] NAB FNPRM Comments at 105 (citing *State Farm*, 463 U.S. at 43).

[75] UCC et al. FNPRM Reply at 10.

[76] *Id.* (citing *Ass'n of Pub.-Safety Commc'ns Officials v. FCC*, 76 F.3d 395, 400 (D.C. Cir. 1996) (citing *Loyola Univ. v. FCC*, 670 F.2d 1222, 1227 (D.C. Cir. 1982))).

[77] UCC et al. FNPRM Reply at 10.

[78] *See id*.

[79] *FNPRM*, 29 FCC Rcd at 4524, para. 334.

[80] *See* CWA FNPRM Comments at 6; SAG-AFTRA FNPRM Comments at 3; UCC et al. FNPRM Comments at 9.

[81] *See* CWA FNPRM Comments at 6; SAG-AFTRA FNPRM Comments at 3; UCC et al. FNPRM Comments at 9.

commercial television stations.[82] Based on these examples, commenters raised meaningful concerns about the potential impact of such agreements on the Commission's public interest goals.[83] The evidence in the record, however, does not demonstrate that SSAs involving noncommercial stations, radio stations, or newspapers are common or that they present the same kinds of potential public interest concerns. However, we may revisit our decision to limit disclosure to commercial television stations in the future if evidence suggests that additional disclosure may be appropriate.

369. *Redaction of confidential or proprietary information.* As part of the SSA disclosure requirement, we adopt provisions that permit stations to redact confidential or proprietary information, just as we have for LMAs and JSAs.[84] We note, however, that the redacted information must be made available to the Commission upon request. The redaction allowance directly addresses the concerns of commenters that oppose the disclosure of SSAs on the grounds that it will require stations to disclose sensitive, confidential business information.[85]

370. NAB nevertheless argues that the redaction allowance proposed in the *FNPRM* is not sufficient to protect the business interests of stations that are subject to the disclosure requirement.[86] NAB argues that the disclosure of the mere existence of SSAs will provide competitive information to competitors.[87] In reply, UCC et al. assert that the potential disclosure of sensitive business information is not a sufficient reason to abandon the proposed disclosure requirement, as the public and the Commission need to know the content of these agreements in order to evaluate their impact on the public interest.[88] CWA asks that the Commission carefully scrutinize redacted material if a dispute arises and hold that information that "is not financial in nature will be presumptively non-confidential or proprietary."[89]

371. We reject NAB's argument that the redaction allowance will not be sufficient to protect broadcast stations' business interests because the disclosure of the mere existence of these agreements will provide useful information to competitors.[90] All broadcasters have long been required to attach copies of transaction-related SSAs to a license assignment or transfer application, including placing the application and relevant agreements in the station's public inspection file until final action has been taken on the application.[91] There is no evidence in the record that this requirement has resulted in any competitive harm. In addition, we note that broadcast commenters have failed to provide evidence that the business interests of television broadcast stations have been inhibited by the adoption of the LMA and JSA disclosure requirements or that such interests are likely to be inhibited by the substantially similar SSA disclosure requirement adopted today. Furthermore, we find that NAB's argument is at odds with its own proposed alternative for stations to submit aggregate lists of SSAs as part of their biennial ownership reports, which would disclose the existence of such agreements.[92] We conclude that the adopted redaction allowance sufficiently balances the informational needs of the public and the Commission with the

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[82] Free Press FNPRM Reply at 16-18; Block FNPRM Comments at 6-7; AFTRA NPRM Comments at 4-7; CWA NPRM Comments at 5-6; Free Press NPRM Comments at 52-56; UCC et al. NPRM Comments at 4-8; Mediacom Communications Corp. and Suddenlink Communications NPRM Comments at 22-23 (Mediacom/Suddenlink).

[83] *See* Free Press FNPRM Reply at 16-18; Block FNPRM Comments at 6-7; AFTRA NPRM Comments at 4-7; CWA NPRM Comments at 5-6; Free Press NPRM Comments at 52-56; UCC et al. NPRM Comments at 4-8; Mediacom/Suddenlink NPRM Comments at 22-23.

[84] *See* 47 CFR § 73.3526(e)(14), (e)(16).

[85] Smaller Market Coalition FNPRM Comments at 18.

[86] NAB FNRPM Comments at 104.

[87] *Id*.

[88] UCC et al. FNPRM Reply at 10-11.

[89] CWA FNPRM Comments at 6.

[90] *See* NAB FNRPM Comments at 104.

[91] *See, e.g.*, FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License.

[92] *See* NAB FNPRM Comments at 105.

business interests of broadcasters to keep proprietary information confidential.

372. *Cost of compliance.* In the *FNPRM*, we requested comment on alternative filing methods and their associated costs.[93] NAB, however, criticizes the Commission for failing to inquire whether the benefits of disclosure will outweigh the costs of compliance, argues that the costs will exceed the benefits, and disputes the Commission's rationale that the costs will not be significant because the requirement is limited to commercial television stations and because SSAs are typically multi-year agreements.[94] However, Free Press asserts that the costs and effort associated with the proposed disclosure requirement will be minimal and the benefits of transparency will outweigh the costs.[95]

373. Consistent with Commission precedent, we find that an online public filing requirement minimizes the cost to broadcasters while ensuring that the public has easy and convenient access to the information. As the Commission has previously stated, we find that the electronic upload or scanning and upload of SSAs is not unduly burdensome.[96] We do not find arguments to the contrary to be persuasive or supported by evidence. Aside from general statements that disclosure will be too costly, NAB and the Smaller Market Coalition provide no cost estimates to support their assertions.[97] Moreover, in light of our clarifications above, we find that we have adequately addressed concerns that the definition of SSAs is overly broad and would result in a significant increase in the number of agreements stations would be required to upload to their public inspection file.[98] Television broadcasters should also be well versed in uploading documents to the Commission's online public inspection file database, as they have been required to use the database since 2012.[99]

374. *Duplicative filings*. As the Commission already requires broadcasters to submit JSAs and LMAs in accordance with its public file disclosure requirements,[100] we confirm that, to the extent that the SSA disclosure requirement would duplicate established JSA and LMA disclosures, a broadcaster would have to place these agreements in their public inspection file only once. A broadcaster will not be required to file additional copies of JSAs and LMAs for the SSA disclosure requirement if the broadcaster's public inspection file already contains a copy of the agreement. This clarification reduces the burden of compliance to broadcasters and is consistent with previous Commission decisions regarding duplicative filings.[101]

375. *Procedural matters*. Each station that is party to an SSA executed prior to the effective date of the disclosure requirement we adopt herein, which is subject to OMB approval, shall place a copy of the SSA in its public inspection file within 180 days after the disclosure requirement becomes effective, provided that the agreement is not already in the station's public inspection file.[102] SSAs that

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[93] *FNPRM*, 29 FCC Rcd at 4525, para. 337.

[94] NAB FNPRM Comments at 105.

[95] Free Press FNPRM Reply at 18.

[96] *See Enhanced Disclosure Order*, 27 FCC Rcd at 4547, para. 27.

[97] *See* NAB FNRPM Comments at 104-05; Smaller Market Coalition FNPRM Comments at 17.

[98] *See, e.g.*, Smaller Market Coalition FNPRM Comments at 17.

[99] *See Expansion of Online Public File Obligations NPRM*, 29 FCC Rcd at 15944, para. 1 (noting the successful transition by television broadcasters to online public filing in the past two years).

[100] *See* 47 CFR § 73.3526(e)(14), (e)(16); *see also* 47 CFR §§ 73.3613(b), (c) (requiring stations to disclose agreements when they relate to control of a licensee or involve management consulting or similar agreements).

[101] *See Enhanced Disclosure Order*, 27 FCC Rcd at 4546, para. 20 (noting that broadcast stations are not required to upload material to the online public file that is already filed with the Commission or available on a Commission database).

[102] *See* 47 CFR § 73.3526(e)(18) (as amended herein). We will seek OMB approval for the disclosure requirement, and, upon receiving approval, the Commission will release a Public Notice specifying the date by which SSAs must be placed in the stations' online public files. The Public Notice will also provide further details on how the SSA

are executed after the disclosure requirement is effective must be placed in the stations' online public files in a timely fashion, and stations are reminded to maintain orderly public files.[103]

3. Attribution

376. Finally, in response to the *FNPRM*, multiple commenters assert that the Commission should immediately make SSAs attributable based on the existing record and the Commission's experience with SSAs in the context of assignments/transfers of control of station licenses.[104] These commenters believe that SSAs—a term that heretofore has not been defined or applied consistently—harm the public interest and that disclosure alone is insufficient to address these harms.[105] According to these commenters, SSAs provide similar—perhaps even greater—incentives for the station providing the services to exert influence over the core operations of the station receiving the service than already attributable agreements, such as certain LMAs and JSAs.[106] Multiple broadcast commenters, however, urge the Commission to reject the calls to make SSAs attributable based on the existing record.[107]

377. We decline to make SSAs attributable. As noted in the *FNPRM*, and as confirmed herein, we believe that it is necessary to first define SSAs and to require their disclosure before making any decisions regarding attribution or any other regulatory action that may be appropriate based on review of these agreements.[108] Unlike the resource sharing provided for in LMAs and JSAs—which are specific types of SSAs involving discrete, easily defined activities with a clear impact on a station's core operating functions—the types of resource sharing in other SSAs are not easily categorized and their potential impact on a station's core operating functions is not well understood at this time, largely due to the lack of a definition of SSAs and lack of disclosure.[109] Accordingly, our action today is a necessary step before the Commission can consider whether attribution of any additional types of SSAs or any other regulatory action is appropriate. The Commission has traditionally taken an incremental approach in determining whether and how to attribute agreements between and among broadcasters.[110] In these circumstances, we find that it is appropriate and reasonable to proceed in this fashion, "one step at a time," when addressing these complicated issues.[111] Once the Commission has had an opportunity to evaluate the potential impact of SSAs on the Commission's rules and policy goals, it will be in a position to consider whether attribution or other regulatory action is warranted.

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files are to be designated within each station's online public file.

[103] *See Enhanced Disclosure Order*, 27 FCC Rcd at 4582, para. 102.

[104] *See, e.g.*, CWA FNPRM Comments at 7-20; Free Press FNPRM Comments at 25-27; Free Press FNPRM Reply at 18-19; SAG-AFTRA FNPRM Comments at 2-3; UCC et al. FNPRM Comments at 1-2, 10-11.

[105] *See, e.g.*, Block Communications FNPRM Comments at 6-11; CWA FNPRM Comments at 12-20; Free Press FNPRM Comments at 21-22, 25-27; SAG-AFTRA FNPRM Comments at 2-3; UCC et al. FNPRM Comments at 10-11.

[106] CWA FNPRM Comments at 10; SAG-AFTRA FNPRM Comments at 2-3; UCC et al. FNPRM Comments at 10.

[107] *See* NAB FNPRM Reply at 14; Sinclair FNPRM Comments at 12 (opposing any restrictions on SSAs); Smaller Market Coalition FNPRM Comments at 9.

[108] *FNPRM*, 29 FCC Rcd at 4518-19, para. 320.

[109] *Id*.

[110] *See id.* at 4529-30, paras. 343-44.

[111] *See U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) (quoting *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984)); *see also id.* ("[A]gencies need not address all problems 'in one fell swoop.'"). We note also that the court in *Prometheus III* rejected the argument that the Commission acted "arbitrarily and capriciously by not attributing all . . . SSAs" in the *Report and Order*, finding instead that the Commission was justified in its sequential approach in addressing this issue. *Prometheus III*, 824 F.3d at 60 n.18. Though we reiterated that our action today is not intended to prejudge whether attribution or any other regulatory actions are appropriate for SSAs.

✞✋✍ PROCEDURAL MATTERS

A. Regulatory Flexibility Act

378. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the Report and Order. The FRFA is set forth in Appendix B.

B. Paperwork Reduction Act Analysis

379. *Final Paperwork Reduction Act Analysis*. This Report and Order contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the Federal Register at a later date seeking these comments. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. In this present document, we have assessed the effects of the SSA disclosure requirement, and find that the disclosure requirement will not impose a significant filing burden on businesses with fewer than 25 employees. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA set forth in Appendix B.

C. Congressional Review Act

380. The Commission will send a copy of this Second Report and Order to the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

✞✋✋✍ ORDERING CLAUSES

381. Accordingly, **IT IS ORDERED**, that pursuant to the authority contained in Sections 1, 2(a), 4(i), 303, 307, 309, 310, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, and 403, and Section 202(h) of the Telecommunications Act of 1996, this Second Report and Order **IS ADOPTED**. The rule modifications attached hereto as Appendix A shall be effective thirty (30) days after publication of the text or summary thereof in the Federal Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective on the effective date announced in the Federal Register notice announcing OMB approval. Changes to Commission Forms required as the result of the rule amendments adopted herein **WILL BECOME EFFECTIVE** on the effective date announced in the Federal Register notice announcing OMB approval.

382. **IT IS FURTHER ORDERED**, that the proceedings MB Docket No. 09-182 and MB Docket No. 14-50 **ARE TERMINATED**.

383. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

384. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Second Report and Order to the Government Accountability Office pursuant to the Congressional Review Act.

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[1] *See* 5 U.S.C. § 603.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rule Changes

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

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

AUTHORITY: 47 U.S.C. 154, 303, 334, 336 and 339.

2. Amend § 73.3526 by adding paragraph (e)(18) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

* * * * *

(18) *Shared Service Agreements*. For commercial television stations, a copy of every Shared Service Agreement for the station (with the substance of oral agreements reported in writing), regardless of whether the agreement involves commercial television stations in the same market or in different markets, with confidential or proprietary information redacted where appropriate. For purposes of this paragraph, a Shared Service Agreement is any agreement or series of agreements in which (1) a station provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common de jure control permitted under the Commission's regulations; or (2) stations that are not directly or indirectly under common de jure control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations. For purposes of this paragraph, the term "station" includes the licensee, including any subsidiaries and affiliates, and any other individual or entity with an attributable interest in the station.

* * * * *

3. Amend § 73.3555 by removing paragraphs (d)(3) through (d)(7); revising paragraphs (b), (c), (d)(1), and (d)(2); revising Note 4 and Note 5; and adding Note 11 and Note 12:

§ 73.3555 Multiple ownership.

* * * * *

(b) *Local television multiple ownership rule*. An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if:

(1) The digital noise limited service contours of the stations (computed in accordance with § 73.622(e)) do not overlap; or

* * *

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those TV stations the digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination. In areas where there is no DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination.

(2) [Reserved]

* * * * *

(c) *Radio-television cross-ownership rule*.

(1) This rule is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the principal community contour(s) of the TV broadcast station(s) (computed in accordance with § 73.625) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.186), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the principal community contour(s) of the TV broadcast station(s) (computed in accordance with § 73.625) encompass(es) the entire community of license of the AM station.

* * *

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have digital noise limited service contours (computed in accordance with § 73.622(e)) that overlap with the digital noise limited service contour(s) of the TV station(s) at issue;

* * * * *

(d) *Newspaper/broadcast cross-ownership rule*. (1) No party (including all parties under common control) may directly or indirectly own, operate, or control a daily newspaper and a full-power commercial broadcast station (AM, FM, or TV) if:

(i) the predicted or measured 2 mV/m groundwave contour of the AM station (computed in accordance with § 73.183 or § 73.186) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the AM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market;

(ii) the predicted or measured 1 mV/m contour of the FM station (computed in accordance with § 73.313) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the FM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market; or

(iii) the principal community contour of the TV station (computed in accordance with § 73.625) encompasses the entire community in which the newspaper is published; and the community of license of the TV station and the community of publication of the newspaper are located in the same DMA.

(2) The prohibition in paragraph (d)(1) of this section shall not apply upon a showing that either the newspaper or television station is failed or failing.

* * * * *

Note 4 to § 73.3555:

Paragraphs (a) through (d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, or to FM or AM broadcast minor modification applications for intra-market community of license changes, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (d) of this section will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to all other applications for minor changes to existing stations that seek a change in an FM or AM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (d) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this Note, the Report and Order in Docket No. 02-277, released July 2, 2003 (FCC 02-127), or the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016).

* * * * *

Note 5 to § 73.3555:

Paragraphs (b) through (e) of this section will not be applied to cases involving television stations that are "satellite" operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87-8, FCC 91-182 (released July 8, 1991), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating "satellite" television station, the digital noise limited service contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the principal community contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station, may subsequently become a "non-satellite" station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87-8. However, such commonly owned, operated, or controlled "non-satellite" television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 4 of this section. Nor shall any application for assignment or transfer concerning such "non-satellite" stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 4 of this section.

* * * * *

Note 11 to § 73.3555: An entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the "new affiliate") acquires the network affiliation of another station (the "previous affiliate"), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement. Parties should also refer to the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016).

Note 12 to § 73.3555: Parties seeking waiver of paragraph (d)(1) of this section, or an exception pursuant to paragraph (d)(2) of this section involving failed or failing properties, should refer to the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016).

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

385. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* that initiated this proceeding.[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. In addition, the Commission incorporated a Supplemental Initial Regulatory Flexibility Analysis (SIRFA) in the *FNPRM* in this proceeding.[3] The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the SIRFA. The Commission received no comments in direct response to the IRFA or the SIRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[4]

A. Need for, and Objectives of, the *Second Report and Order*

386. The *Second Report and Order* (*Order*) concludes the 2010 and 2014 Quadrennial Reviews of the broadcast ownership rules, which were initiated pursuant to Section 202(h) of the Telecommunications Act of 1996 (1996 Act).[5] The Commission is required by statute to review its media ownership rules every four years to determine whether they "are necessary in the public interest as the result of competition"[6] and to "repeal or modify any regulation it determines to be no longer in the public interest."[7]

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[1] 5 U.S.C. § 603. The RFA, *id.* §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, Appx. C (2011) (*NPRM*).

[3] *See 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, Appx. D (2014) (*FNPRM*).

[4] *See* 5 U.S.C. § 604.

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (1996 Act) (codified as amended at 47 U.S.C. § 303 note); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (Appropriations Act) (amending Sections 202(c) and 202(h) of the 1996 Act).

[6] 1996 Act § 202(h). In *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*), the Third Circuit concluded that "necessary in the public interest" is a '"plain public interest' standard under which 'necessary' means 'convenient,' 'useful,' or 'helpful,' not 'essential' or 'indispensable.'" *Id.* at 394. The court stated that "the first instruction [of § 202(h)] requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain 'necessary in the public interest.'" *Id.* at 391. In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. *See* Appropriations Act § 629.

[7] 47 U.S.C. § 303 note (Section 202(h) of the 1996 Act as amended). Contrary to the claims of certain commenters, there is no "presumption [in Section 202(h)] in favor of repealing or modifying the ownership rules." *See*, *e.g.*, CBS NPRM Comments at 2-3 (citing *Fox Television Stations v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002)). The court in *Prometheus I* determined that Section 202(h) does not carry a presumption in favor of deregulation. *See Prometheus I*, 373 F.3d at 395 (rejecting the "misguided" findings in *Fox* and *Sinclair* regarding a "deregulatory presumption" in Section 202(h)); *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 444-45 (3d Cir. 2011) (*Prometheus II*) (confirming the standard of review under Section 202(h) adopted in *Prometheus I*). Moreover, when modifying an existing rule, the Commission has the discretion "to make [the rule] more or less stringent"; Section 202(h) is not a "one-way ratchet." *Prometheus I*, 373 F.3d at 394-95; *see also Prometheus II*, 652 F.3d at 445. Whether the Commission determines that a rule should be retained, repealed, or modified, the decision must be in the public interest and must be supported by reasoned analysis. *See Prometheus I*, 373 F.3d at 395; *Prometheus II*, 652 F.3d at 445.

387. The media ownership rules that are subject to this quadrennial review are the Local Television Ownership Rule, the Local Radio Ownership Rule, the Newspaper/Broadcast Cross-Ownership (NBCO) Rule, the Radio/Television Cross-Ownership Rule, and the Dual Network Rule.[8] Ultimately, while the Commission acknowledged the impact of new technologies on the media marketplace, it concluded that some limits on broadcast ownership remain necessary to protect and promote the Commission's policy goals of fostering competition, localism, and diversity. As discussed in more detail below, the *Order* retains two rules without modification—the Local Radio Ownership Rule and the Dual Network Rule—and adopts changes to three others—the Local Television Ownership Rule, the NBCO Rule, and the Radio/Television Cross-Ownership Rule. In particular, the *Order* adopts a new waiver standard for the NBCO Rule and changes to the contours and market definitions used in application of the rule. The *Order* also adopts contour changes to the Radio/Television Cross-Ownership Rule. In addition, the *Order* adopts a definition of and disclosure requirements for shared service agreements (SSAs). Lastly, the *Order* addresses issues referred to us in the Third Circuit's remand in *Prometheus Radio Project v. FCC* (*Prometheus II*)[9] of certain aspects of the Commission's 2008 *Diversity Order*.[10]

388. *Local Television Ownership Rule.* In the *Order*, the Commission finds that the current Local Television Ownership Rule remains necessary in the public interest and should be retained with a limited modification.[11] Specifically, the Commission finds that the public interest would be best served by replacing the Grade B contour overlap test used to determine when to apply the Local Television Ownership Rule with a digital noise limited service contour (NLSC) test—as proposed in the *FNPRM*—rather than the DMA-based approach proposed in the *NPRM*. The *Order* adopts grandfathering provisions for any existing combinations that violate the revised rule, though such combinations must comply with the rule in effect at the time of any subsequent assignment or transfer of control.

389. The Commission finds that Local Television Ownership Rule is necessary to promote competition. In addition, the Commission finds that the competition-based rule adopted in this *Order* will also promote viewpoint diversity by helping to ensure the presence of independently owned broadcast television stations in local markets and is consistent with the Commission's localism goal, though the *Order* does not rely on these goals to retain the rule. Furthermore, the *Order* finds that extending the application of the top four-prohibition to affiliation swaps will help enforce the existing Local Television Ownership Rule. The Commission ultimately concludes that the limited modification of the rule will better promote competition, and that this benefit outweighs any burdens, which are minimized further by the grandfathering provisions.

390. The *Order* also concludes that the Local Television Ownership Rule proposed in the *FNPRM* remains consistent with the goal of promoting minority and female ownership of broadcast television stations. In addition, while the *Order* does not retain the rule with the specific purpose of preserving the current levels of minority and female ownership, it finds that retaining the existing rule effectively addresses the concerns of those commenters who suggested that additional consolidation would have a negative impact on minority and female ownership of broadcast television stations.

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[8] These rules are found, respectively, at 47 CFR §§ 73.3555(b), (a), (d), (c), and 73.658(g).

[9] *Prometheus II*, 652 F.3d at 437.

[10] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (*Diversity Order* and *Diversity Third FNPRM*).

[11] 47 U.S.C. § 303 note (Section 202(h) of the 1996 Act as amended). Under the modified television ownership rule adopted in the *Order*, an entity may own up to two television stations in the same DMA if (1) the digital NLSCs of the stations (as determined by Section 73.622(e) of the Commission's rules) do not overlap; or (2) at least one of the stations is not ranked among the top four stations in the market and at least eight independently owned television stations will remain in the DMA following the combination. In calculating the number of stations remaining post-merger, only those stations whose digital NLSC overlaps with the digital NLSC of at least one of the stations in the proposed combination will be considered, which is consistent with the contour overlap provision of the previous rule. In addition, the Commission retains the existing failed/failing station waiver policy.

391. The Commission also concludes that retaining the existing failed/failing station waiver criteria is in the public interest. The Commission evaluated the various proposed waiver standards proffered by commenters and expressed concern that many of the proposed waiver criteria would be difficult to monitor or enforce, are not rationally related to the ability of each station to compete in the local market, and could be manipulated in order to obtain a waiver. Ultimately, the Commission predicts that such standards would significantly expand the circumstances in which a waiver of the Local Television Ownership Rule would be granted. The *Order* finds that such expansion is inconsistent with the decision to retain the existing television ownership limits. Moreover, the Commission believes that the existing waiver standard is not unduly restrictive and that it provides appropriate relief in markets of all sizes. The Commission finds that the existing waiver criteria strike an appropriate balance between enforcing the ownership limits and providing relief from the rule on a case-by-case basis.

392. *Local Radio Ownership Rule.* In the *Order*, the Commission finds that the current Local Radio Ownership Rule remains necessary in the public interest and should be retained without modification.[12] The Commission finds that the rule is necessary to promote competition. The radio ownership limits also promote viewpoint diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market. Similarly, the Commission finds that a competitive local radio market helps to promote localism, as a competitive marketplace will lead to the selection of programming that is responsive to the needs and interests of the local community. However, the Order does not rely on viewpoint diversity or localism as a justification for retaining the rule. The Commission finds also that the Local Radio Ownership Rule is consistent with the goal of promoting minority and female ownership of broadcast radio stations. The Commission ultimately concludes that these benefits outweigh any burdens that may result from the decision to retain the rule without modification.

393. The *Order* retains the AM subcaps in order to promote new entry. The *Order* finds that broadcast radio, in general, continues to be a more likely avenue for new entry in the media marketplace —including entry by small businesses and entities seeking to serve niche audiences—as a result of radio's ability to more easily reach certain demographic groups and the relative affordability of radio stations compared to other mass media. AM stations remain generally the least expensive option for entry into the radio market, often by a significant margin, and therefore permit new entry for far less capital investment than is required to purchase an FM station. While some commenters suggested that eliminating the subcaps could result in divestiture of properties that could be acquired by new entrants, the Commission did not find this rationale persuasive.

394. The Commission also finds that there continue to be technical and marketplace differences between AM and FM stations that justify retention of both the AM and FM subcaps to promote competition in local radio markets. As the Commission has noted previously, FM stations enjoy technical advantages over AM stations, such as increased bandwidth and superior audio signal fidelity. In addition, AM signal propagation varies with the time of day (i.e., AM signals travel much farther at night than during the day), and many AM stations are required to cease operation at sunset. These technological differences often, but not always, result in greater listenership and revenues for FM stations.

395. While the technological and marketplace differences between AM and FM stations generally benefit FM stations, and thus support retention of the FM subcaps, there continue to be many markets in which AM stations are significant radio voices. Therefore, the Commission finds that retention of the existing AM subcaps is necessary to prevent a single station owner from acquiring

[12] *Id.* Under the local radio ownership rule, an entity may own: (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which can be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which can be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination.

excessive market power through concentration of ownership of AM stations in markets in which AM stations are significant radio voices.

396. In addition, the *Order* adopts certain clarifications and other measures designed to fulfil the intent of the revisions to the ownership rule adopted in the *2002 Biennial Review Order*. Specifically, the *Order* (1) clarifies the exception to the two-year waiting period for certain Nielsen Audio Market changes; (2) adopts an exemption from the Note 4 grandfathering requirements for "intra-Metro" community of license changes; and (3) redefines the Puerto Rico market.

397. *Newspaper/Broadcast Cross-Ownership Rule.* The *Order* retains and modestly relaxes the NBCO Rule, which prohibits common ownership of a daily newspaper and a full-power broadcast station (AM, FM, or TV) within the same local market.[13] The Commission concluded that the rule is necessary to promote viewpoint diversity at the local level because broadcast stations and daily newspapers remain the predominant sources of local news and information. The Commission found that television stations, radio stations, and local newspapers continue to contribute in meaningful ways to viewpoint diversity within their communities.

398. The *Order* updates the geographic scope of the newspaper/television cross-ownership restriction by replacing its use of the analog Grade A contour with the digital principal community contour (PCC) and by adding a requirement that the newspaper and television station must be located within the same Nielsen DMA. The *Order* adopts a parallel approach for newspaper/radio combinations that uses both a radio station's Nielsen Audio Market, when one is defined, and the station's service contour. The *Order* states that the Commission will evaluate requests for waiver of the rule based on the individual merits of a proposed transaction, taking into consideration the totality of the circumstances. It will assess each waiver request independently to determine the likely effect of the proposed transaction on viewpoint diversity in the local market.[14] In addition, the *Order* creates an exception for proposed mergers involving a failed or failing broadcast station or newspaper. It also provides for the grandfathering of combinations, if any, that are impacted by the updates to the geographic scope of the rule. Finally, the *Order* finds that the Commission's approach does not have a negative effect on minority and female broadcast ownership.

399. *Radio/Television Cross-Ownership Rule.* The *Order* retains the Radio/Television Cross-Ownership Rule, which restricts common ownership of television stations and radio stations in the same market based on the number of media voices in the market.[15] The Commission concluded that the rule continues to be necessary to promote viewpoint diversity in local markets because radio stations and television stations continue to contribute in meaningful ways to viewpoint diversity within their communities. The *Order* modifies the rule only to the extent necessary to update its references to two

[13] *Id.* Prior to the revisions adopted in the *Order*, the rule prohibited the licensing of an AM, FM, or TV broadcast station to a party (including all parties under common control) that directly or indirectly owns, operates, or controls a daily newspaper, if the entire community in which the newspaper is published would be encompassed within the service contour of the station, namely: (1) the predicted or measured 2 mV/m contour of an AM station, computed in accordance with Section 73.183 or Section 73.186; (2) the predicted 1 mV/m contour for an FM station, computed in accordance with Section 73.313; or (3) the Grade A contour of a TV station, computed in accordance with Section 73.684. 47 CFR § 73.3555(d) (2015).

[14] To allow for more timely and effective public participation in a waiver proceeding, the *Order* stipulates that if the owner of a broadcast station seeks to acquire a newspaper under conditions that trigger the NBCO Rule, it must file a waiver request prior to consummating the acquisition, rather than at the time of its license renewal.

[15] 47 U.S.C. § 303 note (Section 202(h) of the 1996 Act as amended). If at least 10 independently owned media voices would remain in the market post-merger, an entity may own up to two television stations and four radio stations. If at least 20 independently owned media voices would remain in the market post-merger, an entity may own either: (1) two television stations and six radio stations, or (2) one television station and seven radio stations. In all instances, entities also must comply with the local radio and local television ownership limits. The market is determined by looking at the service contours of the relevant stations. The rule specifies how to count the number of media voices in a market, including television stations, radio stations, newspapers, and cable systems. *See* 47 CFR § 73.3555(c).

analog television service contours that became obsolete with the transition to digital television service. First, consistent with the update to the NBCO Rule, a television station's digital PCC will be used instead of its analog Grade A contour when determining the rule's trigger.[16] Second, a television station's digital NLSC will be used instead of its analog Grade B contour when counting the number of media voices remaining in the market post-merger.[17] The *Order* provides for the grandfathering of combinations, if any, that are impacted by the updates to the service contours utilized in the rule. The *Order* finds no negative impact on minority and female ownership of broadcast stations given the Commission's decision to retain the rule with only these limited modifications.

400. *Dual Network Rule.* In the *Order*, the Commission finds that the Dual Network Rule, which permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top four" networks (ABC, CBS, Fox, and NBC), continues to be necessary to promote competition and localism and should be retained without modification.[18]

401. The *Order* finds that the Dual Network Rule remains necessary in the public interest to foster competition in the provision of primetime entertainment programming and the sale of national advertising time. Specifically, it finds that the primetime entertainment programming supplied by the top-four broadcast networks is a distinct product, the provision of which could be restricted if two of the four major networks were to merge. It also finds that, consistent with past Commission findings, the top-four broadcast networks comprise a "strategic group" in the national advertising market and compete largely among themselves for advertisers that seek to reach large, national mass audiences. The top-four broadcast networks have a distinctive ability to attract, on a regular basis, larger primetime audiences than other broadcast and cable networks, which enables them to earn higher rates from those advertisers willing to pay a premium for such audiences. Accordingly, the Commission concludes that a top-four network merger would substantially lessen competition for advertising dollars in the national advertising market, which would, in turn, reduce incentives for the networks to compete with each other for viewers by providing innovative, high quality programming. Based on their distinctive characteristics relative to other broadcast and cable networks, the Commission finds that the top-four broadcast networks serve a unique role in the provision of primetime entertainment programming and the sale of national advertising time that justifies retaining a rule specific to them.

402. The *Order* also finds that, consistent with past Commission findings, the Dual Network Rule remains necessary to promote the Commission's localism goal. Specifically, the *Order* finds that the rule remains necessary to preserve the balance of bargaining power between the top-four networks and their affiliates, thus improving the ability of affiliates to exert influence on network programming decisions in a manner that best serves the interests of their local communities. Typically, a critical role of a broadcast network is to provide its local affiliates with high quality programming. Because this programming is distributed across the country, broadcast networks have an economic incentive to ensure that the programming both appeals to a mass, nationwide audience and is widely shown by affiliates. A network's local affiliates serve a complementary role by providing local input in network programming decisions and airing programming that serves the specific needs and interests of that specific local community. As a result, the economic incentives of the networks are not always aligned with the interests of the local affiliates or the communities they serve.

[16] 47 CFR § 73.625. Prior to this change, the radio/television cross-ownership rule was triggered when a television station's Grade A contour encompassed a radio station's entire community of license. *Id.* § 73.3555(c)(1)(i)-(ii).

[17] *Id.* § 73.622(e). Previously, an independently owned television station was counted as a media voice remaining in the market post-merger if it was in same DMA as the television station(s) at issue and had a Grade B signal contour that overlapped with the Grade B signal contour of the television station(s) at issue. *Id.* § 73.3555(c)(3)(i).

[18] 47 U.S.C. § 303 note (Section 202(h) of the 1996 Act as amended). The rule provides that "[a] television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations *unless* such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in [Section] 73.3613(a)(1) of the Commission's regulations . . . ." 47 CFR § 73.658(g) (emphasis in original).

403. *Diversity Order Remand and Eligible Entity Definition.* In addition to evaluating each of its broadcast ownership rules, the Commission responds in the *Order* to the Third Circuit's remand of certain aspects of its 2008 *Diversity Order.* Based on analysis of the preexisting eligible entity standard as well as the measures to which it applied, the Third Circuit's remand instructions, and the record in this proceeding, the Commission reinstates the revenue-based eligible entity standard and will apply it to the regulatory policies set forth in the *Diversity Order.*[19] While the Commission recognizes that it does not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership, the Commission finds that reinstating the previous revenue-based standard will promote small business participation in the broadcast industry. The Commission believes that small businesses benefit from flexible licensing policies and that making it easier for small business applicants to participate in the broadcast industry will help encourage innovation and enhance viewpoint diversity. The Commission finds that this action will advance the policy objectives that traditionally have guided its analyses of broadcast ownership issues and will serve the public interest. The Commission also considered and rejected, based on legal impediments and considerations relating to implementation issues, proposals to adopt race-conscious regulatory measures using the Small Business Administration's (SBA) "socially and economically disadvantaged" definition, regulatory measures based on an "Overcoming Disadvantage Preference," and additional proposals related to minority and female ownership.[20]

404. The changes adopted in the *Order* provide a comprehensive framework for broadcast regulation that recognizes both the dynamic changes taking place in the media marketplace as well as the vital roles that traditional media outlets continue to serve in local communities. The record in this proceeding is replete with examples of the ways in which broadband Internet and other technologies have changed the way that consumers access media content. The record, however, also firmly establishes that traditional media outlets continue to thrive and remain the most significant sources of local news content. Moreover, the Commission recognizes that millions of Americans continue to lack access to sufficient broadband speeds necessary to take advantage of online content available via streaming or download. For these consumers, many of whom reside in low income and rural areas, broadcast media serve as a critical source for entertainment and local news. It is with these considerations in mind that the Commission adopts its broadcast media ownership rules. The Commission believes that these rules will continue to promote the Commission's longstanding policy goals of competition, localism, and diversity in the manner described herein.

[19] The preexisting eligible entity standard includes those entities—commercial or noncommercial—that would qualify as small businesses consistent with SBA standards for its industry grouping, based on revenue. *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6; *see also 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13810-12, paras. 488-89 (2003) (*2002 Biennial Review Order*). As the Commission previously held, going forward the Commission will include both commercial and noncommercial entities within the scope of the term "eligible entity" to the extent that they otherwise meet the criteria of this standard. *See Order* at para. 286 (describing the SBA's small business standards, which are used to define an "eligible entity"). Furthermore, the Commission will readopt each of the following measures, which rely on the eligible entity definition and were remanded in *Prometheus II*: (1) Revision of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rule; (3) Distress Sale Policy; (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity; (5) Extension of Divestiture Deadline in Certain Mergers; and (6) Transfer of Grandfathered Radio Station Combinations. *See id.* at para. 285 (describing these measures).

[20] For the discussion of these proposals, see paragraphs 297 through 316 (considering race-conscious regulatory measures using the SBA's "socially disadvantaged business" definition and regulatory measures based on an "Overcoming Disadvantage Preference"), 319 through 321 (considering incubator proposal), 322 (considering proposal to migrate AM radio to VHF Channels 5 and 6), 323 through 328 and 334 through 336 (considering additional proposals related to minority and female ownership) of the *Order*. The Commission also determined that certain proposals warranted additional consideration, as discussed in paragraphs 329 through 333 of the *Order*.

405. *Shared Service Agreements*. In the *Order*, the Commission adopts a definition of SSAs and requires commercial broadcast television stations to disclose SSAs entered into between commercial broadcast television stations to allow the Commission and the public to better understand the terms, operation, and prevalence of these agreements and their potential impact on the Commission's competition, localism, and diversity goals. Because the Commission does not currently require the filing or disclosure of all sharing agreements that do not contain time brokerage or joint advertising sales provisions, the Commission has limited information about the content or breadth of such agreements or the frequency of their use. Because the Commission desires to expand the public's knowledge of these agreements, it adopts a comprehensive definition of SSAs. Commercial television stations will be required to place copies of such agreements in their public inspection files. The SSA disclosure requirement is subject to the same redaction allowances made available to local marketing agreements and joint sales agreements, namely, that licensees may redact confidential or proprietary information.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA and the SIRFA

406. The Commission received no comments in direct response to the IRFA or the SIRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

407. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the SBA and to provide a detailed statement of any change made to the proposed rules as a result of those comments.[21]

408. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

409. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted.[22] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction"[23] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[24] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[25] The final rules adopted herein affect small television and radio broadcast stations and small entities that operate daily newspapers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

410. *Television Broadcasting*. The SBA defines a television broadcasting station that has no more than $38.5 million in annual receipts as a small business. The definition of business concerns included in this industry states that establishments are primarily engaged in broadcasting images together

[21] 5 U.S.C. § 604(a)(3).

[22] *Id*. § 604(a)(3).

[23] *Id.* § 601(6).

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

[25] 15 U.S.C. § 632.

with sound. These firms operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These firms also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources.[26] Census data for 2012 indicate that 751 such firms were in operation for the duration of that entire year. Of these, 656 had annual receipts of less than $25.0 million per year and 95 had annual receipts of $25.0 million or more per year.[27] Based on this data and the associated size standard, the Commission concludes that the majority of such firms are small.

411. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,387.[28] According to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Television Database on June 2, 2016, about 1,264 of an estimated 1,387 commercial television stations (or approximately 91 percent) had revenues of $38.5 million or less. The Commission has estimated the number of licensed noncommercial educational television stations to be 395.[29] The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[30] must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

412. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

413. *Radio Broadcasting*. The SBA defines a radio broadcasting entity that has $38.5 million or less in annual receipts as a small business.[31] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[32] Census data for 2012 indicate that 3,187 such firms were in operation for the duration of that entire year. Of these, 3,134 had annual receipts of less than $25.0 million per year and 53 had annual receipts of $25.0 million or more per year.[33] Based on this data and the associated size standard, the Commission concludes that the majority of such firms are small.

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[26] U.S. Census Bureau, *2012 NAICS Definition*, http://www.census.gov/cgibin/sssd/naics/naicsrch?code=515120&search=2012 (NAICS Search) (June 8, 2016). Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[27] U.S. Census Bureau, *American Fact Finder*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table (visited June 8, 2016).

[28] *See Broadcast Station Totals as of March 31, 2016*, News Release (MB Apr. 6, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0406/DOC-338754A1.pdf (*Broadcast Station Totals*).

[29] *See id.*

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

[31] *See id.* § 121.201 (2012 NAICS code 515112).

[32] *2012 NAICS Definitions* (2012 NAICS definition for 515112, Radio Stations).

414. Further, according to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Radio Database on June 2, 2016, about 11,386 (or about 99.9 percent) of 11,395 commercial radio stations in the United States have revenues of $38.5 million or less. The Commission has estimated the number of licensed noncommercial radio stations to be 4,096.[34] The Commission does not have revenue data or revenue estimates for these stations. These stations rely primarily on grants and contributions for their operations, so it will assume that all of these entities qualify as small businesses. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[35] must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

415. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

416. *Daily Newspapers.* The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 1,000 or fewer employees.[36] Business concerns included in this category are those that "carry out operations necessary for producing and distributing newspapers, including gathering news; writing news columns, feature stories, and editorials; and selling and preparing advertisements."[37] Census Bureau data for 2012 show that there were 4,466 firms in this category that operated for the entire year.[38] Of this total, 4,378 firms had employment of 499 or fewer employees, and an additional 88 firms had employment of 500 to 999 employees.[39] Therefore, the Commission estimates that the majority of Newspaper Publishers are small entities that might be affected by its action.

E. Description of Reporting, Record Keeping, and other Compliance Requirements for Small Entities

417. The *Order* adopts rule changes that will affect reporting, recordkeeping, and other compliance requirements. The need for and content of each of these rule changes is described in detail in Section A above and the Commission's efforts to minimize the impact of each of these rules is described in detail in Section F below. Additionally, the *Order* adopts a requirement that commercial broadcast

[33] U.S. Census Bureau, *American FactFinder*, Tbl.EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012 Economic Census of the United States, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table (last visited June 8, 2016) (NAICS code 51511).

[34] *Broadcast Station Totals.*

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

[36] *Id.* § 121.201 (NAICS code 511110).

[37] *2012 NAICS Definitions* (2012 NAICS definition for 511110, Newspaper Publishers). These establishments may publish newspapers in print or electronic form. *Id.*

[38] *See* U.S. Census Bureau, *American FactFinder*, Tbl.EC1251SSSZ5, Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012 Economic Census of the United States, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table (last visited June 8, 2016) (NAICS code 511110).

[39] *Id.*

television stations must place a copy of any SSA entered into between commercial broadcast television stations in their online public inspection files within 180 days after the filing requirement becomes effective.[40] Going forward, commercial broadcast television stations must place copies of such agreements in their online public inspection files in a timely fashion following execution.

418. As a result of these new or modified requirements, we do not believe that small businesses will need to hire additional professionals (e.g., attorneys, engineers, economists, or accountants) to comply with the new reporting, recordkeeping, and other compliance requirements. For example, commercial television stations should already have staff capable of placing SSAs in the stations' online public files, given the existing public file requirements.

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

419. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[41]

420. In conducting the quadrennial review, the Commission has three chief alternatives available for each of the Commission's media ownership rules—eliminate the rule, modify it, or, if the Commission determines that the rule is "necessary in the public interest," retain it. The Commission finds that the rules adopted in the *Order*, which are intended to achieve the policy goals of competition, localism, and diversity, will continue to benefit small entities by fostering a media marketplace in which they are better able to compete and by promoting additional broadcast ownership opportunities, as described below, among a diverse group of owners, including small entities. The Commission discusses below several ways in which the rules may benefit small entities as well as steps taken, and significant alternatives considered, to minimize any potential burdens on small entities.

421. *Local Television Ownership Rule (Paragraphs 17-81)*. In the *Order*, the Commission finds that the Local Television Ownership Rule remains necessary in the public interest and should be maintained with a limited modification. Accordingly, under the modified television ownership rule an entity may own up to two television stations in the same DMA if (1) the digital noise limited service contours (NLSCs) of the stations (as determined by Section 73.622(e)) do not overlap; or (2) at least one of the stations is not ranked among the top four stations in the market and at least eight independently owned television stations will remain in the DMA following the combination.[42] In calculating the number of stations remaining post-merger, only those stations whose digital NLSC overlaps with the digital NLSC of at least one of the stations in the proposed combination will be considered. In addition, the Commission retains the existing failed/failing station waiver policy.

422. In the *Order*, the Commission affirms the *FNPRM's* proposal to grandfather existing ownership combinations that would exceed the numerical limits under the revised contour approach, though it finds that, going forward, the sale of such combinations must comply with the Local Television Ownership Rule then in effect. The Commission finds that this approach will avoid disruption of settled expectations and prevent any impact on the provision of television service by smaller stations operating in rural areas. Moreover, the Commission finds that by preventing stations with the largest market shares from combining to achieve excessive market power, the Local Television Ownership Rule protects against potential harm to broadcasters with smaller market shares, including small entities. Accordingly, the Commission finds that the rule, as modified, will continue to help ensure that local television markets do

[40] The Commission will seek OMB approval for the filing requirement, and, upon receiving approval, the Commission will release a Public Notice specifying the date by which SSAs must be filed.

[41] 5 U.S.C. § 603(c)(1)-(4).

[42] *See Order* at Appx. A; *see also* 47 CFR § 73.622(e).

not become too concentrated and, by doing so, will allow more firms, including those that are small entities, to enter local markets and compete effectively.

423. The *Order* also addresses the competitive challenges faced by broadcasters that operate in small markets—including small entities—by retaining the existing failed/failing station waiver policy. The *Order* finds that the existing waiver standard is not unduly restrictive and provides appropriate relief in markets of all sizes. In particular, the Commission notes that a review of recent transactions demonstrates that waivers under the failed/failing station policy are frequently granted in small and mid-sized markets, which often provides relief for small entities.[43] Moreover, the Commission finds that the existing waiver criteria strike an appropriate balance between enforcing the ownership limits and providing relief from the rule in circumstances where it is truly appropriate.

424. *Local Radio Ownership Rule (Paragraphs 82-128)*. In the *Order*, the Commission retains the Local Radio Ownership Rule, including the AM/FM subcaps, finding that AM subcaps in particular promote new entry in the broadcast radio marketplace. Accordingly, an entity may own: (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which can be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which can be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination.[44]

425. The *Order* concludes that, consistent with previous Commission findings, broadcast radio continues to be a viable avenue for new entry in the media marketplace, including by small businesses, minorities, women, and entities seeking to serve niche audiences. Specifically, the Commission finds that AM stations are generally the least expensive option for entry into the radio market, often by a significant margin, and therefore permit new entry for far less capital investment than is required to purchase an FM station. The Commission finds that retention of the local radio ownership limits, including the AM/FM subcaps, will help foster opportunities for new entry in local radio markets, including by small entities. Moreover, the Commission believes that by limiting the consolidation of market power among the dominant groups, the rule will help ensure that small radio station owners remain economically viable.

426. *Newspaper/Broadcast Cross-Ownership Rule (Paragraphs 129-197)*. In several ways, the Commission's decisions regarding the NBCO Rule minimize the economic impact on small entities, namely small broadcasters and newspaper owners. First, retaining the prohibition on newspaper/broadcast combinations in local markets will help small entities compete on more equal footing with larger media owners that may have pursued consolidation strategies through cross-ownership. Several commenters expressed concern that permitting consolidation by relaxing or eliminating all or part of the rule would have harmed small broadcast stations, including those owned by women and minorities, and reduced opportunities for new small businesses to enter the market.[45] Second, by entertaining waiver requests on a pure case-by-case basis, taking into consideration the totality of

[43] *See, e.g.*, *Freedom Broadcasting of New York Licensee, L.L.C.*, Letter Order, 27 FCC Rcd 2498 (MB 2012) (granting waiver under the failed/failing station policy in the Albany-Schenectady-Troy, New York, DMA – DMA #58); *Riverside Media, LLC*, Letter Order, 26 FCC Rcd 16038 (MB 2011) (granting waiver under the failed/failing station policy in the Ft. Smith-Fayetteville-Springdale-Rogers, Arkansas, DMA – DMA #101); *ACME Television, Inc.*, Letter Order, 26 FCC Rcd 5189 (MB 2011) (granting waiver under the failed/failing station policy in the Green Bay-Appleton, Wisconsin, DMA – DMA #69); *Estes Broadcasting, Inc.*, Letter Order, 25 FCC Rcd 7956 (MB 2010) (granting waiver under the failed/failing station policy in the Tyler-Longview, Texas, DMA – DMA #107); *Borger Broadcasting, Inc., Debtor in Possession*, Letter Order, 25 FCC Rcd 1204 (MB 2010) (granting waiver under the failed/failing station policy in the Amarillo, Texas, DMA – DMA #130); *Davis Television Clarksburg, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 5472 (MB 2008) (granting waiver under the failed/failing station policy in the Clarksburg-Weston, West Virginia, DMA – DMA #170).

[44] 47 CFR § 73.3555(a).

circumstances surrounding a proposed transaction and the potential harm to viewpoint diversity, the Commission will have the flexibility to accord the proper weight to any factors that are particularly relevant for small media owners. The significant alternatives that the Commission considered, such as allowing combinations under either a bright-line rule or a presumptive waiver standard, would not have afforded the Commission the same degree of flexibility. Third, adopting a more lenient approach for proposed combinations involving a failed or failing broadcast station or newspaper will benefit entities in financial distress, which may be more likely to include small entities. Fourth, grandfathering existing combinations will avoid disruption of settled expectations of existing licensees and prevent any impact on the provision of service by smaller entities that are part of such combinations. Finally, requiring subsequent purchasers of grandfathered combinations to comply with the rule in effect at that time will provide opportunities for new entrants to acquire a divested media outlet.

427. *Radio/Television Cross-Ownership Rule (Paragraphs 198-215)*. By retaining the Radio/Television Cross-Ownership Rule, the Commission minimizes the economic impact on small entities. The Commission considered the significant alternative of eliminating the rule but concluded that it remained necessary to promote viewpoint diversity. Retaining the rule will benefit small broadcast stations by limiting the growth of existing combinations of radio stations and television stations in local markets. In addition, grandfathering existing combinations will avoid disruption of settled expectations of existing licensees and prevent any impact on the provision of service by smaller stations that are part of such combinations; requiring subsequent purchasers of grandfathered combinations to comply with the rule in effect at that time will provide opportunities for new entrants to acquire a divested media outlet. The Commission's decision also alleviates the concern expressed by commenters that further consolidation would harm small businesses because radio provides one of the few entry points into media ownership for minorities and women.[46]

428. *Dual Network Rule (Paragraphs 216-233)*. In the *Order*, the Commission retains the Dual Network Rule without modification. As noted above, the *Order* concludes that a combination between top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences, which could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high quality programming. Furthermore, the Commission finds that the rule remains necessary to preserve the balance of bargaining power between the top-four networks and their affiliates, thus improving the ability of affiliates to exert influence on network programming decisions in a manner that best serves the interests of their local communities. The Commission believes that these benefits to affiliates are particularly important for small entities that may otherwise lack bargaining power.

429. *Diversity Order Remand/Eligible Entity Definition (Paragraphs 234-336)*. As noted above, the *Order* concludes that the Commission should reinstate the preexisting revenue-based eligible entity definition, which includes those entities—commercial or noncommercial—that would qualify as small businesses consistent with SBA standards for its industry grouping, based on revenue.[47] Specifically, the Commission finds that reinstating the revenue-based standard will help promote small business participation in the broadcast industry. The Commission believes that small-sized applicants and licensees benefit from flexible licensing, auctions, transactions, and construction policies. Often, small-business applicants have financing and operational needs distinct from those of larger broadcasters. By

[45] *See, e.g.*, Free Press FNPRM Comments at 12-13; Association of Free Community Papers FNPRM Comments at 3-4, 8-9 (AFCP); Writers Guild of America, West FNPRM Comments at 10-11 (WGAW); National Hispanic Media Coalition FNPRM Comments at 7, 12-13 (NHMC); UCC et al. FNPRM Comments at 41-42; National Association of Black Owned Broadcasters, Inc. FNPRM Comments at 13-15 (NABOB).

[46] *See* UCC et al. FNPRM Comments at 41-43.

[47] *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13810-12, paras. 488-89. As the Commission previously held, going forward the Commission will include both commercial and noncommercial entities within the scope of the term "eligible entity" to the extent that they otherwise meet the criteria of this standard. *See Order* at para. 286 (describing the SBA's small business standards, which are used to define an "eligible entity").

easing certain regulations for small broadcasters, the Commission believes that it will promote the public interest goal of making access to broadcast spectrum available to a broad range of applicants. The Commission also believes that enabling more small businesses to participate in the broadcast industry will help encourage innovation and expand viewpoint diversity.

430. In addition, the Commission will readopt each measure relying on the eligible entity definition that was remanded in *Prometheus II*. These measures include: (1) Revision of Rules Regarding Construction Permit Deadlines;[48] (2) Modification of Attribution Rule;[49] (3) Distress Sale Policy;[50] (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity;[51] (5) Extension of Divestiture Deadline in Certain Mergers;[52] and (6) Transfer of Grandfathered Radio Station Combinations.[53] The Commission's intent in reinstating the previous revenue-based eligible entity definition—and in applying it to the construction, licensing, transaction, and auction measures to which it previously applied—is to expand broadcast ownership opportunities for new entrants, including small entities. Therefore, the Commission anticipates that these measures will benefit small entities, not burden them.

431. *Shared Services Agreements (Paragraphs 337-377)*. In the *Order*, the Commission requires commercial broadcast television stations to disclose SSAs entered into between commercial broadcast television stations. Commercial television stations will be required to place copies of such agreements in their public inspection files to allow the Commission and the public to understand better the terms, operation, and prevalence of these agreements and their potential impact on the Commission's competition, localism, and diversity goals. Although the Commission does not currently require the filing or disclosure of sharing agreements that do not contain time brokerage or joint advertising sales provisions, broadcasters are required to file many types of documents in their public inspection files. Therefore, broadcasters, including those qualifying as small entities, are well versed in the procedures

[48] *Diversity Order*, 23 FCC Rcd at 5930, para. 15 (revising construction permit rules to allow the sale of expiring construction permits to eligible entities that agree to complete construction within the time remaining on the permit or within 18 months, whichever period is greater); *see also* 47 CFR § 73.3598(a).

[49] *Diversity Order*, 23 FCC Rcd at 5936, para. 31 (relaxing the equity/debt plus (EDP) attribution standard for interest holders in eligible entities by "allow[ing] the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold set forth in [the EDP standard] without triggering attribution where such investment would enable an eligible entity to acquire a broadcast station provided (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity"); *see also* 47 CFR § 73.3555, Note 2(i)(2). In addition, pursuant to the new entrant bidding credits available under the Commission's broadcast auction rules, the modified EDP attribution standard is available to interest holders in eligible entities that are the winning bidders in broadcast auctions. *See id.* § 73.5008(c)(2). This application of the modified EDP standard also is being reinstated by the Commission.

[50] *Diversity Order*, 23 FCC Rcd at 5939, para. 39 (modifying the distress sale policy by allowing a licensee that has been designated for a revocation hearing or has a renewal application that has been designated for hearing on basic qualification issues to sell the station to an eligible entity prior to the hearing).

[51] *Id.* at 5943, para. 56 (giving an applicant for a duopoly that agrees to finance or incubate an eligible entity priority over other applicants in the event that competing duopoly applications simultaneously are filed in the same market).

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

[53] *Id.* at 5944-45, para. 61 (permitting the assignment or transfer of a grandfathered radio station combination intact to any buyer so long as the buyer files an application to assign the excess stations to an eligible entity or to an irrevocable divestiture trust for the ultimate assignment to an eligible entity within 12 months after consummation of the purchase of the grandfathered stations).

necessary for compliance and will not be overly burdened with having to add SSAs to their public inspection files. In addition, the Commission considered various disclosure alternatives in the record, but determined that such measures would either be more burdensome than the disclosure method adopted in the *Order* or that the proposals would not adequately address the concerns raised by the Commission. Ultimately, as the Commission finds that the new SSA disclosure requirement will not be especially burdensome to small entities, it is therefore unnecessary to adopt any special measures for small entities with respect to this new disclosure requirement.

432. **Reports to Congress and Government Accountability Office:** The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[54] A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[55]

[54] *See* 5 U.S.C. § 801(a)(1)(A).

[55] *See id.* § 604(b).

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50; *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294; *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256.

Last month, in the wake of the horrific shootings in Dallas, Texas, Washington, D.C. Police Chief Cathy Lanier held a press conference to reassure the citizens in our nation's capital that her department would continue to build strong community relationships while it protects and serves. Who covered this press conference? Local broadcast television outlets, area radio stations, and the city's daily and weekly newspapers… the ones that have been on the scene, covering these types of events for decades.[56]

This was not an anomaly. Broadcasters and newspapers have been and continue to play a uniquely relevant role in our society when it comes to covering news and events. In fact, a 2010 Pew Research Center study of 98 major metropolitan cities found that nearly 89 percent of news and information about local government came from area newspapers and local broadcast television stations.[57] More to the point, this study found that over half of the 928 local stories it examined came from daily and weekly newspapers.[58] Even more telling is what the National Association of Broadcasters (NAB) stated earlier this year: "*nobody* wants to do what we do – live and vital localism."[59] Couple that statement with a 2015 study published in the Journal of Politics which found a diminished local news environment depresses citizen engagement.[60] It then becomes real clear, that any rule which threatens or jeopardizes "live and vital localism" should never see the light of day.

There is no question that our media landscape looks very different than it did thirty years ago. The Internet and cable news networks and other portals, have given birth to a host of options when it comes to news and information dissemination. Popular outlets like BuzzFeed, Huffington Post, Twitter and hyperlocal blogs found in communities across the country, allow Americans to consume great quantities of information from multiple sources. But make no mistake, more options do not necessarily translate into access to original local news gathering, reporting or sourcing. Using data from Nielsen, Pew Research Center in 2011 found that legacy news organizations, meaning those attached to another platform such as television or print, represent about two-thirds of the top 25 news websites.[61]

And yes, as the former publisher and general manager of a small Charleston-based weekly newspaper for 14 years, I am very much aware that the newspaper business is not what it used to be. Nationally, the number of daily newspapers over the past 40 years has decreased by nearly 25 percent.[62]

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[56] *See, e.g.*, WTOP, *Lanier Talks Community Relations after Dallas Sniper Shootings* (July 8, 2016); WJLA, *D.C. Police to Change Protocol after Officer Shootings in Dallas* (July 8, 2016); The Washington Post, *Police Nationwide Order Officers to Ride in Pairs after Dallas Police Ambush* (July 8, 2016).

[57] Pew Research Center, *Media Coverage of City Governments* (last visited August 16, 2016).

[58] *Id.*

[59] National Association of Broadcasters (NAB), *Gordon Smith Keynote at 2016 NAB Show* (April 18, 2016).

[60] The Journal of Politics, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in US House Elections* (February 4, 2015).

[61] Pew Research Center, *The Top 25* (last visited August 16, 2016).

[62] Newspaper Association of America, *Newspaper Circulation Volume* (last visited August 16, 2016).

Circulation has fallen from 60.7 million in 1975 to 40.4 million in 2014.[63] But if the real fear is that a failed or failing newspaper or broadcast station will jeopardize the number of local voices in a given market, the Commission has adopted an exception to its newspaper/broadcast cross-ownership rule that can actually prevent these voices from vanishing by allowing for an injection of new investment capital into the particular news outlet.

Further, with the broadcast incentive auction well underway, we are on the cusp of seeing major changes to the television landscape. While it is not publicly known which stations will participate, one thing is certain: there will be fewer broadcast television stations on the air post-auction. Relaxing the Commission's media ownership rules at this time, will neither increase the number of diverse stations nor will it create additional local voices.

What is extremely troubling to me is that despite comprising nearly 13 percent of the U.S. population, African Americans held a majority interest in just nine of the nearly 1,400 full power commercial television stations, according to data from 2013.[64] While the Order tees up for further consideration five proposals offered by the Multicultural Media, Telecom and Internet Council (MMTC), which I applaud, more proactive steps must be taken. To satisfy judicial scrutiny and demonstrate the Commission's commitment to ownership diversity that is so desperately wanting, we need a robust record of data that paints a comprehensive picture of today's media landscape. Today, this simply does not exist.

Commenters in the record point to six categories of research that could be a starting point for a more comprehensive set of data examining the impact of ownership diversity.[65] Some of the ideas put forward include looking at the impact of existing FCC policies on ownership by women and people of color; examining local news sharing agreements and how they affect the production of diverse and competitive local news; and undertaking additional research necessary to support Congressional action on the minority tax certificate. If we are serious about our commitment to implementing informed and forward-looking policies that are in the public interest, these ideas should be considered.

Everyone should stop making excuses. The Third Circuit, in its most recent decision was crystal clear: if more data is needed, we "must get it." I stand ready to work with the Commission and interested researchers to fulfill this goal so that the Commission has the information it needs to ensure that the right policies are in place to promote a vibrant and diverse media landscape. Without "it"… well let me simply say, "the proof of the pudding is in the eating."

[63] *Id.*

[64] *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Report on Ownership of Commercial Broadcast Stations, 29 FCC Rcd 7835 (MB 2014) (*2014 323 Report*).

[65] Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed July 7, 2016).

DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50; *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294; *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256.

"The more things change, the more they stay the same." When French journalist Jean-Baptiste Alphonse Kerr first expressed that sentiment 167 years ago, he obviously didn't have the FCC's media ownership regulations in mind. But his words ring true as the Commission finally gets around to finishing the 2010 Quadrennial Review.

Congress instructed the FCC to reassess its media ownership regulations every four years. It also provided that the agency "shall" get rid of outdated rules.[66] This was because Congress recognized that regulations designed to promote localism, diversity, competition, and investment in media could have exactly the opposite effect if they didn't keep up with the times.

But here, the FCC has failed on both counts. In terms of timing, the Commission has thumbed its nose at Congress for the past eight-and-a-half years by refusing to complete a single quadrennial review. This is the regulatory equivalent of completing your figure-skating routine for the 2010 Vancouver Winter Olympics after the Olympic flame has been extinguished at the closing ceremony of the 2016 Games in Rio de Janeiro. What took us so long? Based on the "substance" of this *Order*, I have no idea, for the agency essentially does nothing but stick its head in the sand.

The changes to the media marketplace since the FCC adopted the Newspaper-Broadcast Cross-Ownership Rule in 1975 have been revolutionary. Over the last four decades, newspaper circulation and advertising revenue have plummeted, and hundreds of publications have gone out of business. The Internet has become the go-to source for news. National and regional cable news networks have flourished. The days of Americans waiting for the morning newspaper to learn about what is going on around them are long gone. Yet, instead of repealing the Newspaper-Broadcast Cross-Ownership Rule to account for the massive changes in how Americans receive news and information, we cling to it.

And over the near-decade since the FCC last finished a "quadrennial" review, the video marketplace has transformed dramatically. Especially with the rise of over-the-top video, the market is now more competitive than ever. Never before have Americans been able to choose from such a wide array of content. They now demand to view that content when they want and on the device of their choice. And high-profile news is increasingly made and distributed on online video networks that didn't even exist just a few years ago.[67] Yet, instead of loosening the Local Television Ownership Rule to account for the increasing competition to broadcast television stations, we actually tighten that regulation.

And instead of updating the Local Radio Ownership Rule, the Radio-Television Cross-Ownership

[66] *Compare* Telecommunications Act § 202(h) (FCC "shall" review media ownership rules on quadrennial basis, "shall determine whether any of such rules are necessary in the public interest," and "shall repeal or modify" any unnecessary regulations) *with* Letter from Tom Wheeler, Chairman, FCC, to the Honorable Anna Eshoo, U.S. House of Representatives (Mar. 18, 2016) ("Section 629 of the Communications Act is explicit: The Commission *shall* . . . adopt regulations to assure the commercial availability [of set-top boxes]."), *available at* http://go.usa.gov/xDjbA; Statement of Chairman Tom Wheeler, August 2016 Open Meeting Press Conference at 1:03:08, http://go.usa.gov/xDjbJ ("Make no mistake, we *will* obey the law. The law [section 629] says, 'the Commission *shall*' provide for competitive choice [in navigation devices]. We *will* obey the law.").

[67] *See*, *e.g.*, Daniel Victor & Mike McPhate, "Critics of Police Welcome Facebook Live and Other Tools to Stream Video," *The New York Times* (July 7, 2016) (discussing "the power of [online] video, especially when live, in drawing public attention"), *available at* http://nyti.ms/29lMKOS.

Rule, and the Dual Network Rule, we merely rubber-stamp them.

The more the media marketplace changes, the more the FCC's media regulations stay the same.

This ostrich of an *Order* is not at all what Congress envisioned. And it is a thumb in the eye of the United States Court of Appeals for the Third Circuit, too. Five years ago, the Third Circuit vacated the FCC's definition of "eligible entity."[68] Earlier this year, the Third Circuit said "enough is enough"[69] and demanded that the FCC take prompt action on its "stalled efforts to promote diversity in the broadcast industry."[70] So what does the Commission do here in response to the court? Precisely one thing: It re-adopts the *exact same* "eligible entity" definition that the Third Circuit rejected in 2011!

This proceeding is proof of this agency's plenary and purposeful abdication of its statutory duty. It shows that this Commission that does not believe it is accountable to Congress or the courts. And it is evidence that unless Congress or a court steps in and takes action, this is the way that it will continue to be: The Commission's media ownership regulations will never be relaxed. Efforts to promote diversity will remain stalled. The law, the marketplace, and common sense will continue to be ignored.

Today's result is all the more unfortunate because compromise was well within reach. For example, a bipartisan majority of commissioners was willing to repeal the outdated Newspaper-Broadcast Cross-Ownership Rule. But for some reason, we were told that this rule would not be repealed *unless all commissioners agreed*. And sadly, one chose to exercise that veto.

As someone who has been on the losing end of more 3-2 votes than I care to remember, I am baffled by this new requirement for unanimity. We've been told for years by the FCC's leadership that 3-2 votes are what democracy is all about. Except, I guess, when it isn't. Or more precisely, 3-2 votes are what democracy is all about so long as the commissioners are divided cleanly along party lines. As a result, we end up keeping a rule on the books that almost no one at the FCC actually believes make sense any longer. This is a shame because our regulations should always be shaped only by the facts and law—not crass political considerations.

If I were to detail all of this *Order*'s deficiencies, my dissenting statement would be almost as long as the *Order* itself (161 pages). In the interest of space, I'll focus on what I consider to be the *Order*'s most problematic aspects: (1) doubling down on the Newspaper-Broadcast Cross-Ownership Rule; (2) tightening, rather than loosening, the Local Television Ownership Rule; and (3) failing to take meaningful action to promote diversity.

I.

The newspaper industry is in crisis. Since the FCC adopted the Newspaper-Broadcast Cross-Ownership Rule in 1975, approximately one-quarter of newspapers in the United States have gone out of business.[71] That's over 400 publications.[72] In the last decade, newspapers have shut down in Denver, Tucson, Cincinnati, Honolulu, Tampa, and other major cities.[73] Other newspapers, including the *New*

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[68] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011).

[69] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 37 (3d Cir. 2016) (quoting *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 158 (3d Cir. 2002)) (emphasis and internal quotation marks omitted) (*Prometheus III*).

[70] *Id.*

[71] *See* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, 09-182, at 2 (July 7, 2016) (NAB July 7 *Ex Parte* Letter).

[72] *See id*.

[73] *See* Newspaper Death Watch: Chronicling the Decline of Newspapers and the Rebirth of Journalism, http://newspaperdeathwatch.com/ (Aug. 16, 2016).

Orleans Times-Picayune and the *Birmingham News*, no longer publish on a daily basis.[74] Still others, such as the *Seattle Post-Intelligencer*, have abandoned the print medium altogether and now exist only as a digital platform.[75]

Since 1975, the population of the United States has increased 49% while total newspaper circulation is down by one-third, with the substantial majority of that decline occurring since 2000.[76] Adjusting for inflation, newspaper advertising revenues, both print and digital, are down 64% since 2000, from $65.8 billion to $23.6 billion.[77] And since 2000, employment in newspaper newsrooms has dropped by 42%.[78]

Earlier this month, Warren Buffett, whose company owns 32 newspapers across the country, summarized the bleak picture: "[L]ocal newspapers continue to decline at a very significant rate. And even with the economy improving, circulation goes down, advertising goes down, and it goes down in prosperous cities, it goes down in areas that are having urban troubles, it goes down in small towns—that's what amazes me."[79]

Of course, newspaper reporters continue to do important work throughout our country each and every day. Many were recently reminded of the impact that their stories can have through the 2015 film *Spotlight*, which won the Academy Award for Best Picture. The movie focused on *The Boston Globe*'s investigation into widespread child sex abuse by Roman Catholic priests in and around Boston—reporting that ended up having a worldwide impact on the Catholic Church. But given the newspaper industry's profound financial troubles, it is becoming harder and harder for publications to do this type of investigatory journalism, hold our elected officials to account, and let Americans know what is going on in their communities.

That's why it makes no sense for the government to be discouraging investment in the newspaper industry. In this day and age, if you are willing to invest in a newspaper, we should be thanking you, not imposing regressive regulations. But that is precisely what the Commission is doing in this *Order* by maintaining the Newspaper-Broadcast Cross-Ownership Rule.

Our action (or, to be more accurate, lack of action) is particularly unfortunate because broadcasters are well-situated to partner with newspapers. The reason is simple. Investments in newsgathering are more likely to be profitable when a company can distribute information over multiple platforms. This is not just a theory. Because the FCC grandfathered newspaper-broadcast combinations that predated the 1975 adoption of the Newspaper-Broadcast Cross-Ownership Rule, we have seen this theory play out in practice across the United States.

The National Association of Broadcasters has pointed to no fewer than 15 studies demonstrating that newspaper-television cross-ownership increases the quantity and/or quality of news broadcast by cross-owned television stations.[80] These studies span almost four decades, and some were commissioned by the FCC itself. For example, one FCC-sponsored study in 2007 found that newspaper cross-owned TV stations supply about 7–10% more local news coverage and about 25% more coverage of state and local

[74] *See id*.

[75] *See* William Yardley and Richard Pérez Peña, "Seattle Paper Shifts Entirely to Web," *The New York Times* (Mar. 16, 2009), *available at* http://nyti.ms/2bM4ytt.

[76] Daily circulation was 60.655 million in 1975, 55.773 million in 2000, and 40.420 million in 2014. *See* Newspaper Association of America, Newspaper Circulation Volume, http://bit.ly/2b2r9f2 (linked spreadsheet) (Aug. 16, 2016).

[77] *See* NAB FNPRM Comments at 71.

[78] *See* NAB July 7 *Ex Parte* Letter at 3–4.

[79] Jake Sherman and Anna Palmer with Daniel Lippman, "EXCLUSIVE PLAYBOOK INTERVIEW: Warren Buffett!—Dem EMAIL HACK 'wider than believed'—KASIE HUNT engaged—B'DAY: David Brooks," *Politico*, http://politi.co/2aMjqC1 (Aug. 11, 2016).

[80] NAB FNPRM Comments at 75–76.

politics, on average, than non-cross-owned stations.[81] And another FCC-sponsored study that same year found that cross-owned TV stations broadcast 11% more news programming than non-cross-owned stations.[82] The same is true with respect to newspaper-radio cross-ownership. An FCC-sponsored study found that a cross-owned radio station is four to five times more likely to have a news format than a non-cross-owned station.[83]

And we need not rely on statistics alone. The record contains numerous unrebutted examples of how newspaper-broadcast cross-ownership has provided more comprehensive news coverage to communities throughout our nation, including Atlanta, Cedar Rapids, Milwaukee, Phoenix, South Bend, Spokane, Topeka, and Amarillo.[84] In Dayton, for example:

> Cox Media Group's cross-ownership of the *Dayton Daily News* and CBS affiliate WHIO-TV helped to uncover one of the most prominent stories of [2014]: the mismanagement of the Department of Veterans Affairs. Working together, journalists at the newspaper and television station analyzed the quality of care that veterans were receiving, and discovered that the Department had paid more than $36 million to settle claims resulting from treatment delays. Months of congressional inquiries, national and global media studies, and, ultimately, the resignation of the Secretary of Veterans Affairs followed. These treatment delays would not have come to light had it not been for the dogged efforts of *both* the newspaper and television reporters, working together.[85]

So in the face of all of this data and evidence, why does the Commission choose to retain the Newspaper-Broadcast Cross-Ownership Rule? It claims that this regulation remains necessary to promote viewpoint diversity.[86] But the evidence overwhelmingly shows that there is little if any connection between viewpoint diversity and ownership.[87] Most notably, a 2011 FCC-sponsored study found no statistically significant relationship between ownership and viewpoint diversity, and a 2012 update to that study actually found viewpoint diversity to be positively associated with the number of co-owned television stations in a market.[88] Indeed, research generally shows that a media outlet's viewpoint is driven by the preferences of its audience rather than ownership.[89]

But the larger problem with the Commission's conclusion is that it ignores the realities of the modern media marketplace. This isn't the 1970s anymore. Most Americans don't wait for the morning newspaper or the 11:00 PM newscast to learn what's going on around the globe or at home. That world set sail with *The Love Boat*. Today, most Americans get the information they want when they want it by going online and scouring a wide variety of sources, including digital-only news outlets and social networks such as Facebook and Twitter. When it comes to news, we can now choose from an amazingly

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[81] *See* Jeffrey Milyo, The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News (2007).

[82] *See* Daniel Shiman, The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming (2007).

[83] *See* Craig Stroup, Factors that Affect a Radio Station's Propensity to Adopt a News Format (2007).

[84] *See* NAA FNPRM Comments at 3–10; Morris Communications Co., LLC FNPRM Comments at 17–23.

[85] NAA FNPRM Comments at 5–6 (emphasis in original).

[86] *Order* at para. 142.

[87] *See* NAB FNPRM Comments at 79–82, App. C (listing 15 studies).

[88] *See* Adam D. Rennhoff and Kenneth C. Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News (2011); Adam D. Rennhoff and Kenneth C. Wilbur, Further Revisions to Local Media Ownership and Viewpoint Diversity in Local Television News (2012).

[89] *See, e.g.*, Matthew Gentzkow and Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 ECONOMETRICA 35 (2010); Sendhil Mullainathan and Andrei Shleifer, *The Market for News*, 95 AM. ECON. REV. 1031 (2005).

diverse array of options. Last year, for example, Pew Research Study counted 143 news providers in Denver alone.[90]

The record contains a plethora of statistics detailing how the Internet has transformed the American people's consumption of news and information, and I don't believe that it is necessary to review all of them here. Instead, I'll focus on two other glaring problems with the Commission's analysis that render its decision to retain the Newspaper-Broadcast Cross-Ownership rule in the name of viewpoint diversity fatally flawed.

First, the Commission contends that newspapers and broadcast television stations "continue to be the predominant providers of local news and information upon which consumers rely."[91] But then, in order to justify retaining the prohibition against common ownership of a newspaper and a radio station, the Commission also claims that "broadcast radio stations continue to be an important source of viewpoint diversity in local markets."[92]

These statements place the Commission on the horns of a dilemma. The only reason that the Commission performs a stunning about-face and suddenly claims that radio stations are a significant source of viewpoint diversity[93] is so that it can retain the Newspaper-Radio-Cross Ownership Rule (which generally prohibits cross-ownership). But if radio stations are an important source of viewpoint diversity, then they must be included in the total number of voices in the market. And if that is true, then there is no way that the agency's Newspaper-Broadcast Cross-Ownership Rule can survive.[94]

Take the New York City media market, for example. If there are five major newspapers, over twenty television stations, and about 60 radio stations in the market contributing to viewpoint diversity, then how can prohibiting a newspaper from purchasing a single one of those radio stations or television stations be necessary to preserve viewpoint diversity? With over 80 voices in the market, how can common ownership of just two cause a problem?

Second, the Commission discounts the rise of the Internet by arguing that most of the news found there is provided by websites affiliated with traditional providers, such as newspapers.[95] (This myopic conclusion itself would be news to a wide variety of popular online upstarts, ranging from locally-focused platforms such as *The Texas Tribune*, which earned two Online News Association awards last year for explanatory and topical reporting, and *Voice of San Diego*, which has won national awards for its investigative reporting, to more nationally-focused platforms like BuzzFeed, Vox Media, and Yahoo! News.) But the FCC's regulation only precludes the common ownership of a broadcast station and a newspaper *if the newspaper publishes at least four times a week*. So, for example, newspapers such as the *Patriot-News* of Harrisburg, Pennsylvania, or the *Press-Register* of Mobile, Alabama, which print only three days a week but update their websites constantly, may be commonly owned with a television station.

How does this make any sense? If the content that a newspaper provides on its website is critical to the retention of the Newspaper-Broadcast Cross-Ownership Rule, why should it matter how many days a week it circulates a print edition? So long as newspapers regularly update their websites with breaking news and information, why should a newspaper that offers a print edition seven days a week be treated differently than one that only distributes three print editions a week? Or a newspaper that has chosen to

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[90] *See* Pew Research Center, *Local News in a Digital Age* at 4 (Mar. 5, 2015).

[91] *Order* at para. 142.

[92] *Id*.

[93] *See, e.g.*, *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4435–36, paras. 144–45 (2014) (*2014 Quadrennial Review Notice*).

[94] Conversely, if radio stations are *not* an important source of viewpoint diversity, then the Newspaper-Radio Cross-Ownership Rule must be eliminated.

[95] *See Order* at para. 148 & note 389.

go entirely online? Why should we create an incentive for newspapers to cut back on print editions in order to get more favorable regulatory treatment? The *Order* offers no answers to these questions. That there are no good ones highlights how outdated the Newspaper-Broadcast Cross-Ownership Rule has become. At a time when more and more content is being consumed over the Internet, it makes no sense to base ownership regulations on whether a news outlet distributes a print edition and/or how many times a week it does so. The product, not pulp, is what matters.

Perhaps recognizing its difficulty in justifying the retention of the Newspaper-Broadcast Cross-Ownership, the Commission purports to "provide for a modest loosening" of it.[96] However, the modest steps that it sets forth are entirely inadequate and largely illusory.

To begin with, the Commission adopts an express exception "for proposed combinations involving a failed or failing newspaper, television station, or radio station."[97] But the newspaper industry has explained that this standard's specific criteria "will not open any opportunities for newspaper companies to obtain investment from the media industry, and certainly will not serve the public interest."[98] And there is an even more fundamental problem with this exception. By the time that a newspaper has failed or is failing, it might be too late to save and/or might not be an attractive investment opportunity for a broadcaster. Our goal should be to maintain newspapers as healthy and vibrant institutions. We shouldn't deprive them of the investment they need to thrive until they are at death's doorstep and then hope that someone will swoop in at the last minute to save them.

Additionally, the Commission states that companies may obtain a waiver of the Newspaper-Broadcast Cross-Ownership Rule if they are able "to show that their proposed combination would not unduly harm viewpoint diversity in the local market."[99] What does this mean? Who knows? Curiously, the Commission rejects re-adopting the four-factor test that applied to waiver requests under the vacated 2007 modification of the Newspaper-Broadcast Cross-Ownership Rule because it claims that those factors (*e.g.*, whether the combined entity would significantly increase the amount of local news in the market) "would be vague, subjective, difficult to verify, and costly to enforce."[100] But the waiver standard adopted by the Commission today is far vaguer and more subjective than the 2007 standard for it lacks *any* objective criteria. "Knowing it when we see it" is hardly the stuff of administrative precision.

Moreover, we've seen this song-and-dance before. When the Commission adopted JSA restrictions two years ago, it set up a similar waiver process to preserve beneficial JSAs that it publicly touted when useful for defending its new policy.[101] But that process was a sham. For the entire time that the Commission's JSA restrictions were in effect, not one waiver request was granted. (That may have been one reason why Congress, in an overwhelming bipartisan vote, required that the FCC protect existing JSAs.[102]) I have little doubt that the same thing will happen here.

Where does that leave us? In the face of overwhelming evidence of the newspaper industry's dire condition, the benefits that newspaper-broadcast cross-ownership could bring, and a media marketplace transformed by the Internet, the Commission chooses to leave in place an absurdly antiquated rule that reduces investment in the newspaper business. The FCC's decision is not based on the law or the facts in the record. Nor is it based on common sense. For example, does anyone seriously believe that allowing a newspaper to buy a single radio station in any American city would harm anyone? But politics—in particular, fear of partisan special interests in the Beltway that have banged the same sad drum for years

[96] *Order* at para. 130.

[97] *Order* at para. 173.

[98] Letter from Danielle Coffey and Kurt Wimmer, Newspaper Association of America, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, 07-294, at 2 (Aug. 9, 2016).

[99] *Order* at para. 187.

[100] *Order* at note 542.

[101] *See 2014 Quadrennial Review Notice*, 29 FCC Rcd at 4540, para. 364.

[102] *See* Consolidated Appropriations Act, 2016, § 628, Pub. L. No. 114-113 (2015).

(ironically, mainly online)—has made it impossible for us to repeal this rule.

At this rate, absent congressional or judicial intervention, the Newspaper-Broadcast Cross-Ownership Rule will outlive print newspapers themselves.

II.

In this *Order*, the Commission refuses to relax its Local Television Ownership Rule. This rule prohibits anyone from owning two television stations in a Designated Market Area (DMA) unless at least one of those stations falls outside the top-four stations in the market (top-four prohibition) and there are at least eight independently-owned television stations in the DMA (eight-voices test).

However, record evidence demonstrates that the eight-voices test lacks any foundation in economics or the realities of today's television marketplace. Indeed, repealing that test would promote competition and localism in the video marketplace.

For one, the eight-voices test has no basis in modern competition theory and is inconsistent with fundamental antitrust principles.[103] The test often prohibits mergers that "are unlikely to have adverse competitive effects and ordinarily require no further analysis," according to the United States Department of Justice & Federal Trade Commission's Horizontal Merger Guidelines.[104] And it often prohibits transactions that do not create a presumption of increased market power according to those guidelines.[105] Simply put, in no other industry does the government condition mergers and acquisitions on the maintenance of eight independent competitors in a market. Indeed, under modern antitrust principles, the government does not impose any rigid screen at all.[106]

For this reason, economists Kevin Caves and Hal Singer have concluded that the eight-voices test "does not constitute a reliable competitive screening device. Instead, [it] imposes a presumption of anticompetitive effects over transactions that would not justify such a presumption under standard antitrust practice. [It] compounds this error by making its presumption impossible to overturn, regardless of evidence of procompetitive merger-driven efficiencies."[107]

Caves and Singer's analysis of advertising prices in all local television markets bears out their conclusion.[108] Controlling for other factors, they found no statistically meaningful difference between advertising rates in markets with eight or more independently owned and operated television stations and advertising rates in markets with fewer voices.[109] Moreover, their econometric analysis demonstrated that reducing the number of voices in a market has the impact of *lowering* advertising rates rather than *raising* them, and that this effect holds true whether or not there are fewer than eight voices in a market.[110] Specifically, in markets with fewer than eight voices, local advertising rates are expected to fall by 2.9% with each decrease in the voice count. And in markets with eight or more voices, such rates are expected to fall by 2.4% with each decrease in the voice count.[111]

[103] Kevin W. Caves and Hal J. Singer, An Economic Analysis of the FCC's Eight Voices Rule, at 9–16 (July 19, 2016) (Caves & Singer Study), *attached to* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182 (July 19, 2016).

[104] *See* Caves & Singer Study at 12, 14.

[105] *See id*. at 14.

[106] *See id*. at 13. Rather, the starting point for merger analysis is the Herfindahl-Hirschman Index (HHI), which is used to assess how much individualized scrutiny a transaction requires.

[107] *See id*. at 15–16.

[108] *See id*. at 21–28.

[109] *See id*. at 24–26.

[110] *See id*. at 26–28.

[111] *See id*. at 28.

These findings are fatal to the eight-voices test. First, they demonstrate that there is no meaningful competitive difference between markets with fewer than eight voices and those with eight or more. In each type of market, the response to the reduction in the voice count is similar; advertising rates are statistically the same controlling for other factors. There is no significance to maintaining eight independently owned and operated stations in a market. Thus, that number is entirely arbitrary.

Second, the Caves and Singer findings demonstrate that reducing the voice count by one in a market with fewer than eight voices leads to a more competitive market, not a less competitive one. As reviewed above, when the voice count is reduced by one in such markets, advertising prices fall, not rise, in a statistically significant way.[112]

Another indication that the eight-voices test impedes competition and localism in the video marketplace is the mass of record evidence showing that common ownership of television stations in local television markets leads to *more* local news and information programming.[113] According to the Commission, "[t]he data demonstrate that the duopolies permitted subject to the restrictions of the current rule have created tangible public interest benefits for viewers in local television markets that offset any potential harms associated with common ownership. Such benefits include substantial operating efficiencies, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community."[114] In other words, common ownership increases competition and localism by creating stronger, better-funded competitors.

But the eight-voices test denies those benefits produced by common ownership to viewers in most of our nation's television markets. And those markets are the ones where the efficiencies of common ownership can yield the greatest benefits: smaller markets where advertising dollars (typically the source of funding for local programming) are scarce.

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[112] Unable to formulate a substantive response to the Caves & Singer Study, the Commission refuses to consider it, claiming that it was submitted too late. *See Order* at note 147. But this study merely provides additional empirical support for arguments that the National Association of Broadcasters (NAB) has advanced throughout the 2010 and 2014 Quadrennial Reviews. *See, e.g.*, NAB FNRPM Comments at 39, 55 (arguing that the eight-voices test is "arbitrary" and "makes no sense"). As such, the Commission may not simply disregard it, and the authority that the *Order* relies upon for doing so is inapposite. In *Verizon v. FCC*, 770 F.3d 961, 968 (D.C. Cir. 2014), for example, the D.C. Circuit said that the Commission was not obliged to consider a late-filed proposal for partial forbearance. Here, however, the Caves & Singer Study and NAB's accompanying *ex parte* letter advanced no new proposal. Rather, they provided support for the NAB's longstanding proposal in this proceeding for the FCC to eliminate the eight-voices test. Similarly, in *Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009), the D.C. Circuit ruled that a party had not provided the Commission with a fair opportunity to pass upon an argument by raising it the day an order had been adopted. That case, however, deal with an entirely new claim of inadequate notice. Here, by contrast, NAB merely submitted additional support for a claim that it has advanced for years during this proceeding. Moreover, the Caves & Singer Study was submitted weeks before this *Order* was adopted, not the day of adoption. While the Commission notes that UCC cites rule 1.415(d) ("No additional comments may be filed unless specifically requested or authorized by the Commission") in opposing consideration of the Caves & Singer Study, *see Order* at note 147 (citing 47 C.F.R. § 1.1415(d)), the note to that rule specifically provides that in some rulemaking proceedings, "interested persons may also communicate with the Commission and its staff on an *ex parte* basis, provided that certain procedures are followed." In this proceeding, *ex parte* communications were specifically allowed by the Commission. *See 2014 Quadrennial Review Notice*, 29 FCC Rcd at 4546, para. 378. Indeed, this *Order* is replete with references to *ex parte* communications. *See, e.g.*, *Order* at note 204. Moreover, NAB indisputably complied with all relevant procedures in submitting the Caves & Singer Study. Finally, it is important to recognize that the Commission frequently accepts and relies upon data and studies that it receives shortly before an order is adopted. *See, e.g.*, *Amendment of Part 15 of the Commission's Rules for Unlicensed Operations in the Television Bands, Repurposed 600 MHz Band, 600 MHz Guard Bands and Duplex Gap, and Channel 37 et al.*, ET Docket No. 14-165, Report and Order, 30 FCC Rcd 9551, 9636, 9639, nn.523, 539 (2015) (citing and relying upon a 128-page technical study and a 16-page technical study that had been submitted to the Commission as an *ex parte* filing seventeen days before the *Order*'s adoption).

[113] *See, e.g.*, *Order* at note 86.

[114] *Order* at para. 38.

In contrast, the *Order*'s justification for maintaining the eight-voices test is utterly devoid of factual support. Indeed, all the Commission can muster in support of the eight-voices test is two paragraphs of unsupported assertions. In the first, the *Order* says:

> Nearly every market with eight or more full-power television stations—absent a waiver of the Local Television Ownership Rule or unique circumstances—continues to be served by each of the Big Four networks and at least four independent competitors unaffiliated with a Big Four network. Competition among these independently owned stations serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming. This competition is especially valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations' communities.[115]

Let's unpack this. The Commission begins by arguing that competition between stations affiliated with the Big Four networks and at least four independent competitors unaffiliated with a Big Four network "serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming."[116] But what evidence does the Commission cite to support this proposition? What evidence does it marshal to show that the presence of stations unaffiliated with a Big Four network improves the quality of programming in a television market? What evidence does it produce to show that such independent stations lead to increased local news and public interest programming? The answer to each of these questions is the same: None.[117]

And even if the Commission were able to offer some evidence to back up its assertions, the question would then become: Why is it important to have at least four independent competitors unaffiliated with a Big Four network in a market? Why wouldn't two or three suffice? Or, on the other hand, why not five or six? The *Order* makes a feeble attempt to address those questions in its next paragraph:

> We continue to believe the minimum threshold maintained by the eight-voices test helps to ensure robust competition among local television stations in the markets where common ownership is permitted under the rule. The eight-voices test increases the likelihood that markets with common ownership will continue to be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks. Also, because a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets—demonstrating the dominant position of the top-four-rated stations in the market—we continue to believe that it is appropriate to retain the eight-voices test, which helps to promote at least four independent competitors for the top-four stations before common ownership is allowed. Accordingly, we retain the eight-voices test.[118]

This explanation brings to mind the classic Peggy Lee song: *Is That All There Is*?

To be sure, I agree that the eight-voices test "increases the likelihood that markets with common ownership will continue be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks."[119] But

[115] *Order* at para. 56 (footnotes and citations omitted).

[116] *Id*.

[117] Neither does the *Order* offer any explanation for why stations unaffiliated with a Big Four network play a distinct competitive role in the marketplace than those affiliated with a Big Four network. Many of these stations, after all, are not independent stations. Rather, they are affiliated with a national network, such as the CW or Univision.

[118] *Order* at para. 57 (footnotes and citations omitted).

[119] *Id*.

again, the key question is: Why is it important to have "four independently owned and operated stations unaffiliated with these major networks?" The only justification the Commission provides is the assertion that "a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets."[120] But even assuming that to be true, how does this justify the choice of maintaining "four independently owned and operated stations unaffiliated with the major networks," as opposed to two, three, five, or six? The *Order* offers no explanation, cites no evidence, and refers to no economic theory. It appears that the number four, and thus the eight in the "eight-voices test," was plucked out of thin air. Moreover, if there is a significant gap in audience share between the top-four stations and the other stations in a market, wouldn't that suggest common ownership of non-top four stations would be pro-competitive, insofar as it would allow for stronger competitors to the top-four stations to emerge?

But it gets even worse. The Commission readopts the restrictions on joint sales agreements (JSAs) that were vacated by the Third Circuit in *Prometheus III*—restrictions which have the practical effect of tightening the Local Television Ownership Rule. The Commission provides little new analysis to justify these limits. Rather, it "incorporate[s] by reference the rationale articulated" in its 2014 *Order*.[121] As such, rather than repeat at length the arguments that I advanced against the Commission's JSA decision two years ago, I similarly incorporate by reference the relevant portions of my 2014 dissenting statement.[122] However, it is worth emphasizing three points.

First, just as the Commission is unable to point to any evidence to justify retaining the eight-voices test, neither is it able to cite any evidence supporting its decision to readopt JSA restrictions. Back in 2014, the Commission based its decision on its hypothesis that a JSA allows one station to exert undue influence over another station's programming decision and operations. But as I pointed out at the time, the Commission couldn't come up with "a single example of a station in a JSA exercising undue influence over another station."[123] Indeed, it couldn't round up "a single instance where a JSA has allowed one station to influence *a single programming decision* of another station."[124]

Flash forward two years. Despite the fact that numerous television stations across the country have participated in JSAs for many years, the Commission *still* cannot find a single case in which one station in a JSA has exercised undue influence over another station or influenced a single programming decision of another station. The Commission's JSA analysis remains unjustified jabberwocky.

Second, in my 2014 dissenting statement, I reviewed at length all of the public interest benefits that have been produced by JSAs.[125] In this *Order*, the Commission does not contest any of those benefits. Instead, it claims that "[t]he arguments that television JSAs should not be attributed because they produce public interest benefits are essentially indistinguishable from arguments that the ownership limits should be relaxed because common ownership produces public interest benefits. We acknowledge and address these arguments throughout; however, we ultimately determine that the Local Television Ownership Rule should be retained with a minor modification to the contour standard."[126]

But here's the problem with that evasion. Maintaining the status quo with respect to JSAs is *not* the equivalent of relaxing the Local Television Ownership Rule. Rather, as the Third Circuit recognized, "[a]ttribution of television JSAs modifies the Commission's ownership rules by making them more

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[120] *Id*.

[121] *Order* at para. 62.

[122] *2014 Quadrennial Review Notice*, 29 FCC Rcd at 4590–95, 4597–99 (Dissenting Statement of Commissioner Ajit Pai).

[123] *Id*. at 4597.

[124] *Id*. (emphasis in original).

[125] *See id*. at 4592–95.

[126] *Order* at note 176.

stringent."[127] And the Commission's JSA decision here does not contain any rationale whatsoever for why the local television ownership rule should be tightened. In fact, it concludes that the benefits of making the rule more stringent are outweighed by the harms of taking that step.[128]

So on one side of the ledger, we have uncontested evidence of the public interest benefits yielded by JSAs. And on the other side of the ledger, the Commission points to no evidence of any corresponding harms and does not advance any argument for why the Local Television Ownership Rule should be made any stricter. Yet, it does just that. This deliberate refusal to make a "rational connection between the facts found and the choice made" defines arbitrary and capricious decision-making.[129]

Third, the decision to attribute television JSAs is fundamentally inconsistent with the Commission's other recent attribution decisions.[130] Consider, for example, last year's repeal of the attributable material relationship (AMR) rule in the context of wireless spectrum. The AMR rule used to require that the revenues of any company leasing or reselling more than 25% of the spectrum capacity of a small business's wireless license must be attributed to that small business. In 2015, however, the same Commission majority as here concluded that the AMR rule was "overbroad" and "we no longer need[ed] a bright-line, across-the-board, attribution rule to ensure that a small business makes independent decisions about its business operations."[131] This followed a 2014 decision where the same Commission majority as here waived the AMR rule for a private equity firm that leased 100% of its spectrum capacity to our nation's two largest wireless carriers. There, the Commission reasoned that the firm in question would not necessarily be "unduly influence[d]" by the wireless carriers leasing all of their spectrum capacity because of the firm's representation that the "agreements at issue did not confer any" such influence.[132]

So here is where we are today. Under the Commission's rules, a small business can lease 100% of its spectrum capacity to a Fortune 50 wireless carrier—that is, engage in pure, profitable arbitrage—without *any* attribution requirement being triggered. Yet, as a result of today's *Order*, attribution will automatically kick in whenever one television station sells more than 15% of another television station's advertising time.

How does this make any sense? The Commission purports to attribute television JSAs because selling 16% of a station's advertising inventory gives licensees "the opportunity, ability, and incentive to exert significant influence over the brokered station."[133] Yet, one company leasing *all* of another company's spectrum does not give rise to the same concerns regarding undue influence? A company depending upon a 100% spectrum lease is plainly more subject to undue influence than a television station that agrees to let another station sell 16% of its advertising. However, the *Order* offers no reason why the latter relationship, but not the former, triggers an attribution requirement. As I've written before in commenting upon the 2014 waiver of the AMR rule, "A foolish consistency may be the hobgoblin of

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[127] *Prometheus III*, 824 F.3d at 58.

[128] *See Order* at para. 38.

[129] *Prometheus III*, 824 F.3d at 40 (quoting *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

[130] *See* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jeannine Timmerman, Deputy General Counsel and Senior Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, at 2–3 (July 29, 2016).

[131] *Updating Part 1 Competitive Bidding Rules et al.*, WT Docket Nos. 14-170 et al., Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, 7504, para. 21 (2015).

[132] *Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules et al.*, WT Docket Nos. 05-211 et al., Order, 29 FCC Rcd 9080, 9084–85, paras. 13–14 (2014) (*Grain Waiver Order*).

[133] *2014 Quadrennial Review Notice*, 29 FCC Rcd at 4527, para. 340.

little minds, but a deliberate inconsistency is the ogre of arbitrariness."[134]

III.

The Commission spends almost 50 pages discussing the issue of ownership diversity in this *Order*. That's certainly a lot of talk. But what concrete action does this Commission take to advance diversity in the *Order*? One thing: It reinstates the very same "eligible entity" definition that the Third Circuit rejected five years ago. To describe this decision is to discredit it.

During my time at the Commission, I have made it a priority to encourage greater diversity in the broadcast industry. Each summer, for example, I meet with those participating in the Broadcast Leadership Training (BLT) Program, run by the National Association of Broadcasters Education Foundation. The BLT program educates a diverse group of executives who aspire to be station owners or managers by exposing them to "the fundamentals of purchasing, owning, and running a successful operation of radio and television stations."[135] Each time, I come away inspired by their spirit and optimistic about the future of broadcasting. These sessions also reinforce my determination to do what I can at the FCC to expand opportunities in the industry.

Occasionally, I have been successful. For example, the progress that the FCC has been able to make in revitalizing AM radio, the nation's most diverse broadcast service, has been a big step forward. But too often, the Commission has fallen short. The FCC's leadership has prioritized setting aside spectrum for unlicensed operations in the post-auction television band over saving low-power television stations that often serve minority communities. It has allowed the Advisory Committee for Diversity in the Digital Age to lay dormant. And in this *Order*, it falls short once again.

I am particularly disappointed that the Commission refuses once again to adopt an incubator program, which would allow established broadcasters to provide financing and other forms of assistance to new entrants looking to break into the broadcasting business. This proposal enjoys the support of civil rights organizations, including the National Urban League, LULAC, the Rainbow/PUSH Coalition, the National Council of La Raza, the Minority Media and Telecommunications Council, and the Asian American Justice Center.[136] It enjoys the support of industry.[137] One would think that moving forward with this initiative would be a no-brainer.

The Commission claims that an incubator program would be too difficult to administer and consume too many staff resources.[138] But it is difficult to take that argument seriously. When the FCC's leadership thinks that an issue is important, it is more than willing to adopt regulations that are difficult to administer and consume an enormous amount of staff resources, far more than any incubation program would. Moreover, as detailed in the *Order* itself,[139] the Commission has expended a lot of staff resources *studying* the broadcast diversity issue. If we think that diversity is important, why not spend less time researching the issue and more time actually *doing* something to make things better?

In my view, the real reason why the Commission refuses to adopt an incubator program is ideological in nature. In order to incentivize broadcasters to incubate a new entrant, the FCC would allow participating broadcasters to own one more radio station in a market than they otherwise could under the local ownership rule. A small number oppose this because they fear that this slight and targeted relaxation of our ownership rules would promote concentration in the radio industry. But my response to them is

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134 *Grain Waiver Order*, 29 FCC Rcd at 9091 (Dissenting Statement of Commissioner Ajit Pai).

135 *See* National Association of Broadcasters Education Foundation, Broadcast Leadership Training, http://nabef.org/blt/default.asp (last visited Aug. 18, 2016).

136 *See, e.g.*, Initial Comments of the Diversity and Competition Supporters in Response to the Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, at 19–21 (July 30, 2008).

137 *See, e.g.*, NAB FNPRM Comments at 92–93; NAA FNRPM Comments at 15.

138 *See Order* at paras. 319–21.

139 *See Order* at paras. 246–70.

simple. The benefits of incubating a new voice in a market would far outweigh any such harm, especially since an incubator is likely to be most valuable in small-town markets where finding broadcast spectrum is easy but the economics of the broadcast business are hard.

* * *

As we bring our 2010 Quadrennial Review to an end, it is worth stepping back and looking at the FCC's actions over the past few years from a broader perspective. In the many years in which the 2010 Quadrennial Review has been pending, the Commission has approved the $13.8 billion purchase by our nation's largest cable operator (Comcast) of one of our nation's top four broadcast networks (NBC). It has signed off on the $49 billion merger of our nation's second and fifth largest multichannel video programming distributors (AT&T and DIRECTV). And it has blessed a single $79 billion transaction combining our nation's second, third, and sixth largest cable providers (Charter, Time Warner Cable, and Bright House).

Yet today, after many years of delay and "deliberation," the FCC tells us the prospect of a newspaper purchasing a single television or radio station for relative pocket change still shocks the conscience? One television station selling more than 15% of another's advertising inventory in order to cut costs is a dire threat to competition? A program to incubate diverse voices in the broadcast industry is a bridge too far because it would allow some companies to own an additional radio station in a market? It makes no sense at all.

Soon, I expect outside parties to deliver us to the denouement: a decisive round of judicial review. I hope that the court that reviews this sad and total abdication of the administrative function finds, once and for all, that our media ownership rules can no longer stay stuck in the 1970s consistent with the Administrative Procedure Act, the Communications Act, and common sense. The regulations discussed above are as timely as "rabbit ears," and it's about time they go the way of those relics of the broadcast world. I am hopeful that the intervention of the judicial branch will bring us into the digital age.

For all of these reasons, I dissent.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50; *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294; *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256.

The Commission's role with regard to the Quadrennial Review is quite straightforward. While I strongly disagree with parameters set by past precedent – such as the idea that the pendulum can swing in both deregulatory and regulatory directions, or the misinterpretation of the word "necessary" contained in the law – we still are obligated to review the media landscape and determine whether each of our media ownership rules is "necessary in the public interest as the result of competition."[140] I still believe that the Commission can – and must – thoughtfully update our ownership rules while preserving competition, localism, and diversity. For numerous reasons, however, the Commission has failed to comply with Congress' directive for almost a decade. And yet, we were told by the Chairman almost two years ago that this time would be different.[141] The end result, as represented in this item, is more of the same obfuscation, ignorance, hyper-partisanship and defiance as before.

Prodded at long last by court order into completing the statutorily-mandated Quadrennial Review, the Commission has managed to produce a thoroughly objectionable document divorced from the realities of today's media marketplace. Social media giants, online news sites, over-the-top video content, traditional pay TV, and many other media sources are eating away at the audiences of broadcasters and newspapers by the day. Congress anticipated this type of upheaval in the dynamic media environment, and designed the Quadrennial Review requirement to address it by forcing us to adjust our media ownership rules in response. However, it seems that to my colleagues, all evidence of the myriad new challenges to the past dominance of newspapers and broadcasters serves merely as fodder for interesting gee-whiz anecdotes to be trotted out, never as a prompt for any responsive action by the Commission.

Incredibly, the only significant changes this Commission is willing to make are those that serve to render current media ownership rules, last effectively amended in 1999, even *more* restrictive. While grudgingly allowing for Congress' damage-minimizing directive to grandfather existing Joint Service Agreements (JSAs), the Order reinstalls the Commission's 2014 JSA attribution rule, ignoring the evidence that JSAs have served the public interest well in many circumstances, and narrowing the options for broadcasters attempting to stretch scarce resources.[142] And the Order doubles down on this punitive stance by requiring disclosure of Shared Service Agreements (SSAs) as a waystation en route to a promised proceeding regarding SSA attribution.[143]

Those are the only real modifications this Commission approves for media ownership rules that in some cases date back to the 1960's. No proposal to loosen or eliminate any rule, including proposals made by this same majority in the 2014 FNPRM to eliminate the restrictions on newspaper/radio and radio/television combinations, made the cut. These cross-ownership bans create artificial silos that are preventing broadcasters and newspapers from competing with new entrants and serving the needs of consumers. With newspapers, in particular, facing well-documented struggles and in some instances,

[140] Telecommunications Act of 1996, P.L. 104-104, §202(h), 110 Stat. 56, 111-12 (1996).

[141] *See FNPRM*, 29 FCC Rcd at 4582.

[142] *Supra* para. 62.

[143] *Supra* paras. 338, 377.

fighting for their very survival, eliminating the cross-ownership bans might provide some with much-needed relief in the form of committed and knowledgeable investors. But it seems my colleagues would rather throw the newspaper industry to the wolves than consider so much as a tweak to their article of faith that media ownership rules are forever. And the new exception for failed or failing newspapers is an obvious procedural cover rather than a potential means of any relief, as it is highly unlikely that anyone will want to partner with a company that is in such distress.[144] By then, it's too late.

The Commission also insists on maintaining the television duopoly rule, a restriction on ownership of two television stations in the same market, that may have made sense at its origin in 1964 when consumers' video options were limited to a few broadcast networks via rabbit ears. To say it is still needed in an era of literally hundreds of competitive pay TV channels and essentially unlimited competitive Internet content defies belief. And keeping this rule ensures that several other equally anachronistic regulatory artifacts will make it to the year 2020 intact, such as the "Eight Voices Test." This condition for duopoly ownership was previously struck down by the D.C. Circuit in 2002,[145] and a previous Commission concluded that it could not be justified.[146] Fourteen years later, it makes even less sense. Why should the arbitrary number of eight stations be needed in order for a market to be considered competitive? Why has this number never changed despite the changes in the media landscape? More than half of U.S. markets do not have – and cannot support – eight independently owned stations,[147] so potentially pro-competitive combinations that would benefit stations, and their viewers, cannot even be considered in most of the country.

The Commission's multiple errors stem from its indefensible failure to acknowledge any non-broadcast or non-newspaper competitors as market participants in any context. As the Order asserts, "[t]raditional media outlets … are still of vital importance to their local communities and essential to achieving the Commission's goals of competition, localism, and viewpoint diversity."[148] But it is possible to agree to this sentiment while also realistically assessing and acknowledging the impact of new media on the marketplace. In a recent Pew Research Center study focusing on the flow of local news in three U.S. markets, between 45 and 33 percent of residents stated that the internet is very important in keeping up with local news, while about 10 percent went so far as to say that social media are the *most* important way they get local news.[149] And while it is true that some online news sources have a relationship with legacy print or TV players, 25 out of the 143 identified local news providers in one of the markets studied, Denver, were pure digital-only outlets.[150] The digital media future is here. And it is, of course, having a tangible impact on local markets:

> Taken together, the data illustrate that when it comes to news ecologies, the greater digital orientation and array of providers in Denver widen the local news system somewhat with

[144] *Supra* para. 174. Specifically, a "failed" newspaper must show that it "had stopped circulating … due to financial distress for at least four months immediately prior to the filing of the assignment or transfer of control application, or that it was involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings." A "failing" newspaper would need to show a negative cash flow for the previous three years, and in addition that "the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the failed or failing newspaper … and that selling the newspaper … to any out-of-market buyer would result in an artificially depressed price."

[145] *Sinclair*, 284 F.3d at 165.

[146] *2002 Biennial Review Order*, 18 FCC Rcd at 13671.

[147] Letter from Rick Kaplan, NAB to Marlene Dortch, FCC, MB Docket Nos. 14-50, 09-182 (filed July 19, 2016) https://ecfsapi.fcc.gov/file/1071905276260/OwnershipExParte8VoicesStudy071916nm.pdf.

[148] *Supra* para. 1.

[149] Pew Research Center, *Local News in a Digital Age* (March 5, 2015), http://www.journalism.org/2015/03/05/local-news-in-a-digital-age/.

[150] *Id.*

> less reliance on the major legacy providers, especially the local newspaper, and a greater mix of coverage more often driven by enterprising work from journalists.[151]

Further, to the extent that social media may have once predominantly used traditional media links in timeline updates, tweets and the like, that practice has changed significantly. Online media platforms have become much more news first environments as crowdsourcing users often post faster and more accurately than traditional media sources. In reality, consumers are more likely to learn about the latest Michael Phelps gold medal at the Rio Olympics on a Twitter feed than to wait for an update to a sports or news website or to see the local ten p.m. newscast.

While the evolution of the legacy media world is clearly far from complete, the Commission's duty is to respond to the obvious and far-reaching changes that Americans, and our legacy media, are living under today. However, while "recogniz[ing] that broadband Internet and other technological advances have changed the ways in which many consumers access entertainment, news and information programming,"[152] the Commission fails to reflect that recognition by changing a single one of its media ownership rules, thus missing the entire point of the Quadrennial Review exercise. What good does it do for the Commission to "recognize" the full 2016 media landscape if it does absolutely nothing in response? With many news stories being broken over social media or news websites already this year, it is hard to imagine what it would take for reality set in and convince this Commission to budge, absent a court mandate or change in law.

One reason provided for inaction on the media ownership rules involving television is that the Commission is in the midst of the broadcast spectrum incentive auction, creating uncertainty for the future of the media marketplace.[153] This excuse rings extremely hollow when considering that despite Congress' full knowledge of section 202(h), it declined to include an exemption or delay of the Quadrennial Review when it crafted and enacted the incentive auction legislation. As I have previously argued, this Commission can't read an exemption in the law where one does not exist. Does the on-going incentive auction make our job more complex? Perhaps, but not impossible. Thus, no weight should be given to this weak and misapplied argument.

In a disturbing echo of process fouls past, the Chairman chose to continue his practice of only approving an item if the majority party commissioners are in unison. Clearly, there were at least three votes, and perhaps four, for eliminating the cross-ownership rules, especially the newspaper/radio prohibition. But that wasn't good enough. The fact that one Democratic member objected effectively meant that no changes were permitted. This blatant political move should be seen for what it is. In some regards, it is hard to be surprised at this approach in the current political atmosphere in Washington D.C., except that is not how an "independent" Commission should operate. How can any claimed attempt at consensus-building be taken seriously when the consensus supposedly sought can and will be so easily set aside?

In retrospect, the biggest problem with the Quadrennial Review that Congress likely couldn't anticipate was that those seeking to maintain the status quo could continuously "win" through Commission intransigence and court remands. In fact, the more flawed the item is, the more likely the court can be used as an instrument of delay. More specifically, court review of the Commission's work in this area has served as just another tool of the public "interest" groups seeking to prevent any modernization of our rules. By remanding the item back to the Commission to comply with some objective, the court merely extends the life of all the media ownership rules – a total victory for the forces of inertia.

[151] *Id.*

[152] *Supra* para. 1.

[153] *See Fact Sheet: Updating Media Ownership Rules in the Public Interest* (June 27, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-340033A1.pdf.

In short, rarely have I seen a proceeding take so long and a document say so much in order to accomplish nothing of value. I dissent.