6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 14-50, 09-182, 07-294, and 04-256; FCC 14-28]

2014 Quadrennial Regulatory Review

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document solicits comment on proposed changes to the broadcast ownership rules in compliance with section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its broadcast ownership rules quadrennially to review these rules to determine whether they are necessary in the public interest as a result of competition. In addition, this document solicits comment on certain aspects of the Commission's 2008 Diversity Order that the U.S. Court of Appeals for the Third Circuit remanded and directed the Commission to address in its quadrennial review proceeding. This document solicits comment also on a potential disclosure requirement for certain broadcast television shared service agreements.

DATES: Comments are due on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** and reply comments are due on or before **[INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].** Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via email to PRA@fcc.gov and to Nicholas A. Fraser, Office of Management and Budget, via email to Nicholas_A._Fraser@omb.eop.gov or via fax at (202) 395-5167.

FOR FURTHER INFORMATION CONTACT: Hillary DeNigro, Industry Analysis Division, Media Bureau, FCC, (202) 418-2330. For additional information concerning the PRA proposed information collection requirements contained in the Further Notice of Proposed Rulemaking, contact Cathy Williams at (202) 418-2918, or via the Internet at PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: This Further Notice of Proposed Rulemaking, in MB Docket Nos. 14-50, 09-182, 07-294, and 04-256; FCC 14-28, was adopted on March 31, 2014, and released on April 15, 2014. The document is available for download at http://fjallfoss.fcc.gov/edocs_public/. The complete text of the document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 12th Street, SW, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site http://www.bcpi.com or call 1-800-378-3160.

Initial Paperwork Reduction Act of 1995 Analysis

This Further Notice of Proposed Rulemaking proposes a new or revised information collection requirement. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the OMB to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].** Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) way to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

I. Synopsis of the Further Notice of Proposed Rulemaking

A. Introduction

1. The Commission takes another major step in its review of the broadcast ownership rules. The Commission wishes to build on that record to resolve the ongoing 2010 proceeding, and the Commission is cognizant of its statutory obligation to review the broadcast ownership rules every four years. To accomplish both objectives, with this Further Notice of Proposed Rulemaking the Commission is initiating this 2014

Quadrennial Review; incorporating the existing 2010 record into this proceeding; proposing rules that are formulated based on the Commission's evaluation of that existing record; and seeking new and additional information and data on market conditions and competitive indicators as they exist today. The Commission issues this Further Notice of Proposed Rulemaking to seek additional comment on the appropriateness of the broadcast ownership rules to today's evolving marketplace. Also, the Commission seeks additional comment on issues referred to the Commission in the Third Circuit's remand in Prometheus II of certain aspects of the Commission's 2008 Diversity Order (73 FR 28361, May 16, 2008, FCC 07-217, rel. March 5, 2008). Finally, the Commission takes steps herein to address concerns about the use of a variety of sharing agreements between independently owned television stations — Shared Service Agreements or SSAs.

B. Background

2. 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. 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." 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.'" There is no "'presumption in favor of repealing or modifying the ownership rules.'" Rather, the Commission has the discretion "to make [the rule] more or less stringent." This 2014 Quadrennial Review will focus on

identifying a reasoned basis for retaining, repealing, or modifying each rule consistent with the public interest.

3. Policy Goals. The media ownership rules have consistently been found to be necessary to further the Commission's longstanding policy goals of fostering competition, localism, and diversity. The Commission seeks additional comment on the NPRM's (77 FR 2867, Jan. 19, 2012, FCC 11-186, rel. Dec. 22, 2011) tentative conclusion that these policy goals continue to be the appropriate framework within which to evaluate and address minority and female interests as they relate to the broadcast ownership rules. Based on the record developed in response to the NPRM, the Commission continues to believe that the longstanding policy goals of competition, localism, and diversity are broadly defined to promote the core responsibilities of broadcast licensees. The Commission is not persuaded by the comments in the record that it would be appropriate to adopt any additional formal policy goals. The Commission seeks comment on this tentative conclusion.

C. Media Ownership Rules

1. Local Television Ownership Rule

a. Introduction

4. Based on the record that was compiled for the 2010 Quadrennial Review, the Commission tentatively concludes that the current local television ownership rule remains necessary in the public interest and should be retained with a limited modification. As discussed below, the Commission believes that, based on the current media marketplace and the record in this proceeding, 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, rather than the DMA-based approach proposed in the NPRM. The Commission believes that the local television ownership rule is necessary to promote competition. The Commission further believes that the competition-based rule proposed in this Further Notice of Proposed Rulemaking also would promote viewpoint diversity by helping to ensure the presence of independently owned broadcast television stations in local markets and would be consistent with the Commission's localism goal. The Commission finds that the local television ownership rule proposed in this Further Notice of Proposed Rulemaking would be consistent with the goal of promoting minority and female ownership of broadcast television stations. Finally, the Commission believes that the proposed limited modification of the rule will better promote competition, and that this benefit would outweigh any burdens, which would be minimized by the proposal to grandfather combinations as described herein.

5. The Commission proposes to modify the local television ownership rule to allow an entity to own up to two television stations in the same DMA if: (1) the digital NLSCs of the stations (as determined by §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 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 would be considered, which would be consistent with the contour overlap provision of the current rule. In addition, the Commission proposes to retain the existing failed/failing station waiver policy. The

Commission seeks comment on these proposed modifications to the local television ownership rule and ask whether there have been any developments since the NPRM that the Commission should take into account in the review of the rule. The Commission seeks comment on the costs and benefits of the proposed local television ownership rule. To the greatest extent possible, commenters should quantify the expected costs or benefits of the proposed rule and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

b. Background

6. In the NPRM, the Commission proposed to retain the local television ownership rule, with one modification. Specifically, the NPRM proposed to retain the top-four prohibition, eight-voices test, and numerical limits of the existing rule, while proposing to replace the Grade B contour overlap provision with a DMA-based approach, under which the Commission would prohibit ownership of two stations in the same DMA unless at least one of the stations is not rated in the top four and at least eight independent voices would remain after the transaction. The NPRM also invited comment on whether to adopt a market size waiver standard, the impact of multicasting on the local television ownership rule, and the impact of the proposed rule on minority and female ownership.

c. Discussion

7. Market. As proposed in the NPRM, the Commission tentatively finds that the local television ownership rule continues to be necessary to promote competition among broadcast television stations in local television viewing markets. Although the Commission believes the record in the 2010 Quadrennial Review proceeding supports its

view of the appropriate parameters for defining the market, the Commission seeks comment on whether developments since the NPRM should cause the Commission to shift the focus of its analysis.

8. First, the Commission believes that the video programming market remains the relevant market for review of the local television ownership rule. The Commission also believes that the video programming market is distinct from the radio listening market. While multiple broadcast commenters argued in favor of an expansive market definition that would include nearly all forms of media, the Commission tentatively finds such arguments to be unpersuasive. The Commission has previously found that the video programming market is distinct from other media markets because consumers do not view non-video entertainment options (e.g., listening to music or reading) and non-delivered video options (e.g., DVDs or movie theaters) as good substitutes for watching television, and there is no evidence in the current record that would cause the Commission to disturb these findings. In addition, the Commission notes the NPRM's tentative conclusion that it is not now appropriate to expand the relevant product market beyond video programming to include non-video information sources of local news and information. This tentative conclusion was based on evidence that Internet-only websites provide only a small amount of local news content and a lack of evidence that non-video information sources modify their programming decisions based on the actions of local broadcast television stations or vice versa. The Commission did not receive significant comment on this specific issue in the 2010 proceeding, and the Commission seeks comment on whether it should confirm the NPRM's tentative conclusion for the reasons discussed therein.

9. Second, the Commission believes that its analysis regarding the local television ownership rule should continue to focus on promoting competition among broadcast television stations in local television viewing markets. In order to compete effectively in its local market, and thereby gain market share, a broadcast television station must invest in better programming and provide programming tailored to the needs and interests of the local community, including local news and public interest programming. By strengthening their position in the local market, television broadcasters are better able to compete for advertising revenue and retransmission consent fees, an increasingly important source of revenue for many stations. Viewers in the local market benefit from such competition among numerous strong rivals in the form of higher quality programming.

10. While the Commission is keenly aware of the growing popularity of video programming delivered via MVPDs and the Internet, it tentatively find that competition from such video programming providers is currently of limited relevance for the purposes of its analysis. These programming alternatives compete largely in national markets — cable network programming is generally uniform across all markets, as is video programming content available via the Internet — and, unlike local broadcast stations, such programming providers are not likely to respond to conditions in local markets. Though certain broadcast commenters disputed this notion, the Commission tentatively finds their arguments to be unsupported by evidence of non-broadcast video programmers modifying their programming decisions based on the competitive conditions in a particular local market.

11. In addition, the Commission tentatively finds that broadcast television's

strong position in the local advertising market supports its view that non-broadcast video programmers are not yet meaningful substitutes in local television markets. Broadcasters asserted that the Commission should expand the relevant market, in part because of increased competition for advertising from non-broadcast sources of video programming, particularly in the local advertising market. The data do not support this claim. From 2008 through 2011, though overall local advertising spending was down from its highs in 2005 and 2006, local broadcast television's market share actually increased and achieved the highest levels since 2004. While the shares of local advertising on cable television and the Internet also increased during this time period, those gains do not appear to be at the expense of broadcast television stations. NAB asserted that the recent growth in television station advertising revenue is temporary and not likely to "address the structural changes that have taken place in the [television] market" because the predicted 2012 advertising revenues for the broadcast television industry are below the levels achieved in 2006. While advertising revenues for broadcast television stations were lower during this period, the Commission believes the evidence does not support the conclusion that this was the result of a unique change in the television marketplace; instead, the total advertising market for all media experienced a significant contraction, which was most likely the result of the global financial crisis that impacted nearly all markets. Moreover, total station revenue for 2012 was predicted to exceed the total station revenue for 2006 and to grow steadily through 2017. However, the Commission seeks comment on whether any structural changes have occurred in the television marketplace and, if so, whether to adjust the 2014 Quadrennial Review analysis to account for such changes. The Commission seeks comment on whether there have been any significant changes since these figures became available.

12. The Commission believes 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. Moreover, millions of U.S. households lack broadband access at speeds sufficient to stream or download video programming available via the Internet. Accordingly, the Commission tentatively finds that the record continues to support a local television ownership rule designed to promote competition among broadcast television stations. The Commission believes the 2010 Quadrennial Review record supports the use of this approach, and it seeks comment on whether this market definition should apply for purposes of the 2014 Quadrennial Review.

13. Contour Overlap. The NPRM proposed to eliminate the Grade B contour overlap test and rely solely on Nielsen DMAs to determine when to apply the local television ownership rule. The NPRM recognized that the DMA approach could have a disproportionate impact in certain DMAs and sought comment on the impact of such a change. As discussed below, the Commission tentatively finds that the public interest is best served by retaining the contour-based approach of the previous rule but by replacing the analog Grade B contour with the digital NLSC. The Commission seeks comment on whether any developments have occurred since the NPRM that should cause it to reconsider this proposed approach.

14. The Commission believes that the proposed DMA-only approach would

unnecessarily expand the reach of the local television ownership rule in certain DMAs and thus would be overbroad. Therefore, the Commission tentatively declines to adopt that approach. NAB argues that relying instead on the digital NLSC, which the Commission has treated as the functional equivalent of the Grade B contour, would serve the purpose of establishing a trigger that would accurately reflect current digital service areas while avoiding any potential disruptive impact, and the Commission believes that approach is reasonable. By contrast, there is no digital counterpart to a station's analog city grade contour. Accordingly, consistent with case law developed after the digital transition, the Commission would continue to evaluate all future requests for new or continued satellite status on an ad hoc basis. In addition, consistent with previous Commission decisions, the Commission tentatively finds that retaining a contour-based approach would serve the public interest by promoting local television service in rural areas. In particular such an approach would continue 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. It is important that the local television ownership rule take into account the current digital service area of a station. The Commission confirms that the digital NLSC is an accurate measure of a station's current service area and thus would be an appropriate standard. Thus, under the modified rule proposed in the Further Notice of Proposed Rulemaking, the Commission would continue to define the geographic dimensions of the local television market by reference to DMAs, but the Commission would replace the analog Grade B contour with the digital NLSC, such that within a DMA an entity could own or operate two stations in a market if the digital NLSCs of those stations did not overlap. To the extent that the digital NLSC of two stations in the same DMA overlapped, then the stations serve the same area, even if there was no analog Grade B contour overlap prior to the digital transition, and in that case the combination would be permitted only if it satisfied the top-four prohibition and the eight-voices test. In the 2002 Biennial Review Order (68 FR 46286, Aug. 5, 2003, FCC 03-127, rel. July 2, 2003), in which the local television ownership rule was relaxed, the Commission eliminated the contour overlap provision. 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." The revised rule adopted in the 2002 Biennial Review Order was overturned on appeal. The Commission believes its proposal to adopt the digital NLSC standard is in the public interest and is supported by the record, and it declines to propose alternate possible solutions, such as waiver criteria similar to those adopted in the 2002 Biennial Review Order. However, the Commission invites commenters to propose alternate solutions if they object to the Commission's approach.

15. The NPRM described the potential benefits of a DMA-based approach, including correlation with DMA-wide carriage of broadcast signals pursuant to mandatory carriage requirements and benefits similar to those realized by the geographic market definition in the radio rule. For the reasons discussed above, however, that approach could have a negative impact in certain DMAs. The Commission seeks comment on the tentative conclusion that the alternative approach proposed in this Further Notice of Proposed Rulemaking would avert the negative impact of the DMA-

based approach, accurately reflect current digital service areas, and appropriately balance the Commission's public interest goals.

16. Grandfathering. The Commission tentatively affirms the NPRM's proposal to grandfather existing ownership combinations that would exceed the numerical limits under the revised contour approach, though it tentatively finds that the sale of such combinations must comply with the local television ownership rule then in effect. In addition, the Commission proposes that all permanent waivers from the prior rule that previously have been granted would continue in effect under the new rule, but, like any newly grandfathered combinations, could not be transferred/assigned intact unless the combination complies with the local television ownership rule in effect at the time of the transfer/assignment. The Commission seeks comment on whether it should adopt this approach in the 2014 quadrennial proceeding.

17. The Commission tentatively finds that the concerns raised by those in favor of permitting grandfathering and the transfer of grandfathered combinations would largely be addressed by the proposal to retain a contour overlap provision in the local television ownership rule and to substitute the digital NLSC for the Grade B contour. The contour element of the rule would effectively maintain the status quo for most, if not all, owners of duopolies formed as a result of the previous Grade B contour overlap provision. Consistent with the tentative conclusion in the NPRM, however, the Commission proposes to grandfather ownership of existing combinations of television stations, if any, that would exceed the ownership limit as a result of the change to the digital NLSC test the Commission proposes herein. Even in limited circumstances, compulsory divestiture is disruptive to the marketplace and is a hardship for individual

owners; the Commission believes any benefits to its policy goals (including promoting ownership diversity) would be outweighed by these countervailing equitable considerations.

18. The Commission proposes, however, to require that the sale of any such grandfathered combination comply with the local television ownership rule in place at the time the transfer of control or assignment application is filed. As stated above, the digital NLSC is an accurate measure of a station's digital service area. 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 the sale of a grandfathered combination comply with the new standard would be consistent with the Commission's rationale for adopting the digital NLSC-based standard and would not cause hardship by requiring premature divestiture. Consistent with the Commission's previous decisions, it tentatively finds 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 local television ownership rule at the time of transfer/assignment. Under its proposed approach, the Commission would continue to allow pro forma changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. The Commission seeks comment on this tentative conclusion.

19. Numerical Limits. The Commission proposed in the NPRM to retain the current numerical limits in the local television ownership rule. The Commission seeks comment on whether to adopt that proposal, thereby permitting a licensee to own up to two stations (i.e., a duopoly) in a market, subject to the other requirements proposed in

this <u>Further Notice of Proposed Rulemaking</u>.

20. The Commission seeks comment on its preliminary view that the local television marketplace has not changed significantly since the <u>NPRM</u> to justify either tightening or loosening the current numerical limits of the local television rule. Ownership of a second in-market station can create substantial efficiencies, which may allow a local broadcast station to invest in programming that meets the needs of its local community, such as local news or other public interest programming. Notably, the Commission tentatively finds that there is substantial evidence in the record 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 more than offset any potential harms that are associated with common ownership. Moreover, as discussed in greater detail in the paragraphs below on multicasting, the Commission believes that the ability to multicast is not a substitute for common ownership of multiple stations and, therefore, would not justify tightening the existing numerical limits. The Commission seeks comment on these tentative findings.

21. Similarly, the Commission does not believe there have been sufficient changes in the local television marketplace to justify ownership of a third in-market station. The Commission seeks comment on this tentative conclusion. The primary "change" in the marketplace cited by those commenters in favor of loosening the rule is competition from non-broadcast alternatives. As discussed above, however, the Commission believes the local television ownership rule is designed to promote competition among broadcast television stations in local television markets, and the Commission has tentatively concluded that it is not yet appropriate to consider

competition from non-broadcast sources in evaluating whether the rule remains necessary. Even if the Commission were to consider such competition, Entravision, which supported ownership of up to two stations in all markets and up to three stations in markets with 18 or more television stations, conceded that such consolidation is likely to threaten the Commission's competition and diversity goals by jeopardizing small and mid-sized broadcasters. To combat these harms, Entravision proposed a series of "behavioral regulations" that the Commission could adopt in tandem with loosening the ownership restrictions. The Commission declined to adopt this proposal in the 2006 Quadrennial Review proceeding, a decision that was upheld in Prometheus II, and the Commission sees no changes in the local television marketplace that would warrant reconsideration of the Commission's previous decision. The Commission has long applied structural local media ownership rules and has previously rejected proposals for instituting behavioral rules. The Commission proposes to affirm this approach, as it continues to believe that behavioral rules are not appropriate substitutes for structural local media ownership rules. The Commission seeks comment on this proposal. Without significant evidence of the public interest benefits that could result from the ownership of three stations in a local market, the Commission does not believe that there is adequate justification at this time for increasing the numerical limits.

22. Top-Four Prohibition. The Commission proposes to continue to prohibit mergers between two top-four-rated stations in a local market, consistent with the tentative conclusion in the NPRM. The Commission tentatively finds that the top-four prohibition remains necessary to promote competition in the local television marketplace. The Commission seeks comment on whether there have been any developments since the

NPRM that it should consider with regard to this issue.

23. Consistent with previous Commission decisions, the Commission proposes to continue to prohibit mergers involving two of the top-four stations in a market because it believe such combinations would be the most deleterious to competition. The Commission has previously identified potential harms associated with top-four combinations, and the Commission found no evidence in the 2010 Quadrennial Review record to disturb the Commission's previous findings. Accordingly, the Commission continues to believe that top-four combinations would often result in a single firm obtaining a significantly larger market share than other firms in the market and that such combinations could create welfare harms. Top-four combinations have been found to reduce incentives for local stations to improve their programming, as once strong rivals suddenly have incentives to coordinate their programming in order to minimize competition between the commonly owned stations. In addition, in general, there remains a significant "cushion" of audience share points that separates the top-four stations in a market from the fifth-ranked station. Accordingly, the Commission tentatively finds that the public interest is best served by retaining the top-four prohibition. The Commission seeks comment on this tentative conclusion.

24. The NPRM also sought comment on certain circumstances in which a licensee is able to obtain control over two of the top-four stations in a market through a transaction or series of transactions, sometimes referred to as "affiliation swaps," that do not require prior Commission approval. Based on its review of the 2010 Quadrennial Review record, the Commission tentatively finds that such transactions should be subject to the top-four prohibition because it believes they circumvent the intent of the rule and

are not in the public interest. The Commission seeks comment on whether it should adopt this approach.

25. In general, national network affiliation is a significant driver of a station's audience share. The Commission has previously found that, nationally, the Big Four networks (i.e., ABC, CBS, Fox, and NBC) are the highest rated networks and that, in general, the national audience statistics are reflected in the rankings in the local markets. Recent Nielsen data confirm this finding. 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. Because such affiliation swaps do not involve the assignment or transfer of a station license, the transaction is not subject to prior Commission approval under Section 310(d) of the Communications Act of 1934. Thus, by engaging in an affiliation swap, parties can achieve a top-four station combination that would otherwise have been prohibited by the Commission's rules.

26. This fact is evidenced in the Honolulu, Hawaii, DMA, where an affiliation swap between a top-four station and a non-top-four station — which was commonly owned with a different top-four station in the market — was executed. In addition to the affiliation swap, the parties swapped certain of the stations' non-network programming and the stations' call signs, purportedly to avoid viewer confusion. Thus, the stations (though not the licenses) effectively changed hands without prior Commission approval — approval that was not technically required. Consistent with the Commission's observation above regarding the correlation between affiliation with a Big Four network and market rank, following the affiliation swap, the non-top-four station became a top-four station. By structuring these transactions so as to evade Commission review, a

single entity was able to acquire control over a second top-four station in the market, a result that is prohibited under the local television ownership rule.

27. The Commission tentatively finds that 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 can be used to evade the top-four prohibition. Accordingly, in order to close this loophole, the Commission proposes to clarify that such transactions must comply with the top-four prohibition at the time the agreement is executed. Specifically, the Commission believes an entity should 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. In addition, the Commission proposes that, for purposes of making this determination, the new affiliate's post-consummation ranking would be the ranking of the previous affiliate at the time the agreement is executed, determined in accordance with § 73.3555(b)(1)(i) of the Commission's rules. The Commission proposes to find any party that has control over 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. Application of this rule would be prospective, and parties that acquired control over a second in-market top-four station by

engaging in such transactions prior to the release date of a decision to adopt such a rule would not be subject to divestiture or enforcement action. Consistent with KHNL/KGMB License Subsidiary, such transactions that would not be subject to such a rule could still be considered in the context of individual licensing proceedings. All future transactions would be required to comply with the Commission's rules then in effect. The Commission seeks comment on these proposals. In addition, it seeks comment on whether and how station owners are attempting to circumvent the top-four prohibition, or any other of the media ownership rules, through the invention of similar devices. While the Commission has tentatively determined that the present circumstances support prospective application of this rule, parties are on notice that similar efforts to evade the media ownership rules could be subject to enforcement action.

28. The Commission seeks comment on whether this application of the top-four prohibition is consistent with the Commission's policy to avoid constraints on commercial activities that are designed to effect station improvements. The Commission continues to encourage licensees to improve the quality of the programming and operation of their stations in ways that are consistent with the Commission's rules and policies. Moreover, the Commission does not believe that closing this loophole in the top-four prohibition violates the First Amendment. Indeed, recent constitutional challenges to the media ownership rules have been rejected, and the Commission tentatively finds that this application of the top-four prohibition withstands First Amendment scrutiny for the same reasons.

29. While certain commenters argued to the contrary, for the reasons discussed herein, acquiring control over a second in-market top-four station through the

transactions described above is easily distinguishable from other, legitimate actions a station may undertake to increase ratings at the expense of a competitor. In addition, Sinclair cautioned the Commission against interfering in the free market negotiation of affiliation agreements — which it asserted occur often and for valid business reasons — based upon a single instance where the Commission believes an affiliation swap constituted an "end run" around the top-four prohibition. Contrary to Sinclair's assertion, the Commission does not believe that it is necessary, or wise, to permit additional parties to evade the top-four prohibition before it acts, nor does it believe that this proposal is likely to have a significant impact on the negotiation of affiliation agreements. Consistent with Sinclair's comments, the Commission believes that the negotiation of affiliation agreements typically does not involve affiliation swaps and, therefore, would be unaffected by this proposal. And while such swaps may not occur often, given the potential of such transactions to undermine the local television ownership rule, the Commission believes that the application of the top-four prohibition to such transactions would be necessary. The Commission does not believe there is a reliable marketplace solution that would restrain the use of affiliation swaps to evade the top-four prohibition. The Commission seeks comment on these views.

30. Eight-Voices Test. Consistent with the proposal in the NPRM, the Commission tentatively concludes that a merger between two in-market stations with overlapping contours should not be permitted unless there would be at least eight independently owned commercial and noncommercial television stations remaining in the market post-merger, and at least one station is not a top-four station. The Commission tentatively finds that the eight-voices test continues to be necessary to promote

competition in local television markets. The Commission seeks comment on these tentative conclusions.

31. The Commission's view is that the 2010 Quadrennial Review record does not reveal sufficient changes in the local television marketplace to warrant modification of the eight-voices test at this time. Consistent with the Commission's prior position, the Commission tentatively finds that, in order to permit common ownership of two in-market stations with digital NLSC overlap, there should be a minimum of eight independently owned and operated television stations in the market post-merger. The Commission believes this minimum threshold would help ensure robust competition among local television stations in the markets where common ownership is permitted under its proposed rule, as it would increase the likelihood that each such market would 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. Indeed, nearly every market with eight or more full-power television stations — absent a waiver of the local television ownership rule or unique circumstances — is 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 is important, as it serves to improve the programming offered both by the major network stations and the independent stations, including increased local news and public interest programming. The Commission notes that this competition is perhaps most valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks. Moreover, because there continues to be a significant gap in audience share between the top-four stations in a market and the

remaining stations in most markets, the Commission continues to believe that it is appropriate to retain the eight-voices test, which helps to promote at least four independent competitors before common ownership is allowed. The Commission seeks comment on the tentative conclusion that, in light of this concentration and consistent with the 2006 Quadrennial Review Order (73 FR 9481, Feb. 21, 2008, FCC 07-216, rel. Feb. 4, 2008), it remains prudent to require the presence of at least four additional independently owned and operated competitors in the market in order to promote competition in the local television market before permitting any common ownership in that market. The Commission is most interested in learning whether any new information has become available since the NPRM that it should take into account in considering this issue.

32. The Commission tentatively finds that it is appropriate to include only full-power television stations in the voice count. The primary purpose of the rule is to promote competition among broadcast television stations in local television viewing markets; therefore, the Commission tentatively finds that it would be inappropriate to include other types of media when counting voices. The Commission notes that in the 2006 Quadrennial Review Order the Commission addressed the Sinclair court's criticisms of the eight-voices test, specifically the rationale for defining voices differently in the radio-television cross ownership rule and the local television ownership rule. The Commission detailed its rationale for limiting voices in the television rule to only full-power television stations, a rationale that was subsequently upheld on appeal in Prometheus II, and to which the Commission proposes to continue to adhere herein. The Commission seeks comment on its view that Sinclair does not compel the Commission to

include additional voices in the eight-voices test.

33. Market Size Waivers. The NPRM sought comment on whether the Commission should adopt a waiver standard for markets where the rules would otherwise limit ownership to a single television station, and, if so, how such a waiver standard should be structured. The NPRM sought comment also on whether such a market size waiver, which could even allow combinations between top-four stations, would promote additional local news offerings in small markets that are less able to support four local news operations. Based on review of the 2010 Quadrennial Review record, the Commission tentatively concludes that a market size waiver standard is not necessary. Instead, the Commission tentatively concludes that retention of the existing failed/failing station waiver policy would serve the public interest and it seeks additional comment on whether to relax the waiver criteria or establish additional grounds for waiver.

34. The Commission seeks comment on the tentative conclusion that establishing a new market size waiver standard is not needed. Having evaluated the various proposed waiver standards proffered by commenters, the Commission is concerned 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 Commission is concerned that such relaxation would be inconsistent with the tentative conclusion that the public interest is best served by retaining 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. Waiver of its rules is meant to be exceptional relief, and the Commission tentatively 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.

35. In addition, the Commission tentatively finds that it is not necessary to modify the existing waiver standard in order to promote additional local news, as the current policy already indirectly takes this into consideration in cases involving failing stations. Indeed, parties frequently pledge to continue and/or increase local news offerings in order to demonstrate that the proposed transaction would produce public interest benefits. The Commission's commitment to promoting increased local news remains strong, and the Commission believes that the existing waiver policy helps further that goal. The Commission seeks comment on whether there is new information since the NPRM that would alter its preliminary views on this issue.

36. The Commission seeks comment on the tentative conclusion that maintaining the failed/failing station waiver policy will serve the public interest. While it proposes to retain the existing failed/failing station waiver policy, it acknowledges that some industry participants have argued that certain elements of the existing policy are too restrictive. Accordingly, the Commission seeks comment on potential changes to the policy to address those circumstances. For example, are there circumstances in which the Commission should refrain from applying the four-percent all-day audience share requirement or adopt a higher threshold? If so, what circumstances would justify such a change? Are any other changes appropriate? The Commission encourages commenters to provide alternative waiver criteria for its consideration, including specific justifications

for such criteria, as well as the potential impact on its policy goals.

37. Multicasting. The NPRM sought comment on whether the transition to digital television, and specifically a station's ability to multicast multiple program streams has eliminated the need to permit common ownership of two stations in local television markets, as the local television ownership rule does. The 2010 Quadrennial Review record does not persuade the Commission that multicasting justifies imposition of a single-station ownership restriction or other tightening of the current ownership limits. The Commission seeks comment on whether there have been any developments since the NPRM that should cause it to reevaluate this position.

38. The Commission tentatively concurs with the broadcast commenters that, while multicasting has produced public interest benefits, the ability to multicast does not justify tightening the current numerical limits. Based on evidence in the 2010 Quadrennial Review record, broadcasting on a multicast stream does not — at present — produce the cost savings and additional revenue streams that can be achieved by owning a second in-market station. 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, the Commission's 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. The Commission seeks comment, however, on whether it should reconsider its position within the context of the 2014 Quadrennial Review proceeding. The Commission notes that it has authorized channel sharing by broadcast television stations in connection with the incentive auction of broadcast television spectrum and that

the statutory provision mandating the incentive auction protects the must-carry rights of stations that voluntarily relinquish spectrum usage rights in order to channel share. The Commission seeks comment on the potential impact of this aspect of the incentive auction for purposes of the media ownership rules.

39. Moreover, as discussed above, the Commission tentatively finds that the public interest is served by retaining the current numerical ownership limits; it believe that doing so would promote competition in local television markets. Therefore, as the court noted in Prometheus II, even if multicasting did generate cost savings and new revenue streams similar to owning a second in-market station — though the Commission believes that at present it does not — the Commission is not required "to promulgate a more restrictive rule just because entities may gain similar economies of scale and generate new revenue by multicasting." Indeed, for the reasons discussed herein, the Commission proposes not to make such a change, and it seeks comment on the potential consequences of such an approach for purposes of the 2014 Quadrennial Review.

40. The NPRM sought comment also on the impact of dual network affiliations on local markets and whether the Commission should limit the ability of stations to utilize their multicast capacity to form dual affiliations with certain networks. As discussed below, the Commission proposes to decline to regulate such dual affiliations in the context of the media ownership rules at this time, and it seeks comment on this proposal. The Commission seeks comment on multicasting issues in general and, in particular, on any potential impact on the incentive auction.

41. The Commission does not believe the 2010 Quadrennial Review record supports regulation within the context of its media ownership rules to restrict the use of

multicast capability to form dual affiliations. The commenters were primarily concerned with such dual affiliations involving two Big Four networks. Evidence available during the 2010 proceeding indicates that dual affiliations involving two Big Four networks via multicasting are generally — if not exclusively — limited to smaller markets with an insufficient number of full-power commercial television stations to accommodate each Big Four network or where other unique marketplace factors are responsible for creating the dual affiliation arrangements. BIA data from 2012 indicate that there are approximately 40 instances of dual affiliation via multicasting involving multiple Big Four networks. Each market in which the Commission identified such dual affiliation was outside the top-100 ranked DMAs, with the vast majority of such markets — approximately 73 percent — containing three or fewer full-power commercial television stations. These findings are consistent with the data and estimates provided by cable commenters, as a significant majority of the dual affiliations identified in these comments involved a Big Four network and a "Little Two" network (i.e., The CW or MyNetworkTV). The Commission tentatively finds that Big Four/Little Two dual affiliations via multicasting, regardless of market rank, do not raise sufficient competitive concerns to justify an amendment to the local television ownership rule. While there may be potential harms that result from certain dual network affiliations, the Commission tentatively agrees with broadcast commenters that the potential benefits of dual affiliation via multicasting in these smaller markets, including dual affiliation with more than one Big Four network, outweigh any potential harms to the Commission's policy goals. Indeed, the Commission believes that 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. Based on the 2010 Quadrennial Review record, it appears that marketplace incentives operate to limit the occurrence of dual affiliations via multicasting involving multiple Big Four networks to these smaller markets. For these reasons, the Commission tentatively declines to regulate dual affiliations at this time, and the Commission seeks comment on this approach within the context of any marketplace changes that may have occurred since the NPRM.

42. Minority and Female Ownership. The Commission sought comment on the impact of the proposed local television ownership rule on minority and female ownership opportunities, as well as the impact of diverse television ownership on viewpoint diversity. The Commission tentatively finds that the local television ownership rule proposed in this Further Notice of Proposed Rulemaking is consistent with its goal to promote minority and female ownership of broadcast television stations. The Commission seeks comment on this tentative conclusion.

43. As discussed above, the Commission tentatively finds that the 2010 Quadrennial Review record demonstrates that the existing local television ownership rule remains necessary to promote competition among broadcast television stations in local markets. Moreover, the Commission believes the competition-based rule would also indirectly advance its viewpoint diversity goal 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. In addition, while the Commission does not propose to retain the rule with the specific purpose of preserving the current levels of minority and female ownership, the Commission tentatively finds that retaining the

existing rule would effectively address the concerns of those commenters who suggested that additional consolidation would have a negative impact on minority and female ownership of broadcast television stations. The Commission notes also that it proposes to retain without modification the current failed/failing station waiver policy, including the out-of-market-buyer solicitation requirement — the failed station solicitation rule (FSSR) — which promotes new entry in a market by ensuring that out-of-market entities interested in purchasing a station, including minorities and women, will have an opportunity to bid. The Commission seeks comment on how any developments since the NPRM may affect these tentative findings. In addition, the Commission seeks comment on whether the incentive auction has the potential to impact minority and female broadcast ownership and whether any such impacts should affect the 2014 Quadrennial Review.

2. Local Radio Ownership Rule

a. Introduction

44. Based on the 2010 Quadrennial Review record, the Commission tentatively finds that the current local radio ownership rule remains necessary in the public interest and should be retained without modification. The Commission believes that the rule is necessary to promote competition. In addition, the Commission believes 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." Similarly, the Commission tentatively 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. The Commission tentatively finds also that the local radio ownership rule is consistent with its goal of promoting minority and female ownership of broadcast television stations. Finally, the Commission believes that these benefits outweigh any burdens that may result from its proposal to retain the rule without modification. The Commission seeks comment on these tentative conclusions.

45. In accordance with these tentative conclusions, the Commission proposes that an entity may continue to 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. The Commission seeks comment on the costs and benefits of its proposal to retain the existing local radio ownership rule. To the greatest extent possible, commenters should quantify the expected costs or benefits of retaining the rule and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

b. Background

46. In the NPRM, the Commission proposed to retain the local radio

ownership rule without modification, including the AM/FM subcaps, and sought comment on this tentative conclusion. The Commission also sought comment on whether and, if so, how, to incorporate new audio platforms into the rule and on the impact of such platforms on the broadcast radio industry. In addition, the NPRM sought comment on whether to adopt a specific waiver standard for the local radio ownership rule and on how the proposed rule would affect minority and female ownership opportunities.

c. Discussion

47. Market. In the NPRM, the Commission tentatively concluded that the relevant market for review of the local radio ownership rule is the radio listening market and that it is not appropriate, at this time, to expand that market to include non-broadcast sources of audio programming. Based on the Commission's review of the 2010 Quadrennial Review record, it believes this approach is appropriate, and it seeks comment on whether it should maintain this market definition.

48. The Commission tentatively finds that, for purposes of the Commission's ownership rules, non-broadcast sources of audio programming are not yet meaningful substitutes for broadcast radio stations with respect to either listeners or advertisers. While alternate platforms such as satellite radio and Internet-delivered audio are growing in popularity, broadcast radio remains the dominant radio technology. In 2012, 92 percent of Americans age 12 or older listened to broadcast radio, a figure that has remained essentially constant over the last decade. Satellite radio still serves only a small portion of the population, even though its subscription rates continue to climb. And though recent data suggest that a significant portion of adult U.S. broadband households

(42 percent) listen to Internet-delivered audio programming, the Commission notes that millions of U.S. households continue to lack broadband connections. In addition, only 14 percent of Internet radio listeners listen in their cars, where most broadcast radio listening occurs. Thus, the Commission tentatively concludes that Internet-delivered audio programming is not yet a meaningful substitute for broadcast radio listening for most listeners. The Commission seeks comment on this tentative conclusion and invites commenters to provide any more recent relevant information and data.

49. The Commission believes, moreover, that satellite radio and content delivered via the Internet generally are national platforms that are not likely to respond to competitive conditions in local markets. Satellite radio content is uniform nationally, and there is no evidence in the record that content decisions are made based on competitive conditions in local markets. Similarly, there is no evidence in the record that Internet radio stations and other Internet-delivered audio programming providers (excluding streams of local broadcast radio stations) modify their programming decisions to respond to competitive conditions in local markets. Ultimately, the Commission tentatively finds that only local broadcasters provide programming based on the unique characteristics of their respective local markets. As the Commission has stated previously, it is the competition between such rivals that most benefits listeners in a local market and serves the public interest — competition that is currently lacking from non-broadcast audio alternatives. Therefore, the Commission proposes to continue to limit the relevant market for the local radio ownership rule to broadcast radio stations in local radio listening markets, and it seeks comment on this proposal.

50. In addition, broadcast radio's consistently strong position in both local and

national advertising markets appears to support the Commission's tentative finding that non-broadcast sources of audio programming are not significant competitors at this time. Broadcasters asserted that the Commission should expand the relevant market for review, in part, because of competition for advertising revenue from non-broadcast audio sources; however, recent advertising data do not support this contention. From 2008 through 2011, broadcast radio's local advertising revenue market share increased each year, reaching 16.6 percent in 2011. In the national advertising market during that same time period, broadcast radio's market share remained stable (between 1.8 and 2.0 percent). By contrast, satellite radio's advertising revenue market share in both the local and national markets did not exceed 0.1 percent. And while "Internet advertising" has seen significant gains in advertising revenue market share both locally and nationally, evidence suggests that the revenue is not attributable in any significant portion to providers of Internet-delivered audio programming. For example, in 2011, online-only audio programming providers were estimated to have earned approximately $295 million in advertising revenue. By contrast, in 2011, the total broadcast radio advertising revenue market was projected at approximately $17.8 billion. The Commission notes that NAB conceded that local radio broadcasting revenues have improved in recent years, but it argued that there has been a "structural change in the audio marketplace" because overall revenues were below levels earned in 2005 and 2006 and are not expected to reach those levels until 2015. While total advertising revenue for local radio stations did decline from 2006-2009, with the most significant declines in 2008 and 2009, the evidence does not support the conclusion that this was a result of a unique change in the audio marketplace; instead, the total advertising market for all media experienced a significant contraction that was most likely the result of the global financial crisis that impacted nearly all markets. Moreover, overall advertising revenues for the broadcast radio industry have steadily improved since 2010 and are predicted to grow through 2020. However, the Commission seeks comment on whether any structural changes have occurred in the audio marketplace and, if so, whether to adjust the 2014 Quadrennial Review analysis to account for such changes. The Commission seeks comment on whether there have been any significant changes since these figures became available.

51. Market Size Tiers. The NPRM proposed to retain the current approach of setting numerical limits based on market size tiers and determining the market size based on the number of commercial and noncommercial radio stations in the local market. The Commission tentatively concludes that it should adopt these proposals and seek comment on this approach.

52. The Commission tentatively declines to modify the current rule's method of calculating the number of stations a licensee owns. The Commission seeks comment on Mid-West Family's assessment that the Prometheus I decision mandates an adjustment, in light of the court's Prometheus II decision upholding the existing rule's methodology. The Commission's preliminary view is that adopting Mid-West Family's approach would permit potentially significant consolidation in local radio markets, which would be inconsistent with the rationale for the Commission's proposal, discussed in greater detail below, to retain the existing numerical ownership limits. Finally, the Commission proposes to reject Mt. Wilson's proposal. As discussed in greater detail below in the context of the AM/FM subcaps, digital radio is still a growing technology; there is no mandate requiring its adoption; and it has not yet achieved widespread

deployment or consumer acceptance. Therefore, the Commission tentatively finds that it is premature to amend its local radio ownership rule as a result of digital technology, and it seeks comment on this approach.

53. Numerical Limits. The NPRM proposed to retain the existing numerical limits. In addition, the NPRM sought comment on Clear Channel's proposal to allow increased ownership in larger markets by creating additional tiers. Clear Channel suggested an increase from eight to ten in the number of stations a single entity may own in markets with between 55 and 64 stations and from eight to twelve in the number of stations that a single entity may own in markets with 65 or more stations. No party provided comments on this proposal and, as discussed below, the Commission tentatively finds that the record supports retaining the existing numerical limits (i.e., the existing number of tiers and the numerical limits associated with each); therefore, it tentatively declines to adopt the new ownership tiers proposed by Clear Channel. As discussed above, many commenters in the 2010 Quadrennial Review proceeding supported the Commission's proposal to retain its existing limits, while other commenters argued in favor of loosening or tightening the existing limits. However, no commenters proposed specific numerical limits to replace the existing limits. For the reasons discussed below, the Commission proposes to adopt the tentative conclusion in the NPRM to retain the existing numerical ownership limits for each existing market size tier.

54. In the 2006 Quadrennial Review Order, the Commission rejected calls to relax the numerical ownership limits, finding instead that retaining the existing limits was necessary to protect against excessive market concentration. The Commission noted that, following the relaxation of the local radio ownership limits by Congress in the 1996 Act,

there had been substantial consolidation of radio ownership both nationally and locally. Evidence in the record demonstrated that, in local markets, the largest firms often dominated the market in terms of audience and revenue share. The Commission ultimately concluded not only that the existing limits were not unduly restrictive, but also that permitting additional consolidation would not be in the public interest. The Prometheus II court upheld the Commission's decision.

55. The Commission determined also in the 2006 Quadrennial Review Order that tightening the radio ownership limits was not justified based on the record. The Commission held that tightening the ownership limits would be inconsistent with Congress's decision to relax the limits in the 1996 Act and would ignore the financial stability that consolidation brought to the radio industry. In addition, the Commission determined that tightening the rule would require significant divestitures that would disrupt the radio marketplace and could undermine the ability of local stations to provide quality programming to their local markets. While acknowledging that grandfathering was an option to avoid the disruptive impact of divestitures, the Commission determined that grandfathering in this instance would not be in the public interest.

56. Based on the 2010 Quadrennial Review record, the Commission tentatively finds 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 are essentially unchanged. Evidence from 2012 shows that in local markets, the largest commercial firms continue to enjoy substantial advantages in revenue share — on average, the largest firm in each Arbitron Metro market has a 45 percent share of the market's total radio advertising revenue, with the largest two firms

accounting for 73 percent of the revenue. In more than a third of all Arbitron Metro markets, the top two commercial station owners control at least 80 percent of the radio advertising revenue. With respect to ratings, the top-four firms continue to dominate audience share. Therefore, the Commission does not believe the public interest would be served by relaxing the existing numerical limits. The Commission seeks comment on whether there are any more recent data that point toward a different conclusion.

57. The Commission notes also that the record in the 2010 Quadrennial Review proceeding does not reflect changes in the marketplace that warrant reconsideration of the Commission's previous decision not to make the limits more restrictive, as some commenters recommended. The Commission believes that tightening the restrictions would disregard the previously identified benefits of consolidation in the radio industry and would be inconsistent with the 1996 Act. Further, tightening the rule would require divestitures that the Commission believes would be disruptive to the radio industry and would upset the settled expectations of individual owners. The Commission seeks comment on whether any benefits derived from tightening the limits would outweigh these countervailing considerations. In addition, the Commission seeks comment on its continued belief that, for the reasons stated in the <u>2006 Quadrennial Review Order</u>, tightening the limits while grandfathering existing combinations would not be in the public interest and should be avoided.

58. <u>Clarification of Application of Local Radio Ownership Rule</u>. In the <u>2002 Biennial Review Order</u>, the Commission adopted the current standard of using Arbitron Metro areas, where available, for the application of the numerical radio ownership limits. At that time, the Commission also adopted certain procedures and safeguards designed to

guide the implementation of the revised local radio ownership rule and to deter parties from attempting to circumvent the rule through the manipulation of Arbitron market definitions. Years of experience applying the current approach suggest certain aspects of the current standard that the Commission believes merit clarification or further action to fulfill the intent of the 2002 Biennial Review Order.

59. Multiple parties raised other issues in the 2010 Quadrennial Review proceeding that the Commission tentatively declines to address specifically herein. Mid-West Family requested changes to the grandfathering rules regarding transfers of control due to death or other departure of shareholders/partners of closely held businesses, asserting that such transfers of control should be treated the same as transfers that occur pursuant to a will or intestacy. In addition, UCC et al. argued that the Commission should consider reversing its decision in the 2002 Biennial Review Order to grandfather certain radio station combinations, particularly in light of the elimination of the eligible entity exception, which they asserted could present ownership opportunities for minorities and women. By contrast, Frandsen argued that the Commission should permit the sale of grandfathered clusters to any party. The Commission tentatively declines at this time to address the issues raised by Mid-West Family, UCC et al., and Frandsen. As the Commission has proposed to retain the existing numerical limits, it sees no reason at this time to reverse or expand the grandfathering policies that apply to existing combinations. The Commission has previously found Mid-West Family's requested relief to be outside the scope of the quadrennial review proceeding. Moreover, as discussed herein, the Commission has proposed to reinstate the eligible entity exception.

60. The 2002 Biennial Review Order prohibits a party from receiving the

benefit of a change in Arbitron Metro boundaries or “home” market designation unless that change has been in place for at least two years (or, in the case of a “home” designation change, the station’s community of license is within the Metro). The Commission does not apply the two-year waiting period to Arbitron Metro changes resulting from a Commission-approved change in community of license to an area outside the Metro’s boundaries. The Commission proposes to clarify that the exception to the waiting period for Commission-approved changes applies only where the community of license change also involves the physical relocation of the station facilities to a site outside the relevant Arbitron Metro market boundaries. Otherwise, the licensee of a station currently located in an Arbitron Metro 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. Thus, this clarification safeguards the local radio ownership limits from manipulation based on Arbitron market definition. The Commission seeks comment on this proposed clarification.

61. Note 4 to § 73.3555 of the Commission’s rules (Note 4) grandfathers existing station combinations that do not comply with the numerical ownership limits of § 73.3555(a). Certain circumstances, however, 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 in the case where an applicant with a grandfathered cluster of stations seeks to move a station’s community

of license outside the relevant Arbitron Metro. Given that the Commission relies on BIA for market designations, such an applicant may be prevented from demonstrating compliance with the multiple ownership limits because the station proposing to change its community will continue to be listed by BIA as "home" to the Metro until the community of license change has taken place. To resolve this practical issue, the Commission tentatively proposes to allow a temporary waiver of the radio multiple ownership limits for three months in this limited instance to allow BIA sufficient time to change the affected station's "home" designation following a community of license relocation. The Commission also proposes to exempt from the requirements of Note 4 "intra-Metro" community of license changes — from one community to another within the same Arbitron Metro. The Commission tentatively finds that, in the majority of cases, such a move will have little or no impact on the state of competition within the local market. The Commission seeks comment on these proposed adjustments to the operation of Note 4.

62. In its comments in the 2010 Quadrennial Review proceeding, ARSO renewed its longstanding request that the Commission redefine local radio markets for Puerto Rico. ARSO argues that Arbitron's definition of the entire island of Puerto Rico as a single Arbitron Metro market does not accurately reflect market and geographic realities, which prevent stations from competing island-wide. ARSO requests that the Commission: (1) redefine the local radio markets in Puerto Rico using the eight Metropolitan Statistical Areas defined by the Office of Management and Budget (OMB); or (2) redefine the local radio markets using the three Combined Statistical Areas defined by OMB; or (3) treat Puerto Rico as a non-Arbitron Metro area and redefine its local

markets using contour-overlap methodology. The Commission has consistently waived the Arbitron Metro definition for applicants in Puerto Rico and employed the contour-overlap methodology in the course of implementing the 2002 Biennial Review Order. The Commission has previously stated that it would address ARSO's request for relief in a future proceeding. The Commission seeks comment on ARSO's suggestions and on the effectiveness of the Commission's prior waivers of the definition in this context.

63. AM/FM Subcaps. The NPRM proposed to retain the existing AM/FM subcaps, finding that the rationales for doing so set forth in the 2006 Quadrennial Review Order were still valid, namely to promote new entry and to account for the technological and marketplace differences between AM and FM stations and thereby promote competition. In addition, the NPRM 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. Consistent with the proposal in the NPRM, the Commission tentatively finds that there have not been significant changes in the broadcast radio marketplace with respect to the rationale for maintaining the AM/FM subcaps since the conclusion of the 2006 Quadrennial Review proceeding, and it proposes to retain the existing AM/FM subcaps for the reasons set forth in the 2006 Quadrennial Review Order. The Commission seeks comment on this approach.

64. The Commission tentatively agrees with the commenters in the 2010 Quadrennial Review proceeding that supported retention of the AM subcaps in order to promote new entry. Consistent with Commission precedent, the Commission believes 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 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. While some commenters suggested that eliminating the subcaps could result in divestiture of properties that could be acquired by new entrants, the Commission tentatively finds that this speculative rationale is not persuasive. Therefore, consistent with Commission precedent, it believes that the public interest is best served by retaining the existing AM subcaps, which would continue to further competition, and possibly also viewpoint diversity, by promoting new entry. The Commission seeks comment on this issue and invites commenters to provide any new relevant information that has become available since the NPRM.

65. In addition, the Commission tentatively 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 in order to promote competition in local radio markets. As the Commission has noted previously, FM stations enjoy unique 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.

66. While the Commission has previously stated that digital radio technology

may help AM stations to level the playing field with FM stations, it tentatively finds that this is not yet the case. Deployment of digital radio technology for both AM and FM stations is limited and has not changed significantly in recent years. In addition, the Commission believes it is important to consider consumer adoption when evaluating the impact of digital radio on the technological and marketplace differences between AM and FM stations. AM stations will not be able to realize the potential competitive benefits of transitioning to digital if listeners are largely unable to receive the digital broadcasts. Recent digital radio deployment data suggest that FM stations may actually be increasing the technological divide through greater adoption rates of digital radio technology. Furthermore, consumers have been slow to adopt radios capable of receiving digital signals, though consumer awareness of the technology is relatively high and there are efforts to increase the availability of such radios, particularly as standard or optional equipment in many new car models. The Commission proposes to continue to monitor the impact of the digital radio transition in future media ownership proceedings. It seeks comment on this approach.

67. Furthermore, the Commission tentatively finds that 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. While this change has been beneficial for many AM stations, many more AM stations have not availed themselves of the opportunity and/or lack the ability to do so. Consequently, the Commission believes that FM stations generally continue to enjoy significant advantages over AM stations. The Commission

proposes to continue to monitor the impact of this change in future media ownership proceedings, and it seeks comment on this approach. The Commission has recently initiated a proceeding to explore ways to revitalize the AM band. Similarly, the Commission proposes to monitor that proceeding for any future impact on the AM marketplace that may warrant consideration in its media ownership proceedings. The Commission seeks comment on any present implications of these revitalization efforts for the 2014 Quadrennial Review.

68. Finally, 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." For example, a study provided by Clear Channel found that throughout the 300 Arbitron Metro markets, there are 187 AM stations ranked in the top five in terms of all-day audience share. And according to NAB, AM stations are among the top revenue earners in some of the largest radio markets (e.g., New York, Chicago, and Los Angeles). Therefore, the Commission tentatively finds that retention of the existing AM subcaps is necessary to prevent a single station owner from acquiring excessive market power through concentration of ownership of AM stations in markets in which AM stations are significant radio voices.

69. In addition, as discussed above, the Commission tentatively concludes that it is not in the public interest to tighten the numerical ownership limits; therefore, the Commission sees no need to reassess the subcaps associated with each numerical tier, as proposed by Mt. Wilson. Indeed, tightening the subcaps absent a concurrent tightening of the numerical ownership limits would result in an internal inconsistency in the rule, as

an entity would be unable to own all the stations otherwise permitted under certain numerical tiers. For example, in markets with 30-44 stations, an entity currently may own up to seven stations, provided that no more than four of the stations are in the same service. If the subcap was tightened to three stations in the same service, an entity could then only own up to six stations, even though the rule's premise is that the public interest is best served by permitting ownership of up to seven stations in this particular market. The Commission seeks comment on whether there is any reason the Commission should adopt different subcaps despite this potential inconsistency.

70. Market Size Waivers. Though the NPRM sought comment on whether to adopt a specific waiver standard, no commenter proposed such a standard in the 2010 Quadrennial Review proceeding. The Commission tentatively declines to adopt a specific waiver standard for the local radio ownership rule. The Commission seeks comment on whether it is sufficient that, consistent with Commission precedent, parties that wish to seek a waiver of the local radio ownership rule may do so pursuant to the general waiver standard under Section 1.3 of the Commission's rules.

71. Minority and Female Ownership. The Commission sought comment on how the radio rule affects minority and female ownership opportunities, including specific comment on the results of Media Ownership Study 7, which analyzes the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences. The Commission tentatively finds that the radio ownership rule proposed in this Further Notice of Proposed Rulemaking is consistent with the goal to promote minority and female ownership of broadcast radio stations. The Commission seeks comment on this tentative conclusion.

72. As noted above, the Commission tentatively finds that retaining the existing competition-based numerical limits would indirectly promote its viewpoint diversity goal, in part by preserving ownership opportunities for new entrants, including minority- and female-owned businesses. Moreover, part of the rationale for the proposal to retain the AM/FM subcaps is to promote new entry, particularly in the AM band, which has historically provided low-cost ownership opportunities for new entrants, including minorities and women.

73. The Commission tentatively declines to tighten the local radio rule's ownership limits in order to promote increased minority and female ownership, as some recommend. While the Commission remains committed to promoting minority and female ownership, it is one of many — sometimes competing — goals that the Commission must balance when setting the numerical ownership limits. As discussed above, the Commission believes that tightening the local radio rule's ownership limits would ignore the benefits of consolidation in the radio industry and therefore be inconsistent with the 1996 Act. Furthermore, it believes that tightening the local radio rule would require divestitures that would be disruptive to the radio industry. In addition, while the Commission does not propose to retain the rule specifically to preserve the current levels of minority and female ownership, it tentatively finds that retaining the existing rule effectively would address the concerns of those commenters who suggest that additional consolidation would have a negative impact on minority and female ownership of broadcast radio stations. Ultimately, the Commission tentatively finds that, based on the record in the 2010 Quadrennial Review proceeding, the current competition-based limits reflect an appropriate balance of its policy goals and that retaining these

limits would serve the public interest and simultaneously promote viewpoint diversity. The Commission seeks comment on these tentative conclusions and invites commenters to provide any evidence bearing on this issue that has become available since the NPRM.

3. Newspaper/Broadcast Cross-Ownership Rule

a. Introduction

74. Since 1975, the newspaper/broadcast cross-ownership rule (NBCO rule) has prohibited 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 city of publication. This absolute ban on newspaper/broadcast cross-ownership remains in effect today despite the Commission's attempts over the last decade to modify the restriction. Most recently, in the 2006 Quadrennial Review Order, the Commission adopted a revised standard whereby waiver requests for certain mergers in the top 20 Nielsen DMAs were granted a favorable presumption. The Third Circuit, however, vacated and remanded the revisions on procedural grounds, finding that the Commission had failed to provide adequate public notice of its proposed rule pursuant to the APA. Although the Court in Prometheus I affirmed the Commission's conclusion that an absolute ban is not necessary, the Court in Prometheus II did not reach the Commission's substantive modifications to the NBCO rule.

75. The Commission continues to believe that some restriction on newspaper/broadcast cross-ownership is necessary to protect and promote viewpoint diversity in local markets. The Commission seeks comment on that tentative conclusion. This view is consistent with the Commission's longstanding rationale for the NBCO rule. As the Commission recognized in the 2002 Biennial Review Order, "[a] diverse and

robust marketplace of ideas is the foundation of our democracy." The Supreme Court has recognized the importance of the Commission's role in promoting viewpoint diversity, calling it a "basic tenet of national communications policy."

76. As discussed below, daily newspapers and local television stations (and their affiliated websites) continue to be the dominant providers of local news and information to which consumers turn. Evidence in the 2010 Quadrennial Review proceeding does not suggest that the Internet, for all its ability to make infinite sources of information immediately and globally accessible, has yet tilted that balance. Thus, the "diverse and antagonistic sources" that the NBCO rule historically has protected — daily newspapers and local television stations — are still the primary outlets of local news and information that consumers use. Comments in the current record touting the localism benefits of newspaper/broadcast cross-ownership or claiming a competitive need for traditional media to achieve economies of scale in today's marketplace, while providing a fuller understanding of the newsgathering efficiencies of cross-owned properties and the current financial challenges facing traditional media, were not substantially different from those made in previous reviews, and the Commission does not believe they diminish the viewpoint diversity rationale for the rule. Moreover, the efficiencies that may be gained from newspaper/broadcast combinations do not necessarily lead to gains in localism. As explained below, the Commission seeks comment on the extent to which this dominance of daily newspapers and local televisions stations in the provision of local news and information persists today.

77. However, the Commission found in previous reviews that the nearly 40-year-old blanket prohibition on newspaper/broadcast cross-ownership is overly broad,

and the Third Circuit upheld those findings. It is possible that some newspaper/broadcast combinations could be allowed without unduly harming viewpoint diversity. To that end, the Commission seeks comment on whether the prohibition on newspaper/radio combinations should be lifted. The Commission asks what impact such a modification would have on viewpoint diversity in local markets. Research shows that most radio stations do not produce significant amounts of local news and that most consumers do not rely on radio stations as their primary source of local news. Given that the newspaper/television restriction has always been the crux of the NBCO rule, the Commission seeks comment regarding the added value of the rule's newspaper/radio component. The Commission seeks comment, therefore, on whether there is sufficient justification under the legal standards of Section 202(h) for continuing to restrict newspaper/radio combinations. The Commission seeks comment also on the costs and benefits associated with retaining or eliminating the restriction on newspaper/radio combinations. To the greatest extent possible, commenters should quantify the expected costs or benefits of the rule and any alternatives and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

78. The Commission invites comment also on whether and in what way it should modify the newspaper/television cross-ownership restriction. Although further comment is welcome, the Commission is disinclined to impose a bright-line rule permitting combinations in certain circumstances. Instead the Commission seeks comment on approaches that would maintain the ban on newspaper/television combinations in all markets but that would allow applicants the opportunity to seek

approval of particular transactions. The Commission could consider any waiver requests on a purely case-by-case basis, assessing each request independently and considering the totality of the circumstances each proposed transaction presents, including all asserted and potential likely public interest implications of the specific proposed combination. The Commission seeks comment on this approach, including the costs and benefits associated with a pure case-by-case review of waiver applications. To the greatest extent possible, commenters should quantify the expected costs or benefits of this proposal and any alternatives and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

79. The Commission also invites further comment on a case-by-case waiver approach that would include presumptions that favor or disfavor the grant of waiver requests in accordance with certain prescribed guidelines. This approach would build on proposals in the NPRM to modify the vacated 2006 rule. Under this approach, a request for waiver of the newspaper/television cross-ownership prohibition would be entitled to a presumption that it is consistent with the public interest, convenience, and necessity to allow an entity to own, operate, or control one daily newspaper and one full-power television station in a top-20 Nielsen DMA provided that: (1) the television station is 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 will remain in the DMA. Major media voices would include full-power television broadcast stations and 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 5 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 is 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 will or will not unduly harm viewpoint diversity within the DMA. As provided below, the Commission seeks comment on all aspects of this framework, including the costs and benefits of each of the elements discussed herein. To the greatest extent possible, commenters should quantify the expected costs or benefits of this approach and any alternatives and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

80. As described in more detail below, the Commission seeks comment on various other issues regarding a newspaper/television cross-ownership restriction. First, any restriction would be modified to replace the obsolete analog Grade A contour with an approach that approximates the outdated contour as closely as possible. The Commission proposes 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 principal community contour (PCC) of the television station, as defined in § 73.625 of the Commission's rules, encompasses the entire community in which the newspaper is published. Second, the restriction would not include the four-factor test that all waiver applicants, even those entitled to a favorable presumption, were required to satisfy under the 2006 rule. As discussed below, the Commission believes that the factors are for the most part vague,

subjective, difficult to prove and enforce, and/or not directly linked to viewpoint diversity. Third, the restriction would not include a local news exception, such as the one permitted by the 2006 rule under which the Commission reversed the negative presumption against a waiver when 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. As described below, the Commission believes that the potential difficulties in monitoring and enforcing the exception would render it meaningless. Fourth, the Commission proposes to include in any restriction an exception for merger applicants that demonstrate that either the television station or the newspaper has failed or is failing.

81. Finally, the Commission tentatively agrees with DCS that the NBCO rule does not have a significant impact on minority ownership, and the Commission believes that these modest revisions the Commission put forth for comment would be unlikely to have a disproportionate effect on either minority or female owners. The Commission seeks comment on whether the benefits of the revisions it describes here in the interest of protecting viewpoint diversity would outweigh any burdens that could result from such revisions, which the Commission would minimize by grandfathering any combinations that would become newly non-compliant because of the revisions.

b. Background

82. As discussed below, the NPRM inquired about detailed scenarios in connection with proposed rule modifications.

c. Discussion

(i) Policy Goals

83. Background. In the NPRM, the Commission tentatively affirmed the Commission's past determinations that the NBCO rule promotes viewpoint diversity but is not necessary to advance its localism and competition goals. Consistent with previous Commission findings, the Commission tentatively concluded that, although an absolute ban is overly broad, some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. The Commission's reasoning centered on evidence that newspapers and local television stations, and their affiliated websites, are the primary sources that consumers rely on for local news and information. The Commission recognized that newspaper/broadcast cross-ownership may provide certain benefits that promote its localism goal. Thus, it tentatively affirmed the Commission's earlier findings that the opportunity to share newsgathering resources and to 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. It tentatively concluded, as the Commission found in previous ownership reviews, that newspapers and broadcast stations do not compete in the same product market and, therefore, that the rule is not necessary to promote its competition goal.

84. Discussion. The Commission seeks comment on the current validity of the Commission's tentative conclusion in the NPRM that newspapers and local television stations, and their affiliated websites, are the dominant sources consumers rely on for local news and therefore that cross-ownership restrictions continue to be necessary under Section 202(h) to promote viewpoint diversity in local markets. The Commission proposes to adopt the NPRM's tentative findings that the NBCO rule is not necessary to foster its localism and competition goals. While the Commission recognizes that the rule

may hinder the realization of certain efficiencies that could result in the production of more local news, it anticipates that modifications of the rule, such as those outlined below, could enable such efficiencies, and thereby potentially promote localism, in situations where viewpoint diversity would not be unduly sacrificed.

(i) Viewpoint Diversity

85. In the 2010 Quadrennial Review proceeding, newspaper and media owners proffered two principal arguments to support their position that the Commission's diversity goal no longer justifies a prohibition on newspaper/broadcast cross-ownership. They argued, first, that ownership does not necessarily influence viewpoint and, second, that an array of diverse viewpoints is widely available from an abundance of outlets, particularly via the Internet. Both of these arguments were addressed by the Commission in the 2002 and 2006 media ownership reviews and by the Third Circuit in Prometheus I. The Third Circuit agreed with the Commission that, although these arguments provide an appropriate basis for relaxing the absolute ban on newspaper/broadcast cross-ownership, they do not mandate the removal of all restrictions on such combinations. The Commission seeks comment on the tentative conclusion that neither of these arguments presents a reason for eliminating the NBCO rule in the 2014 Quadrennial Review proceeding.

86. The Commission does not believe that the 2010 Quadrennial Review record compels it to alter the earlier conclusion that cross-ownership can diminish viewpoint diversity. For example, the authors of Media Ownership Study 9 find that ownership concentration may adversely affect viewpoint diversity and the quality of local news. The Commission finds that the results of Media Ownership Studies 8A and 8B,

suggesting that ownership structure does not have a marked impact on viewpoint diversity, cannot serve as a basis for assessing the impact of the NBCO rule. The analysis in Media Ownership Study 8B did not include any variables pertaining to newspaper/broadcast cross-ownership, and Media Ownership Study 8A examined only newspaper/television cross-ownership, for which its data was particularly limited. The 2008 Pritchard Study cited by Cox supports the proposition that cross-ownership does not diminish viewpoint diversity; however, its analysis includes only three cross-ownership situations. The editorial restraint exhibited by media owners in the three markets Pritchard studied does not negate what Pritchard calls the "theoretical power" of media owners to control viewpoint. Even if cross-media owners do not exercise that power frequently, the Commission believes it is important to restrict cross-ownership of the dominant local news providers in markets where viewpoint diversity is insufficiently robust to withstand the potential loss of an independently owned voice. The Commission seeks comment on this view.

87. With respect to the second argument, opponents asserted that the rule cannot be justified on diversity grounds because consumers today have nearly ubiquitous access to a multitude of voices. The Commission believes that the media environment has changed dramatically since 1975 when the average American read one local print newspaper and watched one of three evening newscasts in real time. Without question, the Internet, MVPD services, and other technological developments have profoundly changed the ways in which people access, consume, and share news and information. In its 2002 and 2006 ownership decisions, the Commission described the rapid advancements in the media industry at great length. Since then, those changes have been

compounded as both providers and consumers of news use the Internet even more intensely. As the Commission concluded in its 2002 and 2006 proceedings, the Commission believes the proliferation of media outlets since 1975 may well render the absolute ban on newspaper/broadcast cross-ownership obsolete.

88. While the extent to which Americans turn to news websites unaffiliated with traditional media may be increasing, it appears that such sources have not supplanted print newspapers and local television stations, and their affiliated websites, as the dominant providers of local news. As a threshold matter, online services and information are not available or not enjoyed at full capacity by many Americans due to disparities in broadband availability and adoption rates. Furthermore, according to a recent Pew Report on the State of the News Media, "local TV remains America's most popular source of local news and information." Commission staff reported in the Information Needs of Communities Report that, on a typical day, 78 percent of Americans obtain news from their local television station. A recent trade association analysis reportedly concluded that viewership of local evening news broadcasts in the 10 largest markets exceeded the five highest rated cable news programs combined by more than 430 percent. Although more consumers now turn to the Internet than to print newspapers for news and information, newspapers (both the print and online versions) are relied upon for the widest range of local news topics, and newspaper websites are the primary traditional source of local news for online consumers in the vast majority of large markets. In addition, many local television stations have become "major online sources of news," even surpassing the popularity of newspaper websites in a number of local markets. The author of Media Ownership Study 6 concludes that "[n]ewspapers and

television stations dominate what local news can be found online." The author found that only 17 of the 1,074 local news websites he examined were unaffiliated with traditional print or broadcast media. As the Commission described in the NPRM, the results of Media Ownership Study 6 are supported by data from other studies demonstrating a consumer preference for websites affiliated with legacy media. The Commission seeks comment on its assessment of the current record and it invite commenters to provide any updated information or evidence regarding consumer reliance on unaffiliated online sources for local news and information.

89. Even websites unaffiliated with newspapers and television stations often contain local news content that originates from those traditional sources. The results of the Pew Baltimore Study revealed new media's "limited role" in providing original reporting. The Information Needs of Communities Report points to a number of studies demonstrating that "the growing number of web outlets relies on a relatively fixed, or declining, pool of original reporting provided by traditional media." In addition, Media Ownership Study 6 finds a dearth of independent websites with original local news content. Commenters in the 2010 Quadrennial Review proceeding tended to agree that most independent online sources, particularly news aggregator websites, currently do not provide a substitute for the original reporting by professional journalists associated with traditional local media. Media Ownership Study 6 cautions that even the independent local websites that produce high-quality content are not necessarily substitutes for traditional media outlets. The Commission invites commenters to submit updated information or evidence regarding the prevalence of original local news content on websites unaffiliated with traditional media outlets.

90. At the current time and based on the record before the Commission, it tentatively finds that the record does not support the conclusion that the impact of the Internet has obviated the need for cross-ownership restrictions. The NBCO rule is intended to preserve access to a variety of viewpoints on substantive matters of local concern. The Commission tentatively finds 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. While the Commission tentatively agrees with Tribune that the presence of local and specialized websites "enriches the conversation," the record in the 2010 Quadrennial Review proceeding does not appear to demonstrate that most local, hyperlocal, and niche websites fill the role of local television stations or daily newspapers. In addition, the studies that Tribune cited in support of its assertion that Americans increasingly use the Internet to obtain election information concluded that television remains the primary source for such information among all Americans. Although the 2010 Quadrennial Review record does not appear to provide convincing evidence that the Internet eliminates entirely the need for cross-ownership restrictions, the Commission seeks comment on its tentative assessment of the record. The Commission also seeks comment on whether there have been any changes in the Internet's role in the current marketplace for local news and information that the Commission should consider in its 2014 Quadrennial Review.

(ii) Localism

91. The evidence in the 2010 Quadrennial Review record does not appear to negate the basic proposition that newspaper/broadcast cross-ownership may enable

commonly owned properties to produce and disseminate more and sometimes better local news. As acknowledged in the NPRM, the Commission has found that cross-ownership may produce such benefits to localism. The Commission recognizes that localism benefits are not guaranteed, however. The Commission sought comment in the NPRM not only on the benefits of cross-ownership generally, but also specifically on how to weigh the finding in Media Ownership Study 4 that an increased amount of local news on a cross-owned television station does not necessarily translate into more local news at the market level. The author of the study theorized that cross-owned stations may tend to "crowd out" the news production of other stations.

92. The author of Media Ownership Study 4 cautions that the result showing less local news in markets with newspaper/broadcast cross-ownership is "imprecisely measured and not statistically different from zero." Given that disclaimer, and the disputed evidence in the 2010 Quadrennial Review record, the Commission proposes not to accord much weight to the study's finding that the amount of local news at the market level may be negatively correlated with newspaper/broadcast cross-ownership. Despite the criticisms of the methodology used in Media Ownership Study 4, the Commission thinks it reasonable to accept the premise that such cross-ownership may result in a greater amount of local news production by the cross-owned properties based on other record evidence. The Commission is aware, however, that such an outcome is not assured and depends in part on the owner's commitment to disseminate local news.

93. The Commission believes 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. Moreover, the Commission does not believe that the elimination of the NBCO rule would necessarily result in benefits to localism. The Commission seeks comment on whether a continued restriction, with the modifications described below, would minimize any potential effects on localism while preserving and promoting viewpoint diversity.

(iii) Competition

94. Traditionally, the Commission does not evaluate the NBCO rule in terms of its competition goal because it has found that newspapers and broadcast stations do not compete in the same product market. However, some commenters in the 2010 Quadrennial Review proceeding expressed concerns about the impact of the NBCO rule on competition more generally. Other commenters disputed these concerns.

95. Although the Commission shares the concerns of many Americans about the future of the newspaper industry, the Commission agrees with certain commenters that it would be inappropriate to relax the NBCO rule on the ground that newspapers are struggling to reinvent a successful business model. The Commission maintains that the pertinent issue for this part of its analysis is whether the NBCO rule is necessary to promote competition between newspapers and broadcast stations. The Commission already has determined that it is not. The Commission does not believe it could justify jeopardizing viewpoint diversity in local markets based on assertions that the rule limits opportunities for traditional media owners to increase revenue. Nonetheless, given that the revisions to the NBCO rule considered below would narrow its application, the Commission seeks comment on the extent to which such revisions would mitigate any unintended harms.

96. Despite the bleak outlook for newspapers' print revenues, there have been some encouraging signs that traditional media are finding new ways to monetize their content. The Commission recognizes that the adjustments needed to survive this transition period may pose insurmountable challenges for some owners. Accordingly, as discussed below, the Commission proposes to include an exception to the cross-ownership restriction when either the newspaper or the television station involved in a proposed merger is failed or failing. The Commission believes the risk that a common owner will influence the viewpoint of a newly acquired outlet is preferable to the greater diversity harm of losing the outlet altogether.

97. The Commission seeks comment, for purposes of the 2014 Quadrennial Review proceeding, on its tentative view, as described above and consistent with Commission precedent, that the NBCO rule is not necessary to promote localism and competition goals but that some form of cross-ownership restriction remains necessary to preserve and promote viewpoint diversity in local markets.

(ii) Newspaper/Radio Cross-Ownership

98. Background. In the NPRM, the Commission sought comment on whether it should eliminate the part of the NBCO rule that applies to newspaper/radio combinations. The Commission tentatively concluded that radio stations are not the primary outlets that contribute to viewpoint diversity in local markets and that a substantial amount of news and talk show programming on radio stations is nationally syndicated, rather than locally produced. The Commission's preliminary view was that radio stations are not a primary source that consumers turn to for local news and information and that, rather, consumers in markets of all sizes rely most heavily on other

types of news outlets for local news and information. The Commission asked whether newspaper/radio cross-ownership would promote localism and provide financially struggling newspapers and radio stations the opportunity to become vital participants in the news and information marketplace. In addition, the Commission asked whether it should substitute Arbitron market definitions for radio contours to determine when the NBCO rule is triggered for newspaper/radio combinations and whether existing combinations implicated by a rule change should be grandfathered. The Commission invites further comment also on these issues.

99. Discussion. The Commission seeks further comment on whether the restriction on newspaper/radio cross-ownership should be eliminated from the NBCO rule. The Commission seeks comment on the Commission's tentative conclusions that radio stations are not the primary outlets that contribute to viewpoint diversity in local markets and that consumers rely predominantly on other outlets for local news and information. Several commenters in the 2010 Quadrennial Review proceeding referenced the fact that promoting viewpoint diversity has been the Commission's lone justification for retaining the restriction. As discussed above, the Commission has found repeatedly that the restriction does not promote its localism or competition goals, and the Commission tentatively reaffirms those findings. Therefore, the Commission tentatively agrees with several commenters that if the rule were no longer necessary to support the Commission's viewpoint diversity policy, then the newspaper/radio cross-ownership restriction would be left without a public interest rationale. Under Section 202(h) of the 1996 Act, the Commission must repeal or modify any media ownership regulations that no longer serve the public interest. Accordingly, it seeks comment on whether the

newspaper/radio cross-ownership restriction advances its interest in promoting viewpoint diversity or whether the Commission should eliminate the restriction and permit common ownership of newspapers and radio stations in all markets, within the prescribed limits of the local radio ownership rule.

100. Evidence from the Information Needs of Communities Report shows that consumers' reliance on radio news has declined steadily over the past two decades. From 1991 to 2010, the number of people reporting that they listened to some news on the radio dropped from 54 percent to 34 percent. Of the approximately 11,000 commercial radio stations in the country, only 30 are all-news radio stations, a reduction from the mid-1980s when there were 50 such stations. Although a small number of commercial all-news radio stations in the nation's largest markets are very successful, radio stations in most cities do not provide much local journalism. One finding showed that in 2007 more than 40 percent of radio stations carried news programming produced remotely by a commonly owned station outside the local market. Typically, only one employee is involved in news output at a median-sized radio station. Although the news-talk radio format has exploded in popularity, it has done little for traditional local radio news. Eighty-six percent of programming on news-talk stations is nationally syndicated, rather than locally produced. The Commission invites commenters to provide any new data on these subjects that would be useful for the 2014 Quadrennial Review.

101. In seeking comment on the elimination of the newspaper/radio cross-ownership restriction, the Commission notes that it has recognized since at least 1970 that radio does not play a dominant role in promoting viewpoint diversity. That year, while seeking comment on proposals that led to the adoption of the NBCO rule, the

Commission identified as its foremost concern the common control of television stations and newspapers and noted the significant decline in the number of people relying primarily on radio for local news. Even as it adopted the NBCO rule in 1975, the Commission recognized that "a radio station cannot be considered the equal of either the paper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern." The Commission, nevertheless, included newspaper/radio combinations within the NBCO prohibition "to encourage still greater diversity" because "even a smaller gain is worth pursuing." Since 1975, the Commission repeatedly has acknowledged radio's lesser contributions to viewpoint diversity. For example, the Commission stated in its 2002 media ownership review that "broadcast radio generally has less of an impact on local diversity than broadcast television." In its 2006 review, it observed that "radio is a significantly less important source of news and information than newspapers or television." The Commission seeks comment on whether in today's marketplace the link between the newspaper/radio cross-ownership restriction and the Commission's goal of promoting viewpoint diversity has become too tenuous to support the rule under Section 202(h).

102. The Commission invites commenters to augment the record with any information or evidence regarding any impact on diversity in the local radio markets. The Commission notes that Media Ownership Study 5 suggests that eliminating the restriction would be unlikely to affect either radio news variety or listening, given its finding that newspaper/radio cross-ownership is not correlated with either of those metrics. The Commission seeks comment on this finding. Moreover, several

commenters claimed that lifting the newspaper/radio cross-ownership restriction would revitalize local news on radio stations and would provide struggling newspapers with a broader base of financial support and an increased ability to reach audiences. Although the Commission would not decide to eliminate the restriction based on those projected outcomes, it would welcome the accrual of any such incidental benefits and it seeks comment on such commenters' assertions. Further, the Commission seeks comment on to what extent, if any, its decisions regarding the newspaper/radio cross-ownership rule and radio/television cross-ownership rule, discussed below, should align given that the basis of its analysis for both rules may rest primarily on the contributions of radio to viewpoint diversity.

103. Finally, the Commission notes that earlier this year MMTC submitted a study examining the issue of cross-owned media properties in a market. According to MMTC, the study indicated that cross-ownership does not have a disparate impact on minority and female broadcast owners. As discussed further below, the Commission asks commenters to provide any demonstrable evidence of such a link that may have become available since the MMTC Cross-Ownership Study.

(iii) Newspaper/Television Cross-Ownership Rule

(i) Case-by-Case Waiver Approach

104. Background. In the NPRM, the Commission tentatively concluded that it should reinstate a simplified version of the 2006 rule's framework generally prohibiting newspaper/broadcast cross-ownership but granting waiver requests on a case-by-case basis, using presumptive guidelines, when the proposed merger would not unduly harm viewpoint diversity in the local market. The Commission sought comment on whether,

alternatively, it should adopt a bright-line rule allowing mergers for newspaper/broadcast combinations in the top 20 DMAs in those situations where a waiver request would have been given a favorable presumption under a case-by-case approach. The Commission noted that a bright-line rule for such newspaper/broadcast combinations would conserve resources and promote certainty but that a case-by-case approach would afford greater flexibility to account for the specific circumstances of a proposed merger.

105. Discussion. Although further comment on the issue is welcome, the Commission does not propose to adopt a bright-line rule allowing newspaper/television combinations, even under narrowly prescribed circumstances. The Commission noted in the NPRM that a bright-line rule permitting certain newspaper/broadcast combinations in the top 20 DMAs might promote consistency and certainty in the marketplace and reduce the need for a potentially costly waiver process. The Commission recognizes that, under certain conditions, the largest markets may be able to accommodate a limited amount of consolidation without impairing viewpoint diversity. The Commission also is aware that bright-line rules are more likely to produce predictable and consistent outcomes in an expeditious and less costly manner than rules that incorporate a waiver process, which is inherently more uncertain. The Commission is concerned, however, that a bright-line rule is too blunt an instrument to be used for allowing newspaper/television cross-ownership, no matter how limited. For example, allowing certain combinations only in the top-20 DMAs could foreclose merger opportunities in smaller markets where viewpoint diversity is sufficiently robust. Conversely, such a bright-line rule might permit a combination in a top-20 DMA that would harm the public interest.

106. The Commission tentatively concludes, therefore, that a general prohibition on newspaper/television combinations in all markets is the appropriate starting point when considering the impact of newspaper/television cross-ownership on viewpoint diversity. It believes the 2010 Quadrennial Review record supports this view. The Commission recognizes, however, that particular combinations might be shown to be consistent with its diversity goal, and so it proposes to entertain waiver requests. A waiver process would enable the Commission to examine proposed mergers on a case-by-case basis to determine the likely effects on the affected market. Because the Commission would have the flexibility to evaluate the particular circumstances of a newspaper/television combination, it could tailor its decision accordingly.

107. The Commission believes that a case-by-case waiver approach would produce sensible outcomes and also improve transparency and public participation in the process. Such an approach would afford interested parties the opportunity to comment on a proposed newspaper/television combination because the parties to the transaction would be required to seek a waiver of the Commission's rules regardless of whether the transaction involved the transfer of a broadcast license. A newspaper owner seeking to obtain a television station license would need to seek a waiver of a newspaper/television cross-ownership rule as part of its application for assignment of license or transfer of control. In considering a bright-line rule approach, the NPRM indicated that an opponent of a transaction permitted under a bright-line rule would continue to have the option to file a petition to deny a broadcast license transfer and assignment application involving an NBCO combination. However, with respect to any newspaper purchases by broadcast owners that would be permitted under a bright-line rule, would-be petitioners would not

have an opportunity to oppose the newspaper purchase because there would be no transfer application involved. A case-by-case waiver approach would resolve that issue as every proposed newspaper/television combination would require Commission approval. To that end, the Commission seeks comment on whether, to enable a timely public response to a merger involving a newspaper purchase by a television licensee, it should require the station to file its waiver request prior to a newspaper acquisition, rather than at the time of the station's license renewal, and should require Commission staff to place such waiver requests on public notice. Under the Commission's current practice, if a television licensee purchases a newspaper that triggers the NBCO rule, then, absent a waiver, it must dispose of its station within one year or by the time of its next renewal date, whichever is longer. Alternatively, it can seek a waiver of the rule in conjunction with its license renewal, at which point interested parties are free to comment on the waiver request. As a result, the opportunity to comment on a television station's acquisition of a newspaper may not occur until many years after consummation of the purchase. The Commission therefore seeks comment on requiring television licensees to file waiver requests prior to a newspaper acquisition in order to facilitate the public's timely participation. What are the benefits of this approach and what burdens, if any, would it impose on the applicants? Would the potential benefits outweigh any burdens?

108. Pure Case-by-Case Approach. The Commission also request comment on what type of waiver process would enable it to identify any acceptable newspaper/television combinations most accurately and effectively. The Commission could implement a pure case-by-case approach that evaluates the totality of the circumstances for each individual transaction, 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. The Commission would not require any particular type of evidence to support a waiver applicant's showing that the proposed merger would not diminish viewpoint diversity, and thus would be in the public interest. Similarly, opponents of a transaction could offer a range of arguments and evidence concerning the unique characteristics of a transaction that weigh against the grant of that particular application. This approach could offer the Commission maximum flexibility and discretion in each case to decide whether a waiver would serve the public interest. Such a potentially broad inquiry would avoid a formulaic approach, which may not always adequately measure an imprecise quality like viewpoint diversity. On the other hand, a pure case-by-case approach might not promote consistency and certainty in the marketplace and could impose additional burdens or costs on the applicants, petitioners, or Commission. The Commission seeks comment on the pros and cons, costs and benefits of evaluating waiver requests on the individualized merits of each particular case without relying on presumptive guidelines or established criteria.

109. If the Commission were to adopt a case-by-case approach to waiver applications, it seeks comment on whether, and if so how, the approach should differ from the Commission's traditional waiver standard under Commission rules. Further, it seeks comment on whether a case-by-case approach should incorporate, or disavow, the criteria for waiver set forth when the NBCO rule was adopted in 1975, and which are currently in effect. At the time of adoption, the Commission "contemplated waivers in four situations: (1) where there is an inability to dispose of an interest to conform to the

rules; (2) where the only possible sale is at an artificially depressed price; (3) where separate ownership of the newspaper and station cannot be supported in the locality; and (4) where the purposes of the rule would not be served by divestiture." Has the application of these criteria historically been useful to the industry, the public, or the Commission in evaluating transactions? Have they tended to create an insurmountable bar to the grant of applications or inhibited industry participants from considering transactions? Or do the conditions provide a loophole to the existing ban? Do the specific criteria add value to the standard included in the Commission's rules? Should different criteria be enunciated, for instance including any or all of the elements that are described as possible presumptions as described below? The Commission seeks comment on these issues.

110. Case-by-Case Approach with Presumptions. In addition, the Commission seeks comment on an approach whereby the Commission would ascribe a favorable presumption to certain waiver applicants in the top-20 DMAs and a negative presumption to all other waiver applicants. As described below, the Commission seeks comment on requiring as conditions for a favorable presumption that: (1) the proposed merger does not involve a television station ranked among the top-four television stations in the DMA and (2) at least eight major media voices remain in the DMA following the transaction. In the 2010 Quadrennial Review proceeding, NAA warned that opportunities for acquisition and investment are stifled by the regulatory uncertainty and delay associated with even a straightforward waiver request entitled to a favorable presumption. CRT called the NBCO waiver provision "convoluted," and Tribune claimed that the use of presumptions creates "uncertainty, additional cost and prejudice." Nevertheless,

presumptive guidelines would provide waiver applicants a greater degree of predictability than under a pure case-by-case approach while still affording the Commission some flexibility to take into account the particular circumstances of a proposed merger. Newspaper and television station owners could make more informed decisions about whether to expend the time and resources to pursue a merger. Presumptive guidelines would not prevent a waiver applicant from submitting whatever evidence it deemed useful and would not constrain the Commission's decision-making discretion. However, by providing direction regarding what showings to make, presumptive guidelines could save a waiver applicant time and money and improve its chances for a successful outcome in warranted circumstances. On the other hand, the presumptions could lead to unintended consequences in specific situations, such as recommending denial of an application that could benefit the public interest as a result of the specific characteristics of the transaction and local market or the grant of an application that would not. The Commission seeks comment on the pros and cons, costs and benefits of adopting a case-by-case approach that includes presumptions and the trade-offs involved as compared to the pure case-by-case approach.

(ii) The Scope of the Rule

111. Background. 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. The Commission tentatively concludes that the rule should be updated to reflect the fact that, since the transition to digital television service, full-power television stations no longer have analog Grade A contours. In the NPRM, the Commission sought comment on whether it should modify

the rule so that the cross-ownership prohibition is triggered when a daily newspaper and a television station are located in the same Nielsen DMA. It asked what the impact of the change would be, and in particular whether many more newspaper/television combinations would be implicated under a DMA-based approach than under a contour-based approach. The Commission's preliminary view was that DMA market definitions would reflect newspaper circulation and television viewing areas more accurately than the current approach.

112. The Commission proposed to grandfather ownership of existing newspaper/television combinations that would be in violation of the NBCO rule as a result of shifting to a DMA-based approach. It tentatively concluded that requiring divestiture would be disruptive to the industry and a hardship for the individual owners. In addition, it sought comment on whether grandfathered combinations should be freely transferable in perpetuity.

113. Discussion. Based on the 2010 Quadrennial Review record, including the responses of many newspaper and broadcast owners, the Commission proposes to adopt an approach that uses both DMAs and contours. Newspaper and broadcast owners argued that, because DMAs can be much larger in size than the former Grade A contour areas, the NPRM's proposed DMA-based approach would expand the reach of the rule too broadly. Several commenters asserted that the approach proposed in the NPRM could prohibit cross-ownership when there is no overlap between the community in which a newspaper is published and the primary service area of a broadcast station. To avoid that possibility, the Commission proposes to prohibit cross-ownership of a full-power television station and a daily newspaper 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. Both conditions would need to be met in order for the cross-ownership prohibition to be triggered. The DMA requirement would ensure that the newspaper and television station both serve the same economic market, while the contour requirement would ensure that they actually reach the same communities and consumers within that larger geographic market. Further, if a newspaper's community of publication is located in a different DMA than the television station, then the station likely does not primarily serve the community of publication, despite the fact that the over-the-air signal reaches that community. The Commission notes further, that a television station is not entitled to carriage on cable or satellite television systems outside its DMA, and thus would not be entitled to carriage in the newspaper's out-of-market community of publication. The Commission acknowledges that such an approach could permit combinations that would be prohibited under a contour-only approach; however, it believes that the number of instances where a station's PCC encompasses a newspaper's community of publication not located in the same DMA would be limited. The Commission seeks comment on this approach and notes that, if adopted, it would apply irrespective of how the Commission decides to evaluate requests for waiver of the prohibition.

114. The PCC is a digital contour that ensures reliable service for the community of license. Commission rules already define the PCC, and it can be verified in a straightforward manner if a dispute arose concerning the reach of the NBCO rule.

115. In the Notice of Inquiry (75 FR 33227, June 11, 2010, FCC 10-92, rel. May 25, 2010) (NOI), the Commission explained that it has defined one other digital television service contour, the digital NLSC. However, the NLSC is roughly equivalent to the former analog Grade B service contour and approximates the same probability of service as that contour, which reaches a broader geographic area than the Grade A service contour. For that reason, the Commission does not believe the NLSC would be an appropriate contour to use in conjunction with the NBCO rule. When the Commission initially adopted the NBCO rule, it deliberately chose the smaller Grade A contour to define the rule's boundaries. The Commission seeks comment on its preference not to adopt the NLSC.

116. The Commission recognized in the NOI that because the PCC is larger than the Grade A contour, its use could result in a more restrictive NBCO rule. The Commission's proposed approach, however, would be less restrictive than its initial proposal to rely solely on the DMA market definition to trigger the cross-ownership prohibition. In addition, the Commission has examined size differentials between the PCC and the former Grade A contour for various categories of television stations, specifically, high-VHF, low-VHF, and UHF stations. While the PCC is slightly larger than the Grade A contour, the Commission seeks comment on its belief that the size differentials are not so great as to have a meaningful impact in terms of the proposed rule's applicability.

117. Furthermore, the Commission believes the PCC would be preferable to the other suggestions commenters offered. NAA proposed that the Commission simulate a digital Grade A contour by applying to a station's NLSC the propagation and

implementation margin factor it established for cable carriage of digital broadcast stations (i.e., 20dB). NAA asserted that the resulting simulated contour would be appropriate because the Commission developed the 20dB measurement using “Grade A-type signal quality factors.” The Commission believes that using a measurement based on the signal quality required for cable carriage would impose too strict a standard for purposes of the NBCO rule because it would exclude parts of the coverage area that reliably receive the television signal. A. H. Belo and CRT suggested that the Commission add a mileage qualifier to the DMA measurement. A. H. Belo and CRT, however, did not specify what mileage the qualifier should be or explain how the Commission could develop a mileage qualifier that would be meaningful. The Commission seeks comment on its view that using the PCC would be the superior approach.

118. The Commission is not inclined to adopt the suggestion of A. H. Belo and CRT to limit the application of the NBCO rule to “major” daily newspapers having a circulation exceeding 5 percent of the DMA’s households. Cox similarly argued that the NBCO rule should not be triggered unless the newspaper’s circulation exceeds 5 percent of the households in the television station’s community of license. The Commission seeks comment on whether there are any reasons to change the current definition, which states that “a daily newspaper is 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.” The Commission notes that the newspaper definition suggested by A. H. Belo and CRT could fail to trigger the rule when a newspaper is not widely circulated in the larger DMA despite its influence in its own community of publication. In addition, the Commission is not inclined to adopt Cox’s suggestion to

impose a minimum circulation requirement within the television station's community of license. Under the vacated 2006 rule, a newspaper was not deemed a "major media voice" for purposes of the rule's eight voices test unless it had a circulation exceeding five percent of the households within the DMA. Different definitions may serve different purposes, however, and the Commission seeks comment on whether the current requirement that a daily newspaper be published at least four days a week, in the dominant language in the market, and circulated generally in its community of publication is sufficient to ensure the significance of the newspaper for purposes of triggering the rule, thereby obviating specification of a minimum circulation amount or modification of the area of consideration. The Commission previously has determined that newspapers with these characteristics are significant enough to come within the scope of the NBCO rule, and commenters in the 2010 Quadrennial Review record proceeding have not provided evidence that a less restrictive definition would be sufficient to protect viewpoint diversity.

119. The Commission seeks comment on the tentative conclusion that, to the extent that an existing newspaper/television combination would become newly non-compliant as a result of its proposed modification of the NBCO rule, the Commission should grandfather such combinations in order to avoid market disruption and to avoid penalizing licensees for the switch from an analog contour to a digital contour. The Commission believes that incorporating the PCC into the rule would limit the number of existing newspaper/television combinations that would fall in this category. Consistent with existing precedent, the Commission does not believe grandfathered combinations should be transferrable. The Commission seeks comment on its view that any future

transfer of a grandfathered combination should comply with the applicable ownership rules, including the NBCO rule, in place at the time the transfer of control or assignment application is filed. The Commission does not intend to upset any filing deadlines it has previously imposed on specific parties related to cross-ownership proceedings. In addition, consistent with the Commission's decision in the 2006 Quadrennial Review Order, the Commission would allow all grandfathered combinations or permanent waivers from the prior rule that previously have been granted to continue in effect under the rule ultimately adopted, to the extent that such grandfathering/permanent waivers would still be necessary to permit common ownership.

(iii) Market Tiers

120. Background. In the NPRM, the Commission proposed to differentiate between markets ranked among the top 20 DMAs and markets below the top 20 DMAs for purposes of determining whether a waiver request is entitled to a favorable presumption under the approach discussed in the NPRM. The Commission proposed a top-20 demarcation point for newspaper combinations involving either television or radio stations. The Commission's proposal to lift the restriction on newspaper/radio cross-ownership would render moot the delineation of market tiers for such combinations. The Commission seeks comment, however, on whether a top-20 demarcation point should apply to newspaper/radio combinations in the event it retains a restriction on such combinations. Consistent with its findings in the 2006 Quadrennial Review Order, the Commission's preliminary view was that the top 20 DMAs are notably different from other markets, both in terms of voices and in terms of television and radio households. The Commission tentatively concluded that, based on the range of media outlets available

in the top 20 DMAs, viewpoint diversity in those largest markets is healthy and vibrant in comparison to other DMAs. It sought comment on its tentative conclusion that the viewpoint diversity level in the 20 largest DMAs is sufficient to consider adopting a regulatory framework that would accommodate a limited amount of newspaper/broadcast cross-ownership in those markets. It also sought comment on its continued belief that markets below the top 20 DMAs generally cannot accommodate such cross-ownership absent particular circumstances warranting a waiver. In addition, it asked whether a different demarcation point would more effectively protect and promote its goals.

121. Discussion. In the event it were to adopt a waiver standard with presumptive guidelines, the Commission seeks further comment on whether to grant a favorable presumption to waiver requests seeking approval for a merger in a top-20 DMA where certain conditions are met and to ascribe a negative presumption to waiver requests involving mergers in the remaining DMAs. As described below, the Commission also seeks comment on whether waiver requests for proposed newspaper/television combinations within the top-20 DMAs should be entitled to a favorable presumption only if the television station were not ranked among the top-four television stations within the DMA and there would be at least eight independently owned and operated major media voices remaining in the DMA post-transaction. It seeks comment on the impact of such an approach on viewpoint diversity, particularly in the 20 largest DMAs, and on how any such presumptive waiver standard would work. The Commission tentatively concludes that any such rule should create a favorable presumption for waiver requests only in cases where the proposed combination consists of a single television station and single daily newspaper, as described above, and not in cases where the common ownership is

proposed to include a television duopoly, regardless of whether a duopoly is permitted under the local television ownership rule. The Commission seeks comment on this tentative conclusion. For each element it proposes to include in a presumptive waiver standard, it seeks comment on its usefulness and the costs and benefits of its inclusion.

122. Some commenters in the 2010 Quadrennial Review proceeding asserted that differentiating the 20 largest DMAs from smaller markets would be arbitrary and capricious. On the other hand, there is evidence supporting such a distinction. The greater demographic diversity found more frequently within larger populations is more likely to generate demand for a wider range of viewpoints. The larger populations of the top-20 DMAs may also be better able to provide the economic base to support a greater number of media outlets. Indeed, evidence demonstrates a greater level of media diversity in the 20 largest DMAs that distinguishes those markets from the remaining DMAs. Data show that, while there are at least 10 independently owned, commercial television stations in 14 of the top 20 DMAs, none of the DMAs ranked 21 through 25 has more than seven independently owned, commercial television stations. Additionally, while 10 of the top 20 DMAs have at least two newspapers with a circulation of at least 5 percent of the households in that DMA, four of the five DMAs ranked 21 through 25 have only one such newspaper. Moreover, the top 20 markets, on average, have 15 independently owned television stations and major newspapers and approximately 2.6 million television households. By comparison, DMAs 21 through 30 have on average nine major media voices and fewer than 1.2 million television households, representing drops of 37 percent and 56 percent from the top 20 markets, respectively. DMAs 31 through 50 have average numbers of voices for each category similar to markets 21

through 30, but a lower number of television households averaging 795,000. DMAs 51 through 210 show even more dramatic drops, with, on average, fewer than seven major media voices and approximately 240,000 television households, representing drops of 54 percent and 91 percent from the top 20 DMAs, respectively.

123. Several commenters in the 2010 Quadrennial Review proceeding contended that many lower-ranked DMAs are abundantly diverse. The Commission emphasizes that any presumptions would provide merely a starting point for the analysis of the likely impact of a proposed merger on a particular market. A presumption could be overcome if the weight of the evidence favors the party with the burden of proof. Waiver applicants in smaller markets would not be precluded from demonstrating that a proposed merger would create efficiencies that would serve the public interest without harming viewpoint diversity in the local market.

124. None of the commenters specified an alternative demarcation point, but a few commenters argued that the same standard should apply to all, or the majority of, markets. For example, Cox proposed a two-part test that it argued should apply to NBCO waiver requests in all markets. The first part of the test, Cox claimed, would protect viewpoint diversity by requiring that 20 independent media voices remain in the market following a proposed combination, which could include a newspaper and any broadcast properties that would be permitted under the local ownership rules. Cox proposed that independent media voices include independently owned daily newspapers, full-power television stations, full-power radio stations, cable and satellite television services (counted as one voice), and the Internet (counted as one voice). As Cox stated, the diversity prong of its proposed test was patterned in part after the radio/television cross-

ownership rule. 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. The Commission seeks comment on Cox's suggestion. For the reasons explained below in connection with the eight-voices restriction, the Commission believes that the first part of Cox's proposed test would define independent media voices too broadly. As to the second part of Cox's proposed test, the Commission believes it would be difficult to apply and enforce an objective, content-neutral standard of what constitutes an independent media voice that produces and distributes local news and information programming. Moreover, nothing in the Cox proposal provided specific evidentiary support that relates the standard specifically to newspaper/television combinations.

(iv) Top-Four Restriction

125. Background. Consistent with the 2006 NBCO rule, the Commission proposed in the NPRM that newspaper/television combinations involving a television station ranked among the top-four television stations in the DMA would not be entitled to a favorable presumption. The Commission proposed that television rankings be based on the most recent all-day (i.e., 9:00 am to midnight) audience share, as measured by Nielsen or another comparable professional, accepted audience ratings service.

126. The Commission's preliminary view was that "allowing a top-four station to merge with a daily newspaper would create the greatest risk of losing an independent voice in that market." Based on the Commission's data analysis, the amount of local news drops significantly between the fourth- and fifth-ranked stations. The most dramatic difference occurs in larger markets, where the fifth-ranked station generally

provides no more than half the amount of local news aired on the fourth-ranked station. The Commission sought comment on whether a different limit would be more appropriate, such as a top-five or top-six restriction. It also asked if the restriction should depend on whether the station is affiliated with one of the four major broadcast networks, given evidence that such stations tend to air more local news.

127. Discussion. If the Commission were to adopt a waiver standard with presumptive guidelines, it would not provide a favorable presumption for newspaper/television combinations involving a television station ranked among the top-four television stations in the DMA. The Commission would continue to determine a television station's ranking in accordance with Section 73.3555(d)(3)(i) of the Commission's rules. As stated in the NPRM, evidence shows that the top-four television stations in a DMA generally air more local news and information than the other television stations in the market, particularly in the larger DMAs. The Commission seeks comment on its tentative conclusion that viewpoint diversity in even the largest markets could be harmed if a top-ranked television station merged with a daily newspaper within the same DMA. Therefore, regardless of the DMA's size, the Commission believes that a proposed combination involving a top-four television station would be inconsistent with the public interest. The Commission invites commenters to provide any new information or evidence that the Commission should take into consideration regarding this issue.

128. The Commission disagrees with those commenters who contend that the rationale for allowing cross-ownership in the top 20 markets would also support not having a top-four restriction. The Commission's analysis of this rule hinges not on whether it should be relaxed to enhance efficiencies that could promote localism, but on

whether some form of the rule remains necessary to promote viewpoint diversity. Although the Commission would hope that any permitted combinations under a revised rule would generate localism benefits, the NBCO rule is designed to protect viewpoint diversity. Under the presumptive waiver standard the Commission seeks comment on today, waiver applicants in the top-20 DMAs would be entitled to a favorable presumption on the theory that permitting certain newspaper/television combinations in those markets would not likely harm viewpoint diversity. Allowing the combination of a newspaper and a top-four station, however, could potentially harm viewpoint diversity precisely because the top-four television stations typically provide the most local news among television stations. A combination with one of those stations thus could result in a diminution of viewpoint diversity, and therefore the Commission believes that a waiver request involving such a station should not be entitled to a favorable presumption. The Commission seeks comment on this proposition.

129. Other arguments also sidestep the diversity rationale. Tribune contended that combining with one of the market's weaker television stations may not provide the lifeline that many struggling newspapers need. It further asserted that the rationale for the top-four restriction within the context of the local television rule — to preserve competition among the strongest television stations — is inapplicable to the NBCO rule. The Commission's primary intent, however, in considering whether to retain the top-four component of the NBCO rule, if amended, is to protect viewpoint diversity, not to save struggling newspapers or to promote competition. The Commission seeks comment on its position with respect to these assertions.

130. Finally, Fox claimed that a top-four restriction would violate the First Amendment because it would preclude a speaker from acquiring additional outlets based on the popularity of the speaker's content. The Commission disagrees. As the U.S. Supreme Court stated, assuring "access to a multiplicity of information sources . . . promotes values central to the First Amendment." The Commission also disagrees with Fox's assertion that such a restriction would be content-based. Rather, the Commission believes the top-four restriction would operate on the content-neutral basis of market ranking. It notes that, within the context of the local television rule, the Third Circuit upheld the top-four restriction as a reasonable limit on market power.

(v) Eight Major Media Voices Restriction

131. Background. The Commission proposed that transactions that would leave fewer than eight independently owned and operating "major media voices" in the DMA would not be entitled to a favorable presumption under a presumptive waiver standard. Major media voices were defined in the 2006 Quadrennial Review Order as full-power commercial and noncommercial television stations and major newspapers. The Commission sought comment on the potential impact of eliminating this voices test given its analysis that eight major media voices would remain in each of the top-20 DMAs even if all daily newspapers in those markets combined with television stations. The Commission also asked whether requiring a different number of voices would protect its diversity goal more effectively.

132. Discussion. Were the Commission to adopt the presumptive waiver standard on which it seeks comment, the Commission proposes to ascribe a negative presumption to waiver requests for newspaper/television combinations in the top-20

DMAs if fewer than eight major media voices would remain in the DMA following the proposed merger. The Commission believes it should continue to define major media voices as full-power television broadcast stations and 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 5 percent of the households in the DMA. None of the commenters in the 2010 Quadrennial Review proceeding addressed the impact of removing the eight-voices test from a presumptive waiver standard or recommended an alternative voices test for the top-20 DMAs. Notwithstanding the supposition in the NPRM that the eight-voices test may not have an impact in the top-20 DMAs currently, if the Commission decides to adopt a presumptive waiver standard, then it proposes to retain the test as the more cautious approach and to protect viewpoint diversity in the event that media diversity in a top-20 DMA drops to the point where the test would become a critical factor in promoting that goal. The Commission included the eight-voices test in the 2006 waiver standard to prevent "a significant decrease in the number of independently owned major media voices" in the top-20 DMAs, and it seeks comment on whether it should incorporate the test for the same reason if it adopts a presumptive waiver standard.

133. Some commenters recommended that the Commission expand the definition of major media voices beyond full-power commercial and noncommercial television stations and major newspapers. For example, Cox urged the Commission to include in the definition full-power radio stations, cable and satellite television services (counted as one voice), and the Internet (counted as one voice). Cox argued that its approach would resemble the definition used for the radio/television cross-ownership

rule. Referencing the local television rule, Tribune asserted that a voices test should include radio stations, cable and satellite news channels, weekly newspapers, and independent websites with news and local information. The Commission's view is that neither of these comparisons should persuade it to expand its definition: this Further Notice of Proposed Rulemaking seeks comment on repealing the radio/television cross-ownership rule, and only television stations count toward the minimum number of remaining media outlets required under the local television rule. In addition, the Commission is disinclined to agree with NAA that the definition should include any media outlet that "contribute[s] meaningfully to local news diversity," the determination of which would depend on the type of media outlet under consideration. For practical and legal reasons, the Commission believes it unwise to engage in the kind of subjective, content-based assessment that such a standard likely would entail. The Commission seeks comment on these views.

134. The Commission tentatively concludes that, for purposes of any newspaper/television cross-ownership rule that the Commission may adopt, full-power television stations and major newspapers are the relevant voices that should be included in the definition of major media voices. As noted in the 2006 Quadrennial Review Order and discussed above, television stations and major newspapers are the predominant sources consumers rely on for news and information. In addition, evidence demonstrates that radio stations and independent websites generally do not originate significant amounts of local news. Evidence also suggests that viewership of local broadcast television news far outstrips that of cable news programming. Therefore, the Commission believes that counting the full-power television stations and the major

newspapers within a local market provides a reasonable proxy for the level of viewpoint diversity that is meaningful for purposes of its proposed rule, and the Commission seeks comment on this belief.

(vi) Four-Factor Test

135. Background. Under the NBCO rule as revised in the 2006 Quadrennial Review Order, the Commission considered four factors in evaluating a request for a rule waiver. All waiver applicants, regardless of whether they were entitled to a favorable presumption, were required to show: (1) that the combined entity would significantly increase the amount of local news in the market; (2) that 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.

136. In the NPRM, the Commission sought comment on whether to retain these four factors. The Commission asked if the factors benefitted the waiver applicants or the Commission staff responsible for reviewing waiver requests. It sought comment on whether the factors were overly subjective or likely to create unnecessary delay. The Commission also asked whether, if the four-factor test were excluded from the rule, the presumptions in favor of or against a transaction should create a prima facie case, which would shift the burden of proof to the party seeking to overcome the presumption.

137. Discussion. The Commission proposes not to include the four-factor test in any newspaper/television cross-ownership rule that it ultimately may adopt. None of

the commenters in the 2010 Quadrennial Review proceeding supported retaining the test. The Commission tentatively concludes that the factors are not well-suited as standards required of every waiver applicant because they are vague, subjective, difficult to verify, and costly to enforce. The Commission would not discourage waiver applicants, particularly those in smaller markets, from attempting to strengthen their requests by presenting evidence in support of considerations like those reflected in the four factors. Rather, the ill-defined nature of these factors leads the Commission to believe that they should not be imposed automatically on every waiver applicant. The Commission seeks comment on this approach.

138. In the event the Commission adopts a presumptive waiver standard, it seeks further comment on whether, instead of a four-factor test, it should treat a presumption either in favor of or against a waiver request as establishing a prima facie case. The party seeking to overcome the presumption would have the burden to show that the proposed newspaper/television combination would or would not unduly harm viewpoint diversity within the DMA. To meet this burden, parties could present evidence, for instance, regarding the quantity and strength of existing local news providers within the DMA including, for example, their availability, accessibility, and focus on local news and information; the level and pervasiveness of their presence or influence within the DMA, particularly in those portions of the DMA that potentially would be most affected by the proposed merger; and the strength of the applicant's proposed local news and other local program offerings. The impact on viewpoint diversity in the local market would be the focal point of the Commission's review. Evidence related to other variables could shade the Commission's analysis but would not

be necessary or sufficient. The Commission believes this type of narrowed approach would be consistent with its objective to rationalize the NBCO rule by linking its requirements to its purpose.

(vii) Overcoming the Negative Presumption

139. Background. In the NPRM, the Commission sought comment on whether to retain the criteria required by the 2006 Quadrennial Review Order to overcome a negative presumption. Under the 2006 rule, a waiver applicant could overcome a negative presumption by demonstrating, with clear and convincing evidence, that the merged entity would increase the diversity of independent news outlets and the level of competition among independent news sources in the relevant market. The rule adopted in the 2006 Quadrennial Review Order further stated that the Commission would reverse a negative presumption in two limited circumstances: (1) when the proposed combination involved a failed/failing station or newspaper, or (2) when the proposed combination was with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news after the combination. The NPRM asked whether these standards were sufficiently objective and quantifiable. It asked also whether special consideration should be given to a transaction involving a station or newspaper that is failed or failing, and if so, what type of showing should be required. Finally, the NPRM sought comment on whether the Commission should adopt any other criteria, particularly given that licensees could seek waivers under Section 1.3 of the Commission's rules.

140. Discussion. The Commission believes it should not adopt the criteria required by the 2006 Quadrennial Review Order to overcome a negative presumption in

any presumptive waiver standard that the Commission may adopt, other than the failed/failing station or newspaper criterion. In the preceding discussion of the four-factor test, the Commission sought comment on whether it should enable merger applicants to overcome any negative presumption by demonstrating that the proposed transaction would not unduly harm viewpoint diversity within the DMA. The Commission seeks comment on whether that standard also should replace the 2006 criteria requiring clear and convincing evidence that diversity and competition would increase. The Commission believes that the clear and convincing measure imposed an overly burdensome evidentiary standard, unnecessarily included a competition showing, and failed to identify relevant evidence that would support the diversity showing. The Commission is inclined to agree with Free Press that the exception for waiver applicants that commit to initiating weekly local news programming on a television station that has not been offering any local news would be too difficult to enforce. Not only does the Commission think it would be impractical for the Commission to monitor the station's subsequent local news output, but it does not wish to engage in making content-based judgments regarding what constitutes local news. For this reason and for the reasons stated above for proposing to reject the four-factor test, the Commission is not inclined to adopt NAA's recommendation that any NBCO rule the Commission adopts include an exception when: (1) the merger applicants commit to retaining, protecting, and exercising their respective editorial independence or (2) the merger applicants commit to adding news or public affairs programming to a broadcast station that previously had not been airing news. The Commission seeks comment on this approach.

141. The Commission proposes to adopt a failed/failing entity exception, which

would allow merger applicants to overcome a negative presumption under a presumptive waiver standard when a proposed combination involved a failed/failing television station or newspaper. In addition, it similarly proposes to consider an exception for failed/failing entities if it adopts a waiver standard that does not include presumptive guidelines. As explained above in the discussion of its policy goals, the Commission believes 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. Noting that no alternative definitions were suggested in the 2010 Quadrennial Review proceeding, the Commission seeks comment on whether to incorporate the criteria adopted in the 2006 Quadrennial Review Order to determine if a television station or newspaper is failed or failing. Specifically, in order to qualify as failed, the newspaper or television station would have to show that 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. To qualify as failing, the applicant would have to show that: (1) if the television station was the failing entity, that it had a low all-day audience share (*i.e.*, 4 percent or lower); (2) the financial condition of the newspaper or television station was poor (*i.e.*, a negative cash flow for the previous three years); and (3) the combination would produce public interest benefits. An applicant seeking a waiver of a newspaper/television cross-ownership prohibition on the basis that either the television station or the newspaper was failed or failing would be required to show that the tangible and verifiable public interest benefits of the combination outweighed any harms. Further, as is already the case with failed and failing station waivers of the local television rule, in seeking subsequent renewals of the television station's license, the owner of the combined entities would be required to certify to the Commission that the public interest benefits of the combination were being fulfilled, including a specific, factual showing of the program-related benefits that had accrued to the public. Cost savings or other efficiencies, standing alone, would not constitute a sufficient showing. The Commission seeks comment on the implications of requiring such a showing. In addition, the applicant would have to show that the in-market buyer was 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. One way to satisfy this criterion would be to provide an affidavit from an independent broker affirming that active and serious efforts had been made to sell the newspaper or television station, and that no reasonable offer from an entity outside the market had been received. The Commission seeks comment on whether to adopt such a criterion. It seeks comment on whether to adopt such an exception for failed/failing entities regardless of the waiver standard it adopts.

(iv) Minority and Female Ownership

142. Background. The Commission has provided several opportunities for public input on issues pertaining to minority and female ownership. It sought comment in the NPRM on how the proposed revisions to the NBCO rule could affect minority and female ownership opportunities. Further, it asked how promotion of diverse ownership promotes viewpoint diversity. The Commission also sought comment on the minority and female ownership data contained in the 2012 323 Report. In addition, the

Commission invited comment on the MMTC Cross-Ownership Study which seeks to examine "whether, and to what extent, cross-ownership might have a material adverse impact on minority and women ownership." To inform the 2014 Quadrennial Review, the Commission seeks further comment below on the relationship of the NBCO rule to minority and female ownership.

143. Discussion. Some commenters criticized the Commission for proposing to relax the NBCO rule without first determining that there would be no negative impact on levels of minority and female ownership. The Commission recognizes that the Third Circuit directed the Commission to address certain portions of the Diversity Order in the context of its quadrennial review. The Commission has considered carefully whether there is evidence in the current record that modifications to the NBCO rule, such as those the Commission seeks comment on above, would likely adversely affect minority and female ownership, and it tentatively concludes, as discussed below, that the current record does not establish that such harm is likely. The Commission tentatively finds that the information in the current record asserting a potential impact would not change its underlying analysis regarding the possible rule modifications set forth above. Moreover, the Commission rejects the argument that the Prometheus II decision requires the Commission to take no action unless it can show definitively that a rule change would have no negative impact on minority ownership levels. In any case, considering the low levels of minority and female ownership reflected in the 2012 323 Report, the Commission does not believe the record evidence shows that the cross-ownership ban has protected or promoted minority or female ownership of broadcast stations in the past 35 years, or that it could be expected to do so in the future. The Commission seeks

comment on these views.

144. The Commission notes that commenters in the 2010 Quadrennial Review record did not focus on the impact of newspaper/radio cross-ownership in particular. None of these commenters seriously contended or provided any data showing that newspaper mergers with minority/female-owned radio stations would harm viewpoint diversity in local markets. As discussed above, the Commission does not believe that the vast majority of radio stations contribute significantly to viewpoint diversity. Moreover, the Commission has no evidence in the current record suggesting that minority/female-owned radio stations contribute more significantly to viewpoint diversity or broadcast greater amounts of local news on which consumers rely as a primary source of information than other radio stations. Even if they did, the Commission could not conclude that it would therefore be reasonable to restrain the ability of owners of all commercial radio stations to make business decisions to exit the market or to combine with a newspaper should the record otherwise support allowing such combinations. The Commission invites commenters to provide any new relevant information, data, or evidence that should inform the 2014 Quadrennial Review.

145. With respect to newspaper/television combinations, the current record reflects varying opinions concerning the impact of a rule modification on minority and female ownership. While the Commission agrees with the commenters that current levels of minority and female ownership are discouragingly low, the Commission is not persuaded by evidence in the current record that the NBCO modifications it seeks comment on above would adversely affect minority and female ownership levels. Even assuming that some minority-owned stations would become acquisition targets if the rule

were loosened, the Commission does not believe that such a possibility necessarily would preclude rule modifications that are otherwise consistent with its statutory mandate. To the extent that governmental action to boost ownership diversity is appropriate and in accordance with the law, the Commission does not believe that any such action should be in the form of indirect measures that have no demonstrable effect on minority ownership and yet constrain all broadcast licensees. The Commission seeks comment on this tentative conclusion and its impact on any decision to modify its cross-ownership rules. Several commenters argued that promoting access to capital would advance minority ownership more effectively than either limiting the number of potential buyers for minority broadcast owners interested in selling or preventing minority broadcast owners from experimenting with print publication. The Commission addresses related proposals below.

146. At this time, the Commission is not convinced that a top-four restriction, if adopted as part of a presumptive waiver standard, would decrease minority ownership. Commenters predicted that minority-owned television stations, the majority of which are stand-alone stations unaffiliated with a network, would be likely targets for acquisition if top-four television stations were excluded from cross-ownership. However, a newspaper publisher that is foreclosed from buying a top-ranked television station may not necessarily seek to purchase a lower-ranked station. In any event, station owners would not be compelled to sell their stations as a result of a modification to the NBCO rule. Moreover, a station owner that wishes to exit the market is not prevented from selling its station under the current NBCO ban, which merely eliminates newspaper owners as potential buyers. The Commission notes that the commenters' concern is in tension with

the more frequent complaint that the Commission has not been aggressive enough in encouraging investment in minority broadcasters. The changes the Commission seeks comment on today could permit stand-alone stations without a network affiliation to compete better in the market and to improve their local news offerings by combining resources with an in-market daily newspaper, if they so desired and such an opportunity were available. The Commission seeks comment on the likelihood of such an effect.

147. In addition, commenters arguing that minority-owned broadcasters are competitively disadvantaged in the presence of large media conglomerates pointed to alleged effects of multiple station ownership, not cross-ownership of newspapers and broadcast stations. As the Commission has found, newspapers and broadcast stations generally do not compete in the same product markets, and it does not believe that an owner of a newspaper/television combination would possess any greater ability to impede local competition among local television stations than the well-capitalized owner of a single media property. Free Press pointed to various financial pressures that it claims have forced a number of minority owners to exit the market. To the extent that Free Press alleged that these financial difficulties stemmed from or were exacerbated by media consolidation, the consolidation to which Free Press refers is not related to the NBCO rule. Given that an NBCO restriction did not prevent the minority owners Free Press identified from leaving the market and in light of the Commission's finding that newspapers and broadcast stations generally do not compete in the same product market, the Commission seeks further comment specifically on the relationship between the NBCO rule and minority and female ownership.

148. The MMTC Cross-Ownership Study stated that "the impact of cross-

media ownership on minority and women broadcast ownership is probably negligible." MMTC indicated that the study surveyed both minority- and/or female-owned broadcast stations in markets with cross-owned media, along with non-minority/non-female-owned broadcast stations in the same markets, to explore whether there was a difference in the responses of the two groups regarding the importance of local cross-owned media. According to MMTC, the study's findings showed a lack of concern by almost all of the respondents about the presence of cross-owned media in the market. MMTC acknowledged, however, that the study was "not intended as a comprehensive random sample survey" and cautioned that the limited number of responses warrants "great care" in reaching any conclusions.

149. A number of commenters argued that the MMTC Cross-Ownership Study was critically flawed in its methodology and analysis and that the Commission cannot rely on the study as a basis for policy making. In response, MMTC recognized that the MMTC Cross-Ownership Study is not dispositive but argued that it provides useful evidence about the impact of cross-ownership, noting the record was previously devoid of any such data.

150. Given the limitations of the study that even MMTC acknowledges, the Commission does not believe it can draw definitive conclusions about the impact of cross-ownership on minority and female ownership from the MMTC Cross-Ownership Study alone. The Commission invites commenters to provide additional evidence that bears on this issue, especially any evidence arising since MMTC's filing of the study.

151. Furthermore, the Commission notes that any attempt to conduct an empirical study of the relationship between cross-ownership restrictions and minority and

female ownership would face obstacles that likely would make such study impractical and unreliable. A rigorous econometric analysis would require that the Commission observe a sufficient number of markets in which cross-ownership and/or minority and female ownership levels recently have shown variation. Due to the Commission's cross-ownership restrictions having been in place for such a long period of time and to low levels of minority and female ownership, however, both cross-ownership and minority and female ownership levels show very little variation, making empirical study of the relationship between these multiple variables extremely difficult. In addition, any study necessarily would be based on a very small dataset for the same reasons. As a result of these limitations, any estimation of the relationship between cross-ownership restrictions and minority and female ownership is likely to be imprecise. Given such imprecision, the Commission does not believe that a study could extrapolate with any degree of confidence the effect that changing the Commission's cross-ownership rules would have on minority and female ownership levels, and any attempt to do so would be misleading. Variation in ownership structure over time, resulting from additional cross-owned entities, could provide additional data points to study in the future. The Commission seeks comment on these views concerning the inherent challenges to conducting comprehensive research on these issues.

152. Finally, the Commission emphasizes that, as proposed above, no newspaper/television combination would be permitted without a Commission waiver of a general rule prohibiting such combinations. Even a waiver request that would be granted a favorable presumption under a presumptive waiver standard would be subject to denial if the Commission found that the proposed transaction was likely to harm viewpoint

diversity in the local market. A case-by-case waiver approach under either option the Commission offers for comment would allow for close Commission examination of the particular circumstances of a proposed combination. Where the newspaper purchase of a television station, minority/female-owned or otherwise, would disserve the public interest, the Commission would deny the request for a rule waiver. The Commission seeks comment on whether a waiver requirement would provide adequate protection when the particular circumstances of a proposed merger run counter to its diversity goals.

4. Radio/Television Cross-Ownership Rule

a. Introduction

153. The Commission seeks comment on whether the radio/television cross-ownership rule, which limits the combined number of commercial radio and television stations a single entity may own in the same market, is still necessary in the public interest or whether it should be repealed. It seeks comment on whether the current media marketplace and the evidence adduced in the 2010 Quadrennial Review proceeding support a conclusion that the local television ownership rule and the local radio ownership rule, which the Commission proposes to retain with limited modification elsewhere in this Further Notice of Proposed Rulemaking, adequately serve the goals the radio/television cross-ownership rule was intended to promote, namely, competition and diversity in local markets. The Commission seeks comment on whether the benefits of eliminating this regulation would outweigh any potential costs and whether simplifying its rules in this way would have only a minimal effect in most markets. Moreover, the Commission seeks comment on whether repeal of this rule would be consistent with its goal of promoting minority and female ownership of broadcast stations. The

Commission invites commenters to discuss any relevant evidence in the 2010 Quadrennial Review record and submit any new evidence that bears on its review of this rule. In addition, the Commission seeks comment on the costs and benefits of retaining or eliminating the radio/television cross-ownership rule. To the greatest extent possible, commenters should quantify the expected costs or benefits of the rule and any alternatives and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

b. Background

154. In the NPRM, the Commission tentatively concluded that the radio/television cross-ownership rule is not currently necessary to promote the public interest. The Commission sought comment on a range of issues, including whether radio and television stations constitute different markets, whether repeal of the rule would encourage more and better competition in local media markets, whether repeal of the rule would result in additional broadcast consolidation, and what impact, if any, repeal would have on small, independent broadcasters, including those stations owned by minorities and women. The Commission indicated that changes in the marketplace and evidence from the media ownership studies specifically supported the tentative conclusion that the rule is not necessary to promote viewpoint diversity in local media markets.

155. The Commission invites commenters to augment the 2010 Quadrennial Review record with any new or different evidence, data, or information relevant to its consideration of the radio/television cross-ownership rule in this consolidated docket.

c. Discussion

156. Considering the record in the 2010 Quadrennial Review proceeding and

consistent with the tentative conclusion in the NPRM, the Commission seeks comment on whether the radio/television cross-ownership rule is still necessary to promote the public interest or whether the rule should be repealed. The Commission notes that the record suggests that, unlike local television stations and daily newspapers, radio stations are not a dominant source of local news and information, and thus, the Commission seeks comment on whether retention of this rule is necessary to promote and preserve viewpoint diversity in local markets. Moreover, the Commission seeks comment on whether the existing rule offers substantial benefits in addition to its other rules. The Commission tentatively finds, as the Commission consistently has in past proceedings, that this rule is not necessary to support its goals of competition or localism.

157. Viewpoint Diversity. Limiting the combined number of commercial radio and television stations that a single entity may own in a market was previously found necessary to promote a diversity of viewpoints. The Commission seeks comment on the continued necessity of such a restriction. It notes that, despite its specific request in the NPRM, no studies were submitted in the 2010 Quadrennial Review record to demonstrate that this rule supports viewpoint diversity or that repeal of the rule would cause a decrease in viewpoint diversity. The Commission seeks comment on whether the local radio and local television ownership rules, which it proposes to retain, as well as its proposed newspaper/television cross-ownership rule, would be sufficient to protect viewpoint diversity such that retaining the radio/television cross-ownership rule is unnecessary.

158. The Commission seeks comment on evidence in the 2010 Quadrennial Review record suggesting that radio stations are not currently a dominant source of local

news and information. Consistent with the tentative conclusions in the NPRM, the record in the 2010 Quadrennial Review proceeding demonstrates that consumers rely primarily on local television stations and daily newspapers (and their affiliated websites) for their local news, and not on radio stations. If the record demonstrates that radio stations are not the primary outlets that contribute to local viewpoint diversity, what harm to viewpoint diversity would result from repealing the radio/television cross-ownership restriction? To the extent that noncommercial radio stations contribute to local news and information, the Commission notes that, because its ownership rules do not apply to noncommercial radio stations, the repeal of this rule would not impact their contribution to viewpoint diversity. The Commission seeks comment on how this fact should affect its analysis.

159. The Commission has previously acknowledged that radio is a distant third behind newspapers and television stations in terms of being an important provider of news and information. Indeed, the Commission has long recognized that "a radio station cannot be considered the equal of either the newspaper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern." In the 2006 Quadrennial Review Order the Commission decided to retain the radio/television cross-ownership rule on the basis that the public relied on both radio and television for news and information. Information in the record in the 2010 Quadrennial Review proceeding, as well as the Information Needs of Communities Report and the most recent media ownership studies, suggest that local radio stations do not contribute to local viewpoint diversity to the same degree as local television stations and daily newspapers.

160. As discussed in the context of the NBCO rule above, recent evidence demonstrates that consumers regard local television stations and daily newspapers as the principal sources of local news and information. According to a recent Pew study, this popularity has, in turn, encouraged many television stations to produce more local morning and mid-day news programming, further establishing television stations as the main providers of local news and information in local markets. Independent television stations, particularly in those markets where they air local news, showed bigger audience or ratings gains in 2011 when compared to any of the stations affiliated with Big Four broadcast networks, which may provide more national programming content during those day parts.

161. As described in detail above, the Information Needs of Communities Report records a steady decline over the past two decades in consumer reliance on commercial radio news. 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. Although the Commission acknowledges that a small number of commercial all-news radio stations in the nation's largest markets are very successful, radio stations in most cities do not provide local journalism. Eighty-six percent of programming on news-talk stations is nationally syndicated, rather than locally produced. The Commission seeks comment on whether there is any more recent countervailing evidence refuting these trends.

162. Additionally, the Commission seeks comment on whether the existing radio/television cross-ownership rule provides meaningful additional restriction on

consolidation, given that the local television and radio rules separately impose limitations on the amount of broadcast ownership permitted in local markets. Would the repeal of the rule have more than a minimal impact on broadcast consolidation in most local markets, as parties would continue to be constrained by the applicable local radio and local television ownership rules? As discussed in the NPRM, absent the radio/television cross-ownership rule, an entity approaching the limits of the existing cap, if constrained only by the local radio rule, would be permitted to acquire one or two additional radio stations in large markets, at most. Under the local radio rule, an entity owning six or seven radio stations can own as many as eight radio stations in the largest radio markets in the absence of the cross-ownership rule. The Commission seeks comment on whether the local radio rule is sufficient to protect competition in local radio markets. It believes the elimination of the radio/television cross-ownership rule would have no effect on the number of television stations an entity may own as the existing cross-ownership rule references the local television rule to determine how many television stations an entity may own. The Commission seeks comment on this conclusion and on whether the radio/television cross-ownership rule has independent effects, aside from those provided by the other local ownership rules, on consolidation in most local markets.

163. The Commission also seeks comment on the implications of the cross-ownership rule's two-tiered voice count restriction on broadcast consolidation in local markets. The restrictions appear to be readily met in many markets. In many large markets, the requirement that at least 20 independently owned and operating media voices remain in order to own television stations and as many as six or seven radio stations is met or exceeded and therefore appears to have little effect. Similarly, in many

small markets the requirement that at least 10 independently owned media voices remain in order to own a television station and as many as four radio stations is met, so that element of the rule presumably has a limited impact on the potential for consolidation in those markets. The Commission seeks comment on these findings and on markets where this element of the rule may have an impact on television/radio consolidation. What is the significance of any such impact? The Commission seeks comment on whether the record from the 2010 Quadrennial Review proceeding or any more recent evidence establishes any particular or measurable potential harm that would likely result from repeal of this cross-ownership rule.

164. Competition. Consistent with prior holdings, the Commission tentatively finds that the radio/television cross-ownership rule is not necessary to promote competition. The Commission has found previously that most advertisers do not consider radio and television to be good substitutes for one another, and that "television and radio stations neither compete in the same product market nor do they bear any vertical relation to one another." This position is consistent with the long-standing conclusion of the Department of Justice, which considers radio advertising as a separate antitrust market for purposes of its competition analysis. Similarly, the Commission tentatively finds that most consumers do not consider radio and television stations to be substitutes for one another and do not switch between television viewing and radio listening based on program content. Nothing in the current record undermines the Commission's previous conclusion that a television-radio combination, therefore, cannot adversely affect competition in any relevant product market. Given that radio and television stations do not appear to compete in the same market and that the local television and radio rules

would prevent significant additional consolidation even in the absence of this rule, the 2010 Quadrennial Review record does not suggest that repeal of the radio/television cross-ownership rule would harm competition. The Commission seeks comment on whether any data or evidence made available since the NPRM warrants a renewed analysis of the competitive effect of the radio/television cross-ownership.

165. Localism. Consistent with the tentative conclusion in the NPRM and previous Commission holdings, the Commission tentatively finds that the radio/television cross-ownership rule is not necessary to promote localism. The Commission seeks comment on this tentative conclusion. Furthermore, it seeks comment on whether elimination of this rule is likely to result in benefits to localism in the form of improved or expanded programming.

166. The Commission sought comment in the NPRM on the relevance of the media ownership studies to its analysis of whether the radio/television cross-ownership rule promotes its localism goals. The Commission specifically highlighted the findings in Media Ownership Study 1 and Media Ownership Study 4 about the correlation between the level of radio/television cross-ownership in a market and the amount of local television programming provided. The Commission stated in the NPRM that Media Ownership Study 1 examines how cross-ownership is associated with localism, as measured by the amount of local news provided in the market, and that the study finds that cross-ownership decreases local television news hours but raises ratings, which leads to ambiguous results. Additionally, the Commission observed the finding in Media Ownership Study 4 that, at the station level, radio/television cross-owned stations appear to air more local news on average, though the impact is marginal. The study showed that

for every additional in-market radio station a parent owned, the television station aired 3.7 more minutes of local news. Some commenters in the 2010 Quadrennial Review proceeding maintained that these media ownership studies support the conclusion that the cross-ownership rule cannot be justified based on localism concerns. NAB stated that the record is clear that repeal of the radio/television cross-ownership rule would benefit both localism and diversity.

167. The Commission agrees with industry commenters who maintained that some limited cross-ownership could create efficiencies that could benefit the public should broadcasters choose to invest additional resources in the production of local news and information programming. When broadcasters engage in joint operations, whether those operations are focused on programming and news gathering or back office matters, the Commission believes it likely that financial efficiencies result. Such efficiencies could lead ultimately to consumer benefits in the form of additional station investments in equipment for radio or television newsrooms, an increase in staffing for news and informational programs, or additional local news coverage on radio stations. The Commission recognizes the potential for such benefits and seeks comment on the likely extent of such gains if the rule were repealed.

168. Minority and Female Ownership. The Commission also sought comment in the NPRM on the effect that eliminating the radio/television cross-ownership rule would have on efforts to foster ownership diversity among minorities and females. Further, the Commission sought comment on the minority and female ownership data contained in the 2012 323 Report. In addition, interested parties had the opportunity to comment on the MMTC Cross-Ownership Study, as discussed in the context of the

NBCO rule above. In response, several commenters criticized the Commission for proposing to relax any of its rules, including the radio/television cross-ownership rule, without first determining that there will be no negative impact on minority and female ownership. The Commission has considered carefully whether there is evidence in the current record that elimination of the radio/television cross-ownership rule would likely adversely affect minority and female ownership, and it believes, as discussed below, that the current record does not establish that such harm is likely. Furthermore, the Commission does not believe that record evidence shows that the cross-ownership ban has protected or promoted minority or female ownership of broadcast stations, or that it could be expected to do so in the future. Nevertheless, the Commission invites commenters to submit further data on the connection, if any, between the radio/television cross-ownership rule and minority and female ownership.

169. Notably, radio/television cross-ownership combinations were not the focus of commenters' concerns raised in response to the NPRM. In fact, no commenter to the NPRM presented empirical data or other analyses that established that repeal of this rule would harm competition, localism, or viewpoint diversity in local markets. As discussed above, the Commission tentatively concludes that the rule is not necessary to promote competition or localism, and the record reflects that most radio commercial stations do not broadcast significant amounts of local news and information. The current record does not suggest that minority/female-owned radio stations contribute more significantly to viewpoint diversity than other radio stations or broadcast more meaningful amounts of local news on which consumers rely as a primary source of information. The Commission seeks comment on these views. As discussed further in the Diversity

section below, several of the media ownership studies in this proceeding concluded that there is a positive relationship between minority station ownership and the provision of certain types of minority-oriented content or the consumption of broadcast content by minority audiences. Several commenters also raised this issue. This observation, however, does not alter the Commission's view that radio stations — be they minority-owned or not — do not contribute significantly to local news. The Commission seeks comment on whether recent evidence shows otherwise. Recognizing that repeal of the rule would potentially allow for the acquisition of a limited number of additional radio stations in some markets by incumbent television broadcasters, the Commission seeks comment on the impact that elimination of the rule would have on media consolidation and thus on small broadcast owners, including minority and women owners. As noted above, the current radio/television rule already allows for a significant degree of cross-ownership of radio and television stations in a market. Second, the cross-ownership rule has always been accompanied by the ownership limitations contained in the local television and local radio rules, which the Commission proposes to retain substantively unchanged in order to protect competition in local markets. The Commission seeks comment on whether the local ownership rules are sufficient to protect minority and female broadcast owners from the competitive effects of media consolidation.

170. Moreover, while the Commission acknowledges the concerns raised by NABOB and others advocating for additional minority ownership opportunities, it agrees with commenters, including NAB, that the low level of minority and female broadcast ownership cannot be attributed solely or primarily to consolidation. Nor has any commenter shown that these low levels of ownership are a result of the existing

radio/television cross-ownership rule. The Commission recognizes the presence of many disparate factors, including, most significantly, access to capital, as longstanding, persistent impediments to ownership diversity in broadcasting. As discussed below, such factors require further study and consideration.

171. In this Further Notice of Proposed Rulemaking, the Commission reaffirms its commitment to broadcast ownership diversity as an important goal. The 2010 Quadrennial Review record, however, does not appear to establish that elimination of the radio/television cross-ownership rule would adversely affect ownership diversity. The Commission asks commenters to provide any demonstrable evidence of such a link that may have become available since the 2010 Quadrennial Review.

5. Dual Network Rule

a. Introduction

172. The Commission tentatively 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. In particular, the Commission tentatively finds 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 willing to pay a premium for such audiences. Thus, the Commission believes 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. The Commission also tentatively find 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 tentatively concludes that the benefits of retaining the rule outweigh any potential burdens. The Commission seeks comment on these tentative findings, particularly with respect to any relevant developments that may have occurred since the NPRM. The Commission seeks comment also on the costs and benefits of its proposal to retain the existing dual network rule. To the greatest extent possible, commenters should quantify the expected costs or benefits of the rule and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

b. Background

173. In the NPRM, the Commission sought comment on its tentative conclusion that the existing dual network rule should be retained without modification in order to promote competition. The Commission also sought comment on the potential impact of top-four network mergers on localism. The Commission invites commenters to augment the 2010 Quadrennial Review record with any new or different evidence, data, or information relevant to its consideration of the dual network rule in this consolidated docket.

c. Discussion

174. Competition. Consistent with the Commission's tentative conclusion in the NPRM, the Commission tentatively 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, as discussed in more detail below, the Commission tentatively 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. The Commission also tentatively 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. Accordingly, the Commission continues to believe 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 tentatively 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. The Commission seeks comment on these tentative findings.

175. As noted in the NPRM, in comparison to other broadcast and cable networks, the top-four broadcast networks achieve substantially larger primetime audiences, as measured both by the audience size for individual programs and by the audience size for each network as a whole. Primetime broadcast network programming is generally designed to attract a mass audience, and financing such programming, in turn, requires the substantial revenue that only a mass audience can provide. The top-four

broadcast networks supply their affiliated local stations with primetime entertainment programming intended to attract both mass audiences and the advertisers that want to reach such large, national audiences. By contrast, other broadcast networks, and many cable networks, tend to target more specialized, niche audiences. As CBS noted, in recent years, some cable networks have moved away from serving niche audiences and have modified their primetime programming lineups to more closely resemble those of broadcast networks. Nonetheless, with the exception of certain individual sports events or mini-series, even the highest rated primetime entertainment programs on cable networks achieve substantially smaller audiences than their broadcast network counterparts. For instance, during 2011, the highest rated primetime entertainment programs on cable networks attracted, at most, between 8 and 9 million viewers. By contrast, in any given week during the 2010-2011 television season, there were typically a dozen or more primetime entertainment programs on the top-four broadcast networks that attracted more than 10 million viewers, with the highest rated broadcast programs frequently attracting more than 20 million viewers, based on Nielsen data. Thus, the audience size for individual primetime entertainment programs provided by each of the top-four broadcast networks remains unmatched by that of any other broadcast or cable network.

176. Furthermore, as measured at the network level, the average primetime audience size for each of the top-four broadcast networks remains significantly larger than the audience size for even the most popular cable networks. The Commission recognizes that consumers generally substitute between broadcast and cable networks and that the gap in size between broadcast and cable audiences has narrowed over time, such

that the aggregate audience for cable networks is now larger. Nevertheless, as stated in the NPRM, in 2009-2010 the average primetime audience for a top-four broadcast network remained substantially larger than the average primetime audience for other broadcast and cable networks. The Commission finds that this gap in audience size continued in 2011. In 2011, the average primetime audience for a top-four broadcast network was nearly three times larger than the average primetime audience for the highest rated cable networks, based on SNL Kagan data. In addition, the average primetime audience for the top-four broadcast networks was more than twice as large as that of the fifth highest-rated broadcast network, and more than five times larger than that of the next highest-rated English-language broadcast network. As a result, based on the 2010 Quadrennial Review record, the Commission tentatively finds that, despite the ability of certain primetime cable network programs to achieve large audiences on occasion, in general, primetime entertainment programming provided by the top-four broadcast networks remains a distinct product capable of attracting large audiences, the size of which individual cable networks cannot consistently replicate. The Commission seeks comment on whether this audience gap has narrowed significantly since the NPRM.

177. Another indicator that the top-four broadcast networks are distinct from cable networks is the wide disparity in advertising prices between them. Using data for 2009, the Commission found in the NPRM that the top-four broadcast networks generally earn higher advertising rates than cable networks. In 2011, based on SNL Kagan data, the average advertising rate among the top-four broadcast networks, as measured in cost per thousand views (referred to as cost per mille or CPM), was $19.19. By contrast, the

four highest CPMs among non-sports cable networks were for MTV, Bravo, Discovery Channel, and TBS, which had an average CPM of $10.95, or approximately 43 percent less than that of the top-four broadcast networks. The appeal of the top-four broadcast networks to advertisers seeking large, national audiences is also reflected in data on net advertising revenues. In 2011, the top-four broadcast networks averaged $3.17 billion in net advertising revenues, based on SNL Kagan data. By contrast, the four non-sports cable networks with the highest net advertising revenue totals (Nickelodeon, USA Network, TNT, and MTV) averaged just under 1 billion dollars in net advertising revenues, or less than one-third of the average amount that the top-four broadcast networks received. The Commission invites commenters to provide any relevant data that has become available more recently.

178. The Commission tentatively concludes that it should adopt the proposal in the NPRM to retain the existing dual network rule without modification in order to promote competition. The Commission finds force in WGAW's view that the rule remains necessary to promote competition in the market for primetime programming. Specifically, the Commission believes 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, the Commission believes 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. The Commission therefore tentatively

concludes 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 to merge. Accordingly, the Commission tentatively concludes that the dual network rule remains necessary to foster competition in the provision of primetime entertainment programming and the sale of national television advertising time. The Commission seeks comment on these tentative conclusions.

179. Localism. In addition to promoting its competition goal, the Commission tentatively finds that, consistent with past Commission findings, the dual network rule remains necessary to promote its localism goal. Specifically, the Commission tentatively 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.

180. In the context of this complementary network-affiliate relationship, the Commission believes that the dual network rule is, as the Affiliates Associations asserted, "an important structural principle" that helps to maintain equilibrium. Specifically, the Commission tentatively finds that a top-four network merger would reduce the ability of a network affiliate to use the availability of other top, independently owned networks as a bargaining tool to influence programming decisions of its network, 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. The Commission seeks comment on its tentative conclusion that the dual network rule remains necessary to foster localism.

181. The NPRM also sought comment on whether antitrust laws and the Commission's public interest standard are sufficient to address any harms to competition or localism that would result from a top-four network merger. As discussed above, the Commission is concerned here that a top-four network merger would restrict the availability, price, and quality of primetime entertainment programming to the detriment of consumers. The Commission is also concerned that the bargaining power and influence of affiliates would be reduced. As the Commission has previously noted, it does not think antitrust enforcement would adequately protect against these harms. The Commission seeks comment on these concerns.

182. Dual Affiliation. Some commenters urged the Commission to prohibit a TV station from affiliating with two or more top-four broadcast networks in a single market, because they contended that the practice allows stations to circumvent the intent of the dual network rule. Specifically, commenters claimed 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. The Commission notes, however, that the dual network rule addresses harms to competition and localism that would result from the consolidation of top-four network ownership at the national level. In particular, as discussed above, the Commission tentatively finds that a combination between top-four broadcast networks would reduce the number of networks competing for national advertisers and would reduce the ability of a local affiliate to use the availability of other top, independently owned networks as a bargaining tool to influence network programming decisions. By contrast, the Commission believes that dual affiliation does not give rise to either of these harms because it does not reduce the number of network owners. Although commenters are invited to offer opposing views, the Commission does not perceive arguments related to dual affiliation as relevant to consideration of the dual network rule. Instead, it believe that issues related to dual affiliation, including the potential consolidation of market power by a single station owner in a local market, are more relevant to the local television ownership rule, and the Commission discusses them above in that context.

D. Diversity Order Remand

1. Introduction

183. In addition to assessing each of the broadcast ownership rules, the Commission is considering in this proceeding the Third Circuit's remand of certain aspects of the Commission's 2008 Diversity Order. In Prometheus II, the Third Circuit concluded that the decision in the Diversity Order to adopt a revenue-based eligible entity definition as a race-neutral means of facilitating ownership diversity was arbitrary and

capricious, because the Commission did not show how such a definition specifically would assist minorities and women, who were among the intended beneficiaries of this action. In light of this conclusion, the Third Circuit remanded each of the measures adopted in the Diversity Order that relied on the revenue-based definition.

184. Based on its 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 thus far in this proceeding, the Commission tentatively concludes that the revenue-based eligible entity standard should be reinstated and applied to the regulatory policies set forth in the Diversity Order. 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 encourage innovation and enhance viewpoint diversity.

185. For the reasons explained below, the Commission tentatively concludes that the Commission is not in a position at this time to adopt a socially disadvantaged business (SDB) eligibility standard, which expressly would recognize the race and ethnicity of applicants, or any other race- or gender-targeted measures. The Commission invites further input on ways to expand the participation of minorities and women in the broadcast industry. It also seeks comment on specific measures, in addition to those that that the Commission tentatively concludes should be reinstated, that may provide further opportunities for minorities and women to own and operate broadcast outlets.

186. The Commission discusses below the actions that it currently believes are appropriate in response to the Third Circuit remand of the Diversity Order.

2. Background

a. Commission Diversity Initiatives

187. In addition to promoting viewpoint diversity generally through the broadcast ownership rules, the Commission has a long history of promulgating rules and regulations intended to foster diversity in terms of minority and female ownership. Although the Commission and Congress previously made available 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, those policies and programs were discontinued following the Supreme Court's 1995 decision in Adarand Constructors, Inc. v. Peña. 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. Under strict scrutiny, racial classifications are constitutional only if they are narrowly tailored measures that further a compelling governmental interest. As a result, the Commission currently does not use race or ethnic origin as a factor in its ownership diversification policies. In addition, Congress repealed the tax certificate policy in 1995 as part of its budget approval process.

188. The Commission announced in October 2013 that it is conducting a study of Hispanic television viewing. The study is the Commission's first systematic examination of the Hispanic television market, a market that implicates an important and growing segment of the nation's population. It incorporates comprehensive data from the improved Form 323 biennial ownership reports, described below. Specifically, the study will consider: (1) the impact of Hispanic-owned television stations on Hispanic-oriented programming and Hispanic viewership in selected local television markets; (2) the extent

of Hispanic-oriented programming on U.S. broadcast television; and (3) the role of digital multicasting in increasing the amount of Hispanic-oriented programming.

b. Data Collection Concerning Minority and Female Ownership

189. Collection of Biennial Ownership Data. As explained in detail in the NPRM, the Commission actively has sought in recent years to improve its collection and analysis of broadcast ownership information. Among other initiatives, the Commission has implemented major changes to its Form 323 biennial ownership reports to improve the reliability and utility of the data reported in the form, including data regarding minority and female broadcast ownership.

3. Discussion

a. Remand Review of the Revenue-Based Eligible Entity Standard

190. Background. The Commission solicited comment in the NPRM on whether the Commission should reinstate the pre-existing revenue-based eligible entity definition to support the measures the Third Circuit vacated and remanded as well as other measures the Commission may implement in the future. In light of the Third Circuit's conclusion that the Commission previously had failed to demonstrate a nexus between this definition and its stated goal of promoting female and minority ownership, the Commission asked commenters to supply any available evidence demonstrating that a revenue-based definition would support this specific policy objective. In addition, the Commission sought comment on whether re-adoption of the revenue-based standard would support its traditional diversity, localism, and competition goals in other ways, particularly by enhancing ownership opportunities for small businesses and other new entrants.

191. The Commission adopted its 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 then newly adopted local radio ownership limits. The Commission ruled that licensees would be allowed to transfer control of or assign a grandfathered combination to an eligible entity, which was defined as any entity that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue. In addition, the Commission ruled that eligible entities would be permitted, with limited restrictions, to sell existing grandfathered combinations intact to new owners. The Commission adopted this transfer policy as a means to promote diversity of ownership and observed more generally that policies supporting the entry of new participants into the broadcasting industry also may promote innovation in the field.

192. Thereafter, in the Diversity Order, the Commission concluded that additional uses of the eligible entity definition would advance its objectives of promoting diversity of ownership in the broadcast industry by making it easier for small businesses and new entrants to acquire licenses and attract the capital necessary to compete in the marketplace with larger and better financed companies. In this regard, the Commission stated 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 those owned by women and minorities." The Commission further observed that facilitating market entry by new entrants into the broadcast industry would promote new programming services, particularly those that are responsive to local needs, interests, and audiences currently underserved. Thus, between 2002 and the Third

Circuit's remand of the measures relying on the eligible entity definition in 2011, the Commission used the revenue-based standard to support a range of measures intended to encourage ownership diversity.

193. Several commenters, including AWM and NAB, supported reinstatement of a revenue-based eligible entity definition and the measures to which it previously applied as a means to diversify broadcast ownership. UCC et al. recommended that, instead of abandoning or repurposing the current eligibility definition, the Commission should assess whether it has had any measurable effect on the ownership of broadcast stations by minorities and women. As discussed in more detail below, DCS believed that the Commission should adopt a revised eligible entity definition that incorporates the Overcoming Disadvantage Preference (ODP) standard proposed by the Commission's Diversity Advisory Committee in 2010. According to DCS, no meaningful impact on minority ownership will be achieved by relying on a definition based solely upon the SBA's revenue limits for small businesses.

194. Discussion. The Commission tentatively concludes that a revenue-based eligible entity standard is an appropriate and worthwhile approach for expanding ownership diversity whether or not the standard is effective in promoting ownership of broadcast stations by women and minorities. The Commission concedes that it does not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership. The Commission invites commenters to supplement the record with any new data or analysis that may bear on this issue. Nonetheless, even in the absence of such evidence, the Commission believes that reinstatement of the revenue-based standard would serve the public interest by promoting

small-business participation in the broadcast industry. The Commission believes that small-business applicants and licensees benefit from flexible licensing, auction, transactions, and construction policies. Often, small-business applicants have financing and operational needs distinct from those of larger broadcasters. By easing certain regulations for small broadcasters, the Commission believes that it will promote its 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 encourage innovation and expand ownership and viewpoint diversity.

195. The Commission seeks comment on these tentative conclusions. The Commission also seeks input on other potential public interest benefits or detriments that could result from reinstating the eligible entity standard. It is interested in hearing from eligible entity broadcasters that have used one or more of the measures adopted in the Diversity Order. What measures were used? Did the eligible entity definition facilitate entry into broadcast ownership? Was increased financing and investment available to eligible entity broadcasters as a result of the existence of the eligible entity standard or any of the measures? The experiences of such broadcasters could aid the Commission's assessment of this standard and the measures that utilize the definition.

196. The Commission's records indicate that a large number of Commission permittees and licensees previously have availed themselves of policies based on the revenue-based eligible entity standard. In particular, the Diversity Order afforded eligible entities that acquire broadcast construction permits through an assignment from another permittee additional time to construct their facilities under certain circumstances,

and many small businesses made use of this measure. 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. Between the implementation of the eligible entity definition and the suspension of the definition following the Prometheus II decision, Commission staff processed approximately 247 Form 314 construction permit assignment applications in which the assignee self-identified as an eligible entity. Of those 247 applications, approximately 132 (53.4 percent) of the eligible entities have constructed their broadcast facilities and are now on the air. The data also reveal that the largest group of broadcasters that availed themselves of the eligible entity definition are noncommercial educational broadcasters. Of the 247 total eligible entities, 160 (64.7 percent) are NCE permittees or licensees.

197. On the whole, the Commission believes that these data indicate that the revenue-based eligible entity standard has been used successfully by small firms and has aided their entry into, as well as sustained their presence in, broadcasting in furtherance of the Commission's public interest goals. While these data may not include the total number of applicants and permittees that have availed themselves of one or more of the measures to which the eligible entity standard applied, this information nonetheless suggests that providing additional time to construct broadcast facilities and other measures have assisted market entry by small broadcasters.

198. The Commission also tentatively concludes that, if the Commission reinstates the eligible entity definition, it would be appropriate to readopt each measure relying on this definition that was remanded in Prometheus II. These measures include: (1) Revision of Rules Regarding Construction Permit Deadlines (The Commission

proposes that this exception to its strict broadcast station construction policy, if reinstated by the Commission, would be limited to one 18-month extension based on one assignment to an eligible entity. Moreover, to ensure realization of its policy goals, in reviewing the permit sale to the eligible entity, the Commission proposes to assess the bona fides of both the arms-length structure of the transaction and the assignee's status as an eligible entity.); (2) Modification of Attribution Rule (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. The Commission proposes to reinstate this application of the modified EDP standard.); (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.

199. The Commission proposes 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. The Commission proposes to 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. The Commission previously applied the SBA standards to define eligible entities, and the Commission seeks comment on whether those standards should apply if it re-adopts the eligible entity standard. The Commission requests comment on whether there is any reason to use different eligible entity definitions for commercial and noncommercial entities. For all SBA programs, a radio or television station with no more than $35.5

million dollars in annual revenue currently is considered a small business. To determine qualification as a small business, the SBA considers the revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. The Commission proposes to do the same. In addition, in order to ensure that ultimate control rests in an eligible entity that satisfies the revenue criteria, the Commission proposes that the entity must satisfy one of several control tests. Specifically, 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.

200. The Commission seeks comment on the costs and benefits of the proposal to adopt a revenue-based eligible entity definition and the measures relying on this definition as proposed herein. To the greatest extent possible, commenters should quantify the expected costs or benefits of the proposals and provide detailed support for any actual or estimated values provided, including the source of such data and/or the method used to calculate reported values.

b. Remand Review of a Race- or Gender-Conscious Eligible Entity Standard

(i) Background

201. The Third Circuit in Prometheus II instructed the Commission to address

on remand the other eligible entity definitions it had considered when the revenue-based definition was adopted. Specifically, in the Diversity Third FNPRM, the Commission sought comment on the possibility of replacing the revenue-based standard with a standard based on the SBA's definition of SDBs used for purposes of its Business Development Program. Pursuant to the SBA's program, persons of certain racial or ethnic backgrounds are presumed to be disadvantaged; all other individuals may qualify for the program if they can show by a preponderance of the evidence that they are disadvantaged. In response to the court's directive, the Commission sought comment in the NPRM on the benefits and risks of adopting an SDB standard to support the various ownership diversity measures remanded by the court. The Commission also solicited input on other proposals that were included in the Diversity Third FNPRM as well as any other race- or gender-conscious standards the Commission should consider.

202. Under the SBA's 8(a) Business Development Program, certain individuals are presumed to be socially disadvantaged: African-Americans, Hispanic Americans, Asian Pacific Americans, Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians), and Subcontinent Asian Americans. Additionally, the SBA permits the applicant to show through a "preponderance of the evidence" social disadvantage due to gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes.

203. To the extent an SDB standard includes race-specific criteria, it would be subject to strict constitutional scrutiny. As explained in the NPRM, rules and policies that operate based on race, ethnic origin, or gender are subject to an exacting constitutional analysis. All race-based classifications imposed by the government "'must

be analyzed by a reviewing court under strict scrutiny' . . . [and] are constitutional only if they are narrowly tailored to further compelling governmental interests." 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. Gender-based classifications are evaluated under an intermediate standard of review and will be upheld as constitutional if the government's actions are deemed substantially related to the achievement of an important objective. In the NPRM, commenters were asked to explain in detail, based on relevant case law, whether and how the Commission could overcome the application of strict or intermediate constitutional scrutiny to any race- or gender-based standard. The Commission sought data and explanation for whether and how proposals could be supported and applied in a consistent and rational manner. In particular, the Commission solicited input on whether the Commission could demonstrate a compelling governmental interest in fostering viewpoint diversity, redressing past discrimination, or some other interest and, if so, whether policies based on a race-conscious standard would be a narrowly tailored means of addressing any such interest.

204. The Commission acknowledged in the NPRM that its ownership data and other empirical evidence in the record at that time likely were insufficient to support the adoption of a race- or gender-based standard. In recognition of the fact that such data are not by themselves sufficient to satisfy the constitutional hurdle that has been established for race- and gender-based measures, the Commission asked in the NPRM that commenters supply any relevant evidence, including peer-reviewed studies, which could assist in supporting a race-conscious approach. With respect to any proposals for a

gender-conscious standard, commenters similarly were asked to address the relevant constitutional standards and to provide any available empirical support.

205. A number of commenters supported the adoption of a race- or gender-conscious standard as a means to increase minority and female ownership. Based on the Third Circuit's instructions in Prometheus II, commenters asserted that the Commission must fully consider the feasibility of adopting an SDB standard in this proceeding and that the Commission is not permitted to defer consideration of race- or gender-based action until a future proceeding. 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. 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.

206. Several commenters further asserted 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. NABOB maintained that in this proceeding the Commission "must establish policies, similar to those it had prior to the Adarand decision, which were designed to specifically increase minority ownership of broadcast stations." NABOB also stated that "[f]ailure to adopt a policy to promote minority ownership in this proceeding is contrary to the mandate of the Third Circuit in the Prometheus II case." NABOB argued that "the Commission is obligated by the Prometheus II decision to

continue this proceeding until it has completed the studies required and adopted a policy to promote minority ownership." In addition, NABOB asserted that if the Commission does not take these actions in the instant proceeding, then it must, at a minimum, provide a specific timetable for developing a policy to promote minority ownership.

207. Advocates of a race- or gender-conscious standard cited the Supreme Court's rulings in Grutter v. Bollinger and Metro Broadcasting v. FCC as precedent for establishing a compelling interest in facilitating broadcast ownership diversity

208. Some commenters suggested that the Commission currently lacks evidence sufficient to implement a race- or gender-targeted standard. In light of this perceived deficiency, DCS suggested that the Commission promptly implement an ODP standard, which it described as race- and gender-neutral, while the Commission develops the record necessary to adopt a constitutionally sustainable race-conscious definition. Similarly, UCC et al. argued that "there are problems with the Commission's data collection and analysis that need to be fixed" prior to the adoption of race- or gender-conscious measures. UCC et al. further argued that, because "the Commission will have to show that it tried race-neutral solutions and found them insufficient" in order to "defend against a constitutional challenge to any future policy that uses race as a factor," the Commission should move forward in this proceeding to "evaluat[e] whether its current race- and gender-neutral policies designed to promote opportunities for minorities and women are in fact working as intended." NHMC et al. opined that "any consideration of [SDBs] is premature" until the Commission resolves the existing problems with its data and analysis and that any SDB proposal "would lack requisite

supporting data and analysis necessary to withstand scrutiny from the court based on the current record."

(ii) Discussion

209. The Commission tentatively concludes that it does not have sufficient evidence at this time to satisfy the constitutional standards necessary to adopt race- or gender-conscious measures. In evaluating the possibility of adopting an SDB standard, or any other race-conscious standard, the first question the Commission must consider is whether the standard could be justified by a "compelling governmental interest." Assuming that such an interest could be established, the Commission then would have to be able to demonstrate that the application of the race-conscious standard to specific measures or programs would be "narrowly tailored" to further that interest. The Commission discusses below its preliminary approach to this analysis. While the Commission tentatively finds that a reviewing court could deem the Commission's interest in promoting a diversity of viewpoints compelling, the Commission believes that it does not have sufficient evidence at this time to demonstrate that adoption of race-conscious measures would be narrowly tailored to further that interest. The Commission also discusses the constitutional analysis that would apply if it sought to adopt gender-conscious measures based on that interest. Further, the Commission tentatively finds that it does not have sufficient evidence to establish a compelling interest in remedying past discrimination. The Commission seeks comment on both its preliminary analysis and its tentative findings.

210. As a threshold matter, the Commission rejects commenters' arguments that the Commission is required to adopt an SDB standard or another race-conscious

eligible entity standard in this proceeding in light of the court's instructions in Prometheus II. The Commission also disagrees with arguments that the Commission is not permitted to conclude this proceeding until it has completed any and all studies or analyses that may enable it to take such action in the future consistent with current standards of constitutional law. The Commission intends to follow the Third Circuit's direction that the Commission consider adopting an SDB definition before completion of this proceeding and evaluate the feasibility of adopting a race-conscious eligibility standard based on an extensive analysis of the available evidence. The Commission does not believe that the Third Circuit intended to prejudge the outcome of the Commission's analysis of the evidence or the feasibility of implementing a race-conscious standard that would be consistent both with applicable legal standards and the Commission's practices and procedures.

(i) Constitutional Analysis of Commission Interest in Enhancing Viewpoint Diversity

211. Compelling Governmental Interest Analysis. In the NPRM, the Commission reaffirmed its longstanding commitment to advancing a diversity of viewpoints. The Commission noted that it "has relied on its media ownership rules to ensure that diverse viewpoints and perspectives are available to the American people in the content they receive over the broadcast airwaves," and stated that "media ownership limits are necessary to preserve and promote viewpoint diversity." In this regard, the Commission further explained that it has "regulated media ownership as a means of enhancing viewpoint diversity on the premise that diffuse ownership among media outlets promotes the presentation of a larger number of viewpoints in broadcast content" than otherwise would be available. The NPRM also noted that, in addition to viewpoint

diversity, the Commission has considered the impact of its rules on program, outlet, source, and minority and female ownership diversity.

212. As the Third Circuit observed in Prometheus II, the Supreme Court long has recognized the Commission's interest in broadcast diversity. In Metro Broadcasting, the Supreme 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." In reaching this determination, 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." That opinion was issued prior to Adarand, however, which overruled the application of intermediate scrutiny in Metro Broadcasting. Notably, Adarand did not disturb other aspects of Metro Broadcasting, including the recognition of an important governmental interest in broadcast diversity. Nonetheless, in the aftermath of Adarand, it is clear that the Commission would have to establish that its interest in promoting diversity is not only important, but compelling, in order to adopt a race-conscious standard. In addition, the Supreme Court held in 2003 in Grutter v. Bollinger that diversity is a compelling governmental interest in the realm of higher education. That finding was based on the Court's determination that "universities occupy a special niche in our constitutional tradition" and on substantial evidence, including numerous expert studies and reports, regarding the educational benefits that flow from student body diversity.

213. The Commission believes that its interest in promoting a diversity of viewpoints could be deemed sufficiently compelling to survive strict scrutiny analysis. In

a different context, the Supreme Court has recognized viewpoint diversity as an interest "of the highest order." In addition, the Supreme Court in Metro Broadcasting recognized similarities between broadcast diversity and the interest in promoting student body diversity the Court later recognized as compelling in Grutter: "Just as a 'diverse student body' contributing to a '"robust exchange of ideas"' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." Other similarities between Metro Broadcasting and Grutter further strengthen the conclusion that viewpoint diversity may qualify as a compelling interest. In both cases, the Supreme Court recognized that there were important First Amendment interests at stake and acknowledged that diversity was central to the relevant institution's mission. In addition, just as the Grutter Court acknowledged the longstanding recognition of education's "fundamental role" in American society, the Court long has recognized that broadcasting is "an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."

214. The Commission notes, however, that some decisions applying strict scrutiny have cast doubt on the likelihood that courts would accept the Commission's interest in viewpoint diversity as the basis for race-conscious action. In 2007, the Supreme Court declined to recognize a compelling interest in diversity outside of "the context of higher education." Moreover, the D.C. Circuit held in Lutheran Church-Missouri Synod v. FCC that broadcast diversity does not rise to the level of a compelling governmental interest. The D.C. Circuit reasoned that "even the majority" of the Supreme Court "who thought the government's interest 'important' [in Metro

Broadcasting] must have concluded implicitly that it was not 'compelling'; otherwise, it is unlikely that the majority would have adopted a wholly new equal protection standard to decide the case as it did." That reading is not compelled, however. The Metro Broadcasting Court actually stated that "enhancing broadcast diversity is, at the very least, an important governmental objective," thereby leaving open the possibility that broadcast diversity might be a compelling interest.

215. The Commission seeks comment on this preliminary analysis, including any other factors or relevant precedent that it should consider. The Commission also seeks comment on other relevant interests that a reviewing court might recognize as compelling and the analysis of such interests under applicable judicial precedent.

216. Narrow Tailoring Analysis. Even assuming that the Commission were able to establish a compelling interest in diversity, it still would be required to demonstrate that the adoption of a race-conscious SDB standard, as well as the programs to which it would apply, would be "narrowly tailored" to further that interest. As the Supreme Court has stated, "[e]ven in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." The Commission tentatively concludes that the evidence in the record at this time does not satisfy this requirement for two reasons. First, the Commission tentatively finds that it does not demonstrate that the connection between minority ownership and viewpoint diversity is direct and substantial enough to satisfy strict scrutiny. Second, it believes that the record does not reveal a feasible means of carrying

out the type of individualized consideration the Supreme Court has held is required for a diversity-based program to pass constitutional muster.

217. The Commission disagrees with commenters who argued that a nexus between minority ownership and viewpoint diversity sufficient to satisfy strict scrutiny already has been established and accepted by the Supreme Court in Metro Broadcasting. The Commission believes that empirical evidence of a stronger nexus between minority ownership and broadcast diversity than was demonstrated in Metro Broadcasting would be required for a race-conscious SDB standard to withstand strict scrutiny. In finding that the Commission's minority ownership policies were substantially related to achieving broadcast diversity, the Supreme Court in Metro Broadcasting deferred to the judgment of Congress and the Commission, as corroborated by various social science studies. As stated above, however, the Supreme Court since has repudiated Metro Broadcasting's application of intermediate scrutiny, and under strict scrutiny, the Commission's judgment regarding the relationship between minority ownership and broadcast diversity is unlikely to receive the same deference. In her dissent in Metro Broadcasting, Justice O'Connor argued that the Court should have applied strict scrutiny and that, under such scrutiny, the available evidence fell far short of the requisite direct and substantial connection, establishing at best "the existence of some rational nexus." Subsequent developments in constitutional jurisprudence further suggest that empirical evidence of a stronger nexus between broadcast diversity and minority ownership than was shown in Metro Broadcasting would be required to withstand strict scrutiny.

218. As explained below, there is a significant amount of evidence in this proceeding regarding the role and status of minorities in the broadcast industry.

Although this evidence contributes valuable information to the record in this proceeding and informs the Commission's broader review of the broadcast ownership rules, it tentatively concludes that the evidence in the record would not satisfy strict scrutiny. Commenters are invited to address the Commission's tentative conclusions and evaluations of this evidence. In addition, the Commission invites commenters to provide any additional evidence that may be relevant to this analysis. With regard to any such evidence, commenters should explain whether and, if so, how the evidence would bolster the Commission's ability to satisfy the requisite narrow tailoring standard.

219. The two recent studies in the record that directly address the impact of minority ownership on viewpoint diversity are Media Ownership Studies 8A and 8B. Media Ownership Study 8A focuses on the relationship between local media ownership and viewpoint diversity in local television news. The authors calculate a measure of viewpoint diversity based on program audience data and then analyze the relationship of this measure to certain aspects of the Commission's broadcast ownership rules, finding either that the relationship is not statistically distinguishable from zero or very small in absolute magnitude. In particular, this study finds that the relationship between minority ownership and viewpoint diversity is not statistically distinguishable from zero. As a result, this study does not appear to provide evidence that the Commission could rely upon to justify race-conscious action.

220. Media Ownership Study 8B examines viewpoint diversity in local television news through an analysis of television news transcripts. In general, the authors find very little evidence of a robust relationship between available measures of market structure and viewpoint diversity, perhaps due to the fact that the measures of market

structure are, in the words of the authors, "rather blunt." With respect to minority ownership in particular, the authors find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity. Notably, the study does find a positive relationship between minority ownership and coverage of minority politicians, which suggests that minority-owned stations may focus on certain types of minority-oriented content more than other stations and which could be viewed as a measure of one form of viewpoint diversity. Despite this finding, the Commission tentatively concludes that Media Ownership Study 8B does not provide sufficient evidence to satisfy the requirements of strict scrutiny. First, the effects of minority ownership revealed in the study are quite limited overall, and minority ownership does not have an effect on most variables and disparity measures analyzed. Second, in the vast majority of cases the authors study, the relationship between minority ownership and viewpoint diversity is not statistically different from zero.

221. Other studies in the record examine the relationship between minority ownership of broadcast outlets and other aspects of the Commission's diversity goal, such as programming or format diversity. The Commission does not believe that evidence regarding program or other forms of diversity is as relevant as evidence regarding viewpoint diversity for the purpose of establishing narrow tailoring to a compelling interest. The Commission tentatively concludes that, of any diversity-related interest that the Commission has authority to advance, viewpoint diversity currently is most likely to be accepted as a compelling governmental interest under strict scrutiny. Although the Metro Broadcasting Court did not define broadcast diversity with this level of precision, a court applying strict scrutiny is likely to require such precision, and the

Supreme Court's prior recognition of broadcast diversity as an interest "of the highest order" seems to pertain to viewpoint diversity. Media Ownership Study 7 assesses the relationship between ownership structure and the provision of radio programming, as measured by program formats, to minority (African-American and Hispanic) audiences between 2005 and 2009. The study finds that minority audiences have different format tastes than white audiences and that minority-owned stations disproportionately cater to these tastes. In addition, the regression analyses included in Media Ownership Study 7 show that, on a market-wide basis, the presence of minority-owned stations increases the amount of minority-targeted programming and that the availability of minority-targeted formats attracts more minorities to listening. The study also concludes that most stations with minority-targeted formats are not minority-owned and that group ownership, including particularly ownership by non-minority owners, within a local market allows for greater format diversification. Because this study is focused on format diversity and shows that non-minority stations provide a significant amount of minority-targeted programming, the Commission tentatively finds that it would have limited value as a justification for adopting race-conscious measures.

222. In addition to the Media Ownership Studies commissioned for this proceeding, commenters have submitted a number of studies into the record that analyze issues related to minority broadcast ownership. The Commission discusses those studies that appear to relate most closely to the impact of minority ownership on its diversity goals. Commenters are invited to supplement this discussion with additional views of the relevance of these studies and to submit additional evidence that may be pertinent to the Commission's analysis. For example, "Media Ownership Matters: Localism, the Ethnic

Minority News Audience and Community Participation," a 2006 study commissioned by the Benton Foundation, finds that there is a "nexus" between minority ownership and service to underserved communities. This study used ethnographic and survey research to discern patterns in news consumption among minorities in the Washington, D.C., metropolitan area. It finds that of the 18 percent of minority listeners who reported that they prefer to obtain news programming from radio, a majority of those listeners preferred minority-owned stations. While this finding is informative, the Commission tentatively finds that the evidentiary value of this study in the context of a strict scrutiny analysis would be limited because it covered only three neighborhoods in one metropolitan area. In addition, the study does not provide any statistical analysis of or adjust for factors aside from minority ownership that may explain this result. Additionally, this finding represents only a small percentage of the individuals the authors surveyed (i.e., a majority of 18 percent of the listeners surveyed). Furthermore, the study does not analyze the news content on minority-owned radio stations or provide analysis comparing such content to the news content on other stations.

223. In sum, the Commission believes that the body of evidence contained in the recent Media Ownership Studies and the studies submitted in the record by commenters do 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 eligibility entity definition. Nevertheless, the Commission believes that the studies strengthen the evidence of a link between broadcast diversity and minority ownership. They also begin to answer questions raised by Justice O'Connor's Metro Broadcasting dissent, such as how to define minority programming and whether such programming is

underrepresented, that the Supreme Court found it unnecessary to address under intermediate scrutiny. In particular, existing studies show that minority groups have distinct preferences, and that expanding minority ownership increases the amount of programming targeted to such preferences. As stated above, however, the evidence largely concerns program 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. Many of the studies also support only limited conclusions and reflect a need for further analysis. Given the Commission's tentative assessments of these studies and other data, it cannot conclude at this time that the evidence demonstrates a sufficient nexus between minority ownership of broadcast stations and viewpoint diversity to withstand strict scrutiny.

224. In response to NABOB's request that the Commission provide a specific timetable for completing future studies necessary to adopt a policy to promote minority ownership, the Commission has identified in detail in this Further Notice of Proposed Rulemaking the studies in the current record that it have found establish useful information regarding the relationship between viewpoint diversity and minority and female ownership of broadcast stations. In addition, the Commission has outlined ongoing and additional efforts to achieve important further analysis of the status and impact of minority ownership, including, but not limited to, the studies being conducted by OCBO and the Hispanic television viewing study discussed above. In addition, as indicated in the NPRM, Form 323 ownership data will continue to be collected and analyzed and considered in connection with future media ownership reviews. The process for doing so will continue to be refined and improved. The Commission cannot

firmly establish herein a timetable for release of future biennial ownership data or the completion of studies, examinations, or assessments. Commenters may submit additional studies that the Commission should consider in its analysis.

225. In addition, the Commission tentatively finds that the record in this proceeding does not reveal a feasible means of carrying out the type of individualized consideration the Supreme Court has held is required to pass constitutional muster under strict scrutiny. 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 impact on third parties, and temporal limits. 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. The manner in which the Commission allocates broadcast licenses is different in many important respects from university admissions, and the Commission believes that implementing a program for awarding or affording preferences related to broadcast licenses based on the "individualized review" required in other contexts would pose a number of administrative and practical challenges for the Commission. The Supreme Court has held, however, that "[t]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." The Commission seeks comment on its tentative conclusion and potential ways in which an individualized review process feasibly,

effectively, and efficiently could be incorporated into any race-conscious measures adopted by the Commission.

226. Commenters generally did not suggest criteria, other than race and ethnic origin, that could be considered in an individualized, holistic evaluation system like that approved in Grutter. DCS recommended that the Commission replace its revenue-based eligible entity definition with an ODP standard as a race-neutral means of advancing ownership diversity. The Commission notes that it is not entirely clear whether the proposed ODP standard would be subject to heightened constitutional scrutiny. Moreover, the Commission believes that it does not have a sufficient record at present on a number of issues that would need to be resolved prior to the implementation of an ODP standard. Among other issues, no commenter provided input on (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. Even if the Commission could develop an adequate record on these issues, it is concerned that it may lack the resources to conduct such individualized reviews. Moreover, the Commission would have to walk a very fine line in order to fully evaluate the potential diversity contributions of individual applicants without running afoul of First Amendment values. The Commission is concerned that the type of individualized

consideration that would be required under an ODP standard could prove to be administratively inefficient, unduly resource-intensive, and inconsistent with First Amendment values. The Commission seeks comment on these issues and its foregoing analysis regarding the feasibility of adopting an ODP standard.

227. Analysis of Gender-Based Diversity Measures. The Supreme Court has held that gender-based classifications must satisfy intermediate scrutiny and, as such, must be substantially related to the achievement of an important objective. As noted above, the Supreme Court found in Metro Broadcasting, based on the application of intermediate constitutional scrutiny, that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective." Applying intermediate scrutiny, the D.C. Circuit overturned the Commission's former gender preference policy in Lamprecht v. FCC. Recognizing that Metro Broadcasting established broadcast diversity as an important government objective, the D.C. Circuit focused on its relationship to female ownership. The court stated that the existence of such a relationship rests on several assumptions, but chose to address only one: that women who own broadcast stations are more likely than white men to broadcast "women's programming." The court concluded that the only available study failed to establish a statistically meaningful link between ownership by women and programming of any particular kind. At this time, the Commission cannot conclude that the record evidence establishes a relationship between the Commission's interest in viewpoint diversity and the ownership of broadcast stations by women that would satisfy intermediate scrutiny. While the Commission acknowledges that the data show that women-owned stations are not represented in proportion to the presence of women in the overall population, the Commission does not

believe that the evidence available at this time reveals 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. 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. This study does not appear to demonstrate 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. In any event, the Commission tentatively concludes that this study is too limited in scope to establish a substantial relationship between female ownership and viewpoint diversity. 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. Because these studies do not indicate that increased female ownership will increase viewpoint diversity, the Commission believes that they do not provide a rationale under the foregoing analysis for gender-based diversity measures. However, the Commission seeks comment on this preliminary determination as well as any relevant evidence regarding this issue.

(ii) Constitutional Analysis of the Commission's Interest in Remedying Past Discrimination

228. As an alternative to establishing a compelling interest in viewpoint

diversity, race- or gender-based measures are permissible as a remedy to past or present discrimination. To justify race-based remedial measures, the Commission would have to establish a "strong basis in evidence" of discrimination, *i.e.*, evidence "approaching a prima facie case of a constitutional or statutory violation." To substantiate this approach, the Commission would have to identify, with specificity, evidence of public discrimination within the broadcast industry or private discrimination in which the government acted as a "passive participant." Less evidence is required for gender-based measures, although an "exceedingly persuasive justification" is still necessary. The Commission never has asserted a remedial interest in race- or gender-based broadcast regulation, and courts primarily have considered such measures in the context of public contracting decisions. Most commenters in this proceeding have not focused on establishing a case for remedial measures, although DCS argued that "remedying the present effects of past discrimination provides a compelling interest." While some evidence supports a finding of discrimination in the broadcast industry, the Commission tentatively concludes that it is not of sufficient weight to satisfy constitutional standards. The Commission seeks comment on the preliminary analysis described below, including any other relevant precedent or data it should consider.

229. As the Commission concedes in this Further Notice of Proposed Rulemaking, the proportions of minorities and females that own broadcast stations are lower than their proportions in the general population. 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." But "[w]hen 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." Thus, the raw numbers reflecting existing levels of minority or female ownership by themselves are not sufficient to overcome the constitutional hurdle that has been established for race- and gender-based remedial measures. In Croson, the Supreme Court warns against the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." There is no evidence in the current 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. Commenters are asked to address whether evidence of such a disparity is ascertainable, particularly given the low number of minority and women-owned firms. Based on relevant precedent, the Commission tentatively concludes that it cannot demonstrate a compelling interest in remedying discrimination in the Commission's licensing process in the absence of such evidence. The Commission seeks comment on this tentative conclusion.

230. Anecdotal or historical evidence of discrimination also can establish that a strong basis in evidence exists for remedial measures, although such evidence generally is helpful only when it reinforces statistical evidence. DCS argued that a 2000 study comprising more than 100 interviews demonstrates that broadcast licensing procedures present challenges to minority and female access to spectrum and licenses. In the Historical Study, minorities and women repeatedly report encountering discrimination in their efforts to obtain capital to finance their broadcast and wireless businesses, secure advertising on their stations, gain exposure and experience to qualify for ownership

through employment opportunities, and learn of ownership opportunities. The Historical Study reports no evidence, however, of actual discrimination by the Commission.

231. DCS also argued that another 2000 study establishes that barriers inhibiting minority and female access to capital amount to industry discrimination in which the government has passively participated. The Capital Markets Study found that both minority- and women-owned businesses were significantly less likely to obtain wireless licenses in auctions than were non-minority businesses and that among current broadcast licensees, minority (but not female) applications for debt financing were significantly less likely to be approved than non-minority applications, and minority applicants paid higher interest rates. The study also contains a literature survey of empirical studies using data over two decades, which is not specific to the broadcast industry, finding or suggesting that racial discrimination exists in U.S. capital markets in both denial rates and interest rates. However, the study indicates that its results are not fully conclusive and emphasizes the need for further analysis to control for potentially important variables. Also, the focus on wireless auctions and other non-broadcast industry information makes it less probative of discrimination in the broadcast licensing process. Further, the study does not address the secondary market for licenses.

232. While the evidence offered is informative on these subjects, the Commission preliminarily finds that it is insufficient to satisfy the constitutional requirements to support a race- or gender-based remedial action. In this regard, comparison is instructive to Adarand v. Slater, a leading public contracting case in which the Tenth Circuit found the requisite strong basis in evidence. The court found "significant" evidence of public discrimination in that case: 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 be "significant," if not overwhelming, evidence of discrimination. Nevertheless, the court relied principally on evidence of private discrimination. The evidence was similar in nature to that discussed above — denial of access to capital, as well as the existence of racially exclusionary "old boy" networks and union discrimination that prevented access to the skills and experience needed to form a business — but 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. Here, in contrast, the only statistical evidence pertains to discriminatory access to capital. The rest of the evidence available at this time is anecdotal and, therefore, of more limited value. Thus, it tentatively appears that the existing evidence of past discrimination in this case is not nearly as substantial as that accepted by courts in other contexts.

c. Additional Proposals Related to Minority and Female Ownership

233. As explained above, the Commission tentatively concludes that, if it reinstate the revenue-based eligible entity standard, it also would be appropriate to readopt each of the regulatory policies the Third Circuit remanded in Prometheus II that rely on this standard. Several commenters asked the Commission to consider additional measures that they believed would foster ownership diversity. For example, DCS submitted 47 proposals that it claimed would "address the barriers to diverse participation in media ownership and . . . increase minority and women participation in broadcasting."

Although DCS advocated adoption of all of these proposed measures, it focused on four that it believed the Commission "should immediately begin implementing." These recommendations 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. In addition, AWM asked the Commission to consider several actions to address the "historic underrepresentation of women" in ownership of broadcast stations and managerial positions in the broadcast industry.

234. As discussed below, the Commission has implemented some of these recommendations. Because the Commission believes that the remainder of these proposals would raise public interest concerns, may not provide meaningful assistance to the intended beneficiaries, or are outside of the proper scope of this broadcast ownership proceeding, the Commission tentatively concludes that it should not adopt them here. The Commission seeks comment on this tentative conclusion.

235. Foreign Ownership Restrictions. DCS recommended that the Commission relax its policies under Section 310(b)(4) of the Communications Act, which restricts foreign ownership and voting interests in entities that control Commission licensees. DCS claimed that this action would provide "U.S. broadcasters, particularly minorities, who have difficulty access[ing] capital" with "access to new sources of capital that are not available to them under the current regulatory paradigm." Additionally, in a separate proceeding a broad coalition of broadcasters, public interest groups, and media brokers (Coalition for Broadcast Investment or CBI) sought clarification of the Commission's

policies and procedures in reviewing applications or transactions that propose foreign broadcast ownership that would exceed the 25 percent benchmark contained in Section 310(b)(4). The Media Bureau issued a public notice inviting comment on the CBI Request. The majority of comments filed in response to the public notice supported CBI's position.

236. In November 2013, the Commission issued a Declaratory Ruling (78 FR 75563, Dec. 12, 2013, FCC 13-150, rel. Nov. 14, 2013) clarifying that the plain language of Section 310(b)(4) provides the Commission the authority to review applications for approval of foreign investment in the controlling U.S. parent of a broadcast licensee above the 25 percent benchmark on a case-by-case basis. The Commission stated that such applications may be granted unless it finds that a denial will serve the public interest. In issuing the Declaratory Ruling, the Commission observed the range of changes in the media landscape and marketplace since enactment of the foreign ownership restriction and noted that limited access to capital is a concern in the broadcast industry, particularly for small entities, including entities owned by minorities and women. The Commission 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."

237. Tax Certificate Legislation. DCS also urged the Commission to "continue to support and encourage Congress to reinstate and expand" the former tax certificate policy, which permitted firms to defer capital gains taxation on the sale of media properties to minorities. It also suggested that an updated tax certificate policy could

address previous congressional concerns if it were race-neutral, encompassed both media and telecommunications entities, and included limits on the size of eligible transactions and programs. The Commission agrees that tax deferral legislation could prove an effective means to enhance broadcast ownership diversity. The Commission's most recent Section 257 Report to Congress addresses the benefits of tax certificate legislation to ownership diversity and includes a recommendation that Congress pass such legislation.

238. Incubation. DCS requested that the Commission provide waivers of the local radio ownership rule to broadcasters that finance or incubate an SDB or a "valid eligible entity." Specifically, DCS proposed that an entity that engages in a specified list of "qualifying incubating activities" be granted, under certain conditions, a waiver of the local radio ownership cap "by one station per incubating activity."

239. The Commission shares concerns that proposals like DCS's incubation proposal that would allow blanket waivers of the local radio ownership rule could create a substantial loophole to the ownership caps without sufficient offsetting benefits. The Commission's local radio rules have been carefully calibrated to protect competition and new entry. By allowing broadcasters to exceed these caps, DCS's proposal could result in more local radio consolidation than is presently permitted under the Commission's rules. Moreover, it is unclear based on the record in this proceeding what kind of entities should be eligible to benefit from incubation. Bonneville/Scranton suggested that the guidelines for determining entities that would be eligible to be incubated could be based on the diversity channel set-aside requirement adopted by the Commission as a condition to the approval of the merger of XM and Sirius. In that decision, the Commission

ordered the combined new satellite radio entity to set aside channels to encourage new market entry, enhance viewpoint diversity, and promote the delivery of programming content to underserved audiences. Bonneville/Scranton suggested that a voluntary broadcast incubation program modeled on this condition could permit a currently licensed broadcaster to select a "New Voice" to incubate based on certain minimal Commission requirements and general selection considerations, such as small business size and independence from the broadcaster. NABOB cautioned, however, that "[a]ny policies the Commission adopts which do not have the effect of making it desirable for industry insiders to seek out minorities for broadcast ownership opportunities will be ineffective in increasing minority ownership." The Commission is concerned that implementation of such proposals would pose substantial legal, administrative, and practical challenges. To the extent that the program were limited to SDBs, it would pose the Equal Protection concerns described in detail above. If it were instead extended in the manner suggested by Bonneville/Scranton, it would be difficult for the Commission to administer as a broad-based program and could potentially open a wide loophole in the ownership rules, while possibly having little or no significant effect on minority and female ownership.

240. In addition, the Commission is concerned that it would not be feasible for it to monitor adequately the activities that would qualify an entity for an incubation waiver. As proposed by DCS, qualifying activities would encompass a broad array of arrangements, including, among others, underwriting or financing the operations of eligible entities, providing loans or other financial assistance to eligible entities, and local marketing arrangements between independent programmers and commercial

broadcasters. Given the challenges of monitoring over time the types of complex financing and other arrangements suggested under DCS's incubation proposal, there is a substantial risk that the Commission would not be able to ensure that such arrangements would be, or prospectively would remain, beneficial to eligible entities or other intended beneficiaries. Accordingly, the Commission tentatively declines to adopt this proposal in this proceeding.

241. Migration of VHF Channels 5 and 6. In addition, DCS recommended that the Commission migrate most AM service to VHF channels 5 and 6. Aside from DCS, it does not appear that any party to this proceeding has supported this proposal. The Commission tentatively concludes that this proposal, which would involve extensive changes to the Commission's current licensing rules and spectrum policies, exceeds the proper scope of this broadcast ownership proceeding. Moreover, the Commission notes that Congress has directed the Commission to conduct an incentive auction of television broadcast spectrum and to reassign the remaining broadcast channels in order to make more spectrum available for wireless use. Migrating AM services to VHF channels 5 and 6 has the potential to interfere with the Commission's implementation of Congress's directive.

242. Additional DCS Proposals. Many of DCS's remaining proposals recommend changes to a wide range of Commission licensing, service, and engineering rules and policies. Several of these recommendations propose modifications to the AM broadcast service. The Commission recently adopted a notice of proposed rulemaking which seeks to revitalize the AM band by identifying ways to enhance AM broadcast quality and proposing technical rules that would enable AM stations to improve their

service. The AM Revitalization NPRM (78 FR 69629, Nov. 20, 2013, FCC 13-139, rel. Oct. 29, 2013) solicits comment on some of the technical issues DCS has raised in this proceeding, including modification of: (1) daytime community coverage standard for existing AM stations; (2) nighttime community coverage standards for existing AM stations; and (3) AM antenna efficiency standards. The Commission anticipates that the AM Revitalization NPRM will lead to an examination of important issues regarding the viability of AM broadcast service, and thus, address many of the concerns of minority broadcasters regarding the technical aspects of their licensed services.

243. Some of DCS's proposals extend into areas that are beyond the Commission's authority, including proposals that ultimately would require legislative action or action by other federal entities aside from the Commission in order to create changes in rules or policies. Other proposals involve cable operators and other non-broadcast services that are outside the scope of the quadrennial review proceedings. Although these proposals are accompanied by detailed and thoughtful analysis, and some of them may warrant further consideration, the Commission believes that they are outside the scope of this proceeding. Thus, the Commission does not anticipate taking further action within this or successive quadrennial review dockets on these proposals because they extend beyond its statutory mandate under Section 202(h).

244. AWM Proposals. AWM's proposals include (1) preparing a primer on investment in broadcast ownership for smaller and regional lenders willing to provide loans to new broadcast entrants; (2) preparing a primer for new entrants that provides guidance on how to find financing; (3) establishing a link on the Commission's website to provide information on stations that may be available for sale to small businesses; and

(4) allowing sellers to hold a reversionary interest in a Commission license in certain circumstances. Although several parties broadly stated that they support some of these proposals, there is little record on these subjects in the current proceeding. While the Commission agrees that primers on investment and financing could be useful to new entrants, the Commission notes that OCBO already engages in activities that provide similar resources to broadcasters and potential investors, including the regularly scheduled Capitalization Strategies Workshops noted above and in the NPRM. The Commission also believes 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.

245. In response to AWM's proposal that the Commission create a public listing of stations that may be available for sale to small businesses, the Commission note that the Commission currently does not have at its disposal the information that would be necessary to create such a resource. In addition, the Commission believes that many licensees would object to any requirement that would obligate them to make publicly available information regarding their plans to sell specific stations. Finally, the Commission tentatively finds that AWM's proposal to allow sellers to hold a reversionary interest in broadcast licensees as a means of financing sales of broadcast stations to women and minorities does not address the Commission's historical concerns about reversionary interests and is insufficiently developed to support departure from the Commission's longstanding policy against the holding of such interests. At this time, therefore, the Commission does not believe there is sufficient justification to adopt these proposed measures.

E. Disclosure of Shared Service Agreements

1. Introduction

246. In this Further Notice of Proposed Rulemaking, the Commission considers whether to require broadcast stations to disclose agreements for sharing services and/or resources with other broadcast stations that are not commonly owned, as discussed in greater detail below, to the extent that such agreements are not already separately defined and required to be filed and/or disclosed under the Commission's rules (e.g., LMAs and JSAs). Commenters in a number of proceedings have expressed concern about the impact on competition, localism, and diversity of agreements whereby one station shares studio space, operational support, staff, programming, and/or other services or support with a separately owned station. Often these sharing agreements are executed in conjunction with an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee. Because the Commission does not currently require the filing or disclosure of all such agreements, the Commission and the public lack information about the content or breadth of the agreements or the frequency of their use, inhibiting a thorough analysis of the impact of these arrangements on the Commission's rules and policy goals. Accordingly, in order to enable the Commission and the public to better understand the terms, operation, and prevalence of these agreements, the Commission proposes to define a class of sharing agreements that could impact its rules and policy goals and to require the disclosure of those agreements to enable a comprehensive assessment of their impact. Specifically, in this Further Notice of Proposed Rulemaking the Commission proposes to define a category of sharing agreements designated herein as Shared Service Agreements (SSAs), it proposes to

require the disclosure of SSAs by commercial television stations, and it seeks comment on the appropriate method for achieving such disclosure. While considering whether to require the filing of SSAs and how the term SSA should be defined for this purpose in order to obtain information that will inform the Commission's decision about what, if any, general rules might be appropriate with respect to such agreements, the Commission will, of course, continue to consider such joint agreements, as relevant and appropriate, in deciding whether particular individual transactions serve the public interest. Once disclosure is achieved, the Commission will be able to study these agreements and to determine what further regulatory action, if any, it should take with respect to them.

2. Background

247. In the Enhanced Disclosure FNPRM (76 FR 71267, Nov. 17, 2011, FCC 11-162, rel. Oct. 27, 2011), the Commission sought comment on whether to require the disclosure of sharing agreements that were not already defined and required to be disclosed under the Commission's rules (as are, for example, LMAs and JSAs), and whether to require stations to include such agreements in their online public files. Commercial television stations (full-power and Class A) are required under Section 73.3526 of the Commission's rules to maintain a local public inspection file, the contents of which include, inter alia, the station's current authorization, citizen agreements, issues/programs lists, radio and television LMAs, and radio and television JSAs. Historically, the file was located at the station's main studio; however, in the Enhanced Disclosure proceeding, among other actions, the Commission modified Section 73.3526 for commercial television stations to require that most of the contents of the public file (e.g., LMAs and JSAs) be included in an online public file hosted by the Commission. In

the Enhanced Disclosure Second R&O (77 FR 27631, May 11, 2012, FCC 12-44, rel. Apr. 27, 2012), the Commission declined to adopt any new disclosure requirements for sharing agreements but indicated that it would continue to monitor the issue and revisit the disclosure requirement in the future.

248. Concurrent with the pendency of the Enhanced Disclosure proceeding, the Commission sought comment in the NPRM about various types of sharing agreements, noting that commenters to the NOI had specifically identified sharing agreements and a subcategory of agreements, local news sharing (LNS) agreements, as matters of concern, but acknowledging that these terms were not defined in Commission rules. The NPRM invited views on the potential impact of such agreements on the Commission's ownership rules and fundamental policy goals. It identified potential concerns about such agreements and potential benefits and invited submissions of further information about how to define such agreements and comment on whether they should be attributed or disclosed.

249. The records in the Enhanced Disclosure proceeding and in the 2010 Quadrennial Review proceeding do not contain comprehensive data or information about the breadth, content, or prevalence of sharing agreements between stations that are not commonly owned. The Commission is not aware of any public source for this information. Although some such agreements are filed with the Commission in connection with applications for assignment or transfer of control of broadcast licenses, the Commission has no way of knowing how many of these agreements exist or what they cover. The comments in the earlier proceedings make clear that there are various types of sharing agreements, including those that implicate local news production, that

can involve differing levels of coordination — from those that involve back office functions or leases of property or equipment, to the sharing of raw video footage, to rebroadcasts of another station's entire newscast, to near-total outsourcing of a station's day-to-day operations. Accordingly, any impact on viewers or markets could vary depending on the substance of the agreement and the level of coordination. In the absence of greater information about the number of agreements that exist in the market and their content, the Commission and the public cannot fully evaluate the potential public interest harms and benefits of various arrangements, which is necessary for the Commission to formulate sound public policy.

3. Discussion

250. The Commission believes that commenters have raised important issues about how and to what extent sharing agreements implicate the Commission's competition, localism, and diversity policy objectives. Consideration of these issues is impeded because so little is known about the content, scope, and prevalence of sharing agreements. In order to assess these issues, however, the Commission must first define the agreements between stations that are relevant to its improved understanding of how stations share services and resources and then create a mechanism for making such arrangements transparent to the public and the Commission. Accordingly, the Commission seeks comment on a proposed definition of SSAs and a requirement that commercial television stations be required to disclose these agreements to the public and the Commission. This is a necessary first step in determining whether the Commission's public interest goals will be furthered through additional regulation of these agreements, as some commenters suggest.

a. Definition of Shared Service Agreement

251. Commenters refer to sharing agreements using various terms, such as sharing agreements, SSAs, or LNS agreements; however the Commission's rules do not define these terms. LMAs and JSAs are two types of sharing agreements that are defined in the Commission's rules. A single sharing agreement, however named, may include provisions for time brokerage, local news production, joint advertising sales, and various other station-related services. All of these different kinds of arrangements present questions about the level and type of coordinated activity that may exist between stations and the impact of such cooperation on the public interest. Therefore, the Commission tentatively concludes that it should define SSAs broadly enough to capture all types of resource sharing and collaboration that may take place between stations as the best means to inform the public and the Commission about the scope of any joint activities between stations. This information will provide the basis for informed decision making about any necessary future Commission regulation impacting SSAs or particular categories of SSAs.

252. Accordingly, for the purpose of implementing the proposed disclosure requirements discussed below, the Commission tentatively defines 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.

253. The Commission believes that this definition, by focusing on the provision of station-related services and collaboration by and between broadcast stations, encompasses the universe of agreements that are broadly referred to as "sharing agreements." This would include, for example, the provision of back office services by one independently owned station to another; a joint news-gathering operation; or the joint negotiation of retransmission consent agreements. Each such example is a type of resource sharing, among many others, and the agreements that govern such arrangements are appropriately referred to as SSAs. These agreements, including those that relate to "back office" functions, reflect the range of interaction between stations, and the Commission believes that disclosure of all such agreements will permit it to understand the scope of station interactions so that it can more effectively advance its public policy goals in this area.

254. Moreover, the Commission believes that the definition of SSA should not be limited to only those agreements to which station licensees are parties, as the licensees are not always a party to the sharing agreement that affects their station's operations. For example, the parent company of one station may contract with the parent company of another independently owned station to provide station-related services for the first station, using the same employees for both stations. If the definition were limited to agreements that involved licensees, this type of agreement would arguably not be included, even though this is certainly an example of the type of sharing agreement the

Commission seeks to identify. Accordingly, limiting the definition of SSAs to agreements between licensees would exclude existing agreements that the Commission intends to include in the definition, as well as afford a means to evade any disclosure requirements. Neither outcome would serve the public interest.

255. The Commission seeks comment on the tentative conclusion that SSAs should be defined broadly to enable the Commission and the public to understand the potential concerns and benefits of these agreements. Is a broad definition the most appropriate way to inform the Commission and the public about the breadth and prevalence of agreements across the marketplace? The Commission seeks comment also on the proposed definition. Is it broad enough to include all types of resource sharing and service agreements between stations that may be relevant to the Commission's policy making initiatives? Is the definition too broad, such that it would apply to agreements that do not involve the provision of station-related services and/or collaboration between stations to enable the provision of such services? Is there an alternate definition that would better serve the Commission's purpose? The Commission's transaction review experience indicates that SSAs are often accompanied by contingent interest agreements. The Commission seeks comment on whether this is also the case for SSAs that are not part of a transaction. If so, the Commission seeks comment on whether and how it should seek to achieve additional transparency concerning such contingent interest arrangements in this this proceeding. The Commission encourages those who disagree with the proposed definition to provide specific alternative language to define SSAs for purposes of this proceeding.

256. Should the term SSA instead be defined more narrowly, and if so how?

For example, are there sharing agreements that are insignificant to the operation of the station(s), such that disclosure would not meaningfully benefit the Commission's or the public's understanding of station operations, and that should thus be excluded from the definition of SSA for this purpose? If so, what types of exclusions to the definition should the Commission adopt? Would a de minimis financial exception be appropriate (i.e., if the total dollar amount of the goods or services provided under the agreement is below a certain total dollar amount)? If so, what should the cutoff be? How should the Commission determine where to set the cutoff? Could such an exclusion omit significant agreements that involve in-kind contributions? Should the Commission define SSAs to implicate only agreements that involve local news operations or the provision or production of programming? Is so, how would such a definition be crafted? Would it implicate any special legal or Constitutional considerations? If so, how could the Commission address such issues? Should the Commission limit the definition of SSAs only to those involving stations in the same local market? Could such a limitation exclude agreements that have a significant impact on station operations or programming? As discussed in the following section, the Commission proposes to limit disclosure of SSAs to commercial television stations. Accordingly, should the Commission limit the definition of SSAs to only those agreements involving exclusively commercial television stations? The Commission notes that commenters focus primarily on sharing agreements involving commercial television stations; accordingly, the Commission tentatively concludes that any disclosure requirement for SSAs should be limited to agreements involving exclusively commercial television stations. The Commission seeks comment on whether to expand the disclosure requirement to include agreements involving commercial radio stations and/or noncommercial stations. Are there many examples of agreements between commercial television stations and other types of stations (e.g., noncommercial stations, AM/FM stations)? What are the costs and benefits of the definition the Commission proposes and of any alternate definitions offered? How would a narrower definition be reconciled with the Commission's and the public's interest in understanding the breadth and prevalence of agreements across the marketplace?

b. Disclosure of Shared Service Agreements

257. Although the Commission believes that commenters have raised meaningful concerns about the potential impact of sharing agreements on competition, diversity, and localism in television markets, it also acknowledges that broadcast commenters have provided evidence that such agreements may produce public interest benefits. Currently, the Commission and the public lack a full understanding of the agreements and the ability to assess the impact of the agreements on Commission policy goals. Thus, the Commission tentatively concludes that disclosure of SSAs as defined in this proceeding is necessary to inform the Commission and the public of joint operations and collaborations between independently owned commercial television stations. Section 73.3613, which governs the filing of contracts with the Commission, requires that a summary of the substance of oral contracts subject to filing under that section must be reported in writing. The Commission proposes that any disclosure requirement it may adopt for SSAs similarly require that the substance of oral SSAs be reported in writing. The Commission seeks comment on this proposal.

258. The Commission believes that disclosure of such agreements involving commercial television stations will permit the Commission to better understand the

operation of stations and to assess the impact, if any, of SSAs on the television marketplace. Furthermore, members of the public will be able to gain a greater understanding of the relationships between independently owned stations that are parties to SSAs, which will allow them to evaluate whether such interaction has an impact on programming or other station operations. The Commission seeks comment on its tentative conclusion that disclosure of SSAs as defined herein is necessary to enable the Commission and the public to assess the implications of these agreements for the marketplace and the Commission's public policy goals. Does the Commission have any alternate means of assessing the breadth and prevalence of these agreements or their impact and implications? If so, what means are currently available to the Commission and the public?

259. The Commission seeks comment on the manner in which SSAs are to be disclosed to the public and the Commission. For example, should a television station be required to place a copy of each SSA for the station in its public inspection file? Under such a requirement, should the Commission require that these agreements be placed in the local public inspection file located in the station's main studio or in the station's online public file, or both? Should the disclosure requirement apply to each station that is involved in the agreement (e.g., the recipient of services and the provider of the services)? Would a requirement to disclose only in a physical (i.e., not online) public inspection file limit the Commission's and the public's ability to learn about the content, scope, and prevalence of sharing agreements? The Commission already requires that all radio and television LMAs and JSAs between commercial broadcast stations be disclosed by placing them in the station's public file, regardless of whether the agreements are

attributable or filed with the Commission. Should the Commission extend this existing requirement for LMAs and JSAs to include all SSAs for commercial television stations? What are the costs and benefits of each method of disclosure? As noted above, certain types of sharing agreements are already specifically defined in the Commission's rules and are already subject to various regulations and policies (e.g., LMAs and JSAs). The Commission does not believe that the adoption of any proposal in this Further Notice of Proposed Rulemaking should result in a duplicate disclosure obligation for such agreements. For example, if the Commission were to extend the existing public inspection file disclosure requirement for LMAs and JSAs to SSAs, an agreement that satisfies the definition of a JSA and an SSA would only need to be placed in the public inspection file once. However, in the event that the Commission adopts a disclosure requirement for SSAs that is different than the disclosure requirements already in existence for other types of sharing agreements — for example, a dedicated docket in the Commission's Electronic Comment Filing System (ECFS) or a new form — the Commission seeks comment on the extent to which that disclosure requirement should apply to other sharing agreements that are already subject to various disclosure requirements, as well as the associated benefits, burdens, and costs of any such approach.

260. Should the Commission consider a requirement that SSAs be filed pursuant to Section 73.3613 of the Commission's rules? What are the benefits or drawbacks of this alternative? Pursuant to Section 73.3613, licensees or permittees of commercial or noncommercial AM, FM, television, or International broadcast stations must file copies of certain contracts (including written summaries of oral contracts) with the Commission within 30 days of execution. These contracts cover a broad array of

agreements that relate to station ownership and operation. Because the Commission proposes to limit the disclosure of SSAs to commercial television stations, as noted above, any new filing requirement under 73.3613 would be similarly tailored. How would such a requirement be structured? Should the Commission consider adopting a different filing process? For example, should the Commission create a new form to be filed with the Commission or open a dedicated docket in ECFS, in which licensees, permittees, or applicants would file copies of agreements? What would such a process entail and what would be the benefits and/or drawbacks of that process?

261. In addition, the Commission proposes that any disclosure requirement it may adopt be subject to the same redaction allowances made available with respect to the filing of LMAs and JSAs, namely, that licensees may redact confidential or proprietary information. Currently, stations are permitted to redact confidential or proprietary information when disclosing LMAs and JSAs, though the information must be made available to the Commission upon request. The Commission proposes that the same procedure apply to the disclosure of SSAs. Would this approach be desirable with respect to the disclosure requirements the Commission is proposing here? Should it consider limiting any disclosure or filing requirement to larger markets, such as the top 50 or 100 Designated Market Areas? What considerations would justify any proposed limitation, and what other factors should the Commission consider in evaluating any limitation? While such an approach might reduce burdens on stations in smaller markets, is the impact of SSAs in smaller markets potentially greater due to the typically smaller number of stations in these markets, such that limiting disclosure to larger markets would not be advisable? For each potential alternative proposed, the Commission seeks

comment on the associated benefits, burdens, and costs. How much time should it provide for stations to come into compliance with this proposed filing requirement? What burdens would the proposed disclosure requirement place on stations, and what costs are associated with those burdens? How often would these burdens or costs be incurred? Do SSAs as defined herein typically last for a period of multiple years, and if so does that fact mitigate any associated burdens or costs, and by how much? How would the possible exclusions from the definition of SSA discussed above impact the burdens and costs?

II. Procedural Matters

A. Ex Parte Rules

262. Permit-But-Disclose. The proceeding for this Further Notice of Proposed Rulemaking shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or

paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

B. Comment Filing Procedures

263. Comments and Replies. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

264. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

C. Supplemental Initial Regulatory Flexibility Analysis

265. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM in this proceeding. The Commission sought written public comment on the proposals in the

NPRM, including comment on the IRFA. The Commission received no comments in direct response to the IRFA. Additionally, the Commission has prepared this Supplemental IRFA of the possible significant economic impact on small entities of the proposals in the Further Notice of Proposed Rulemaking. Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the deadlines for comments provided on the first page of the Further Notice of Proposed Rulemaking. The Commission will send a copy of the Further Notice of Proposed Rulemaking, including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the Further Notice of Proposed Rulemaking and Supplemental IRFA (or summaries thereof) will be published in the Federal Register.

1. Need for, and Objectives of, the Further Notice of Proposed Rulemaking

266. The Further Notice of Proposed Rulemaking initiates the 2014 Quadrennial Review of the broadcast ownership rules, which was initiated pursuant to Section 202(h) of the Telecommunications Act of 1996 (1996 Act). This review will incorporate and build on the record of the ongoing 2010 Quadrennial Review. 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" and to "repeal or modify any regulation it determines to be no longer in the public interest."

267. 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 rule, the radio/television cross-ownership rule, and

the dual network rule. As discussed in more detail below, the Further Notice of Proposed Rulemaking proposes to retain two rules without modification — the local radio ownership rule and the dual network rule — and seeks comment on potential changes to two others — the local television ownership rule and the newspaper/broadcast cross-ownership rule. The Further Notice of Proposed Rulemaking also seeks comment on whether to eliminate the radio/television cross-ownership rule. In addition, the Further Notice of Proposed Rulemaking seeks comment on issues referred to the Commission in the Third Circuit's remand in Prometheus Radio Project v. FCC (Prometheus II) of certain aspects of the Commission's 2008 Diversity Order. Lastly, the Further Notice of Proposed Rulemaking seeks comment on the proposed disclosure of certain sharing agreements.

268. Local Television Ownership Rule. In the Further Notice of Proposed Rulemaking, the Commission seeks comment on whether the current local television ownership rule remains necessary in the public interest and should be retained with a limited modification. Specifically, the Commission seeks comment on whether to retain the existing ownership limits, including the top-four prohibition and the eight voices test, but replace 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, rather than the DMA-based approach proposed in the NPRM.

269. The item tentatively concludes that the current local television ownership rule remains necessary in the public interest and should be retained with a limited modification. Based on the current media marketplace and the record in this proceeding, 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 NLSC test, rather than the DMA-based approach proposed in the NPRM. The Commission believes that the local television ownership rule is necessary to promote competition. The Commission further believes that the competition-based rule proposed in the Further Notice of Proposed Rulemaking also would promote viewpoint diversity by helping to ensure the presence of independently owned broadcast television stations in local markets and would be consistent with the Commission's localism goal. The Commission finds that the local television ownership rule proposed in the Further Notice of Proposed Rulemaking would be consistent with the goal of promoting minority and female ownership of broadcast television stations. The Commission believes that the competition-based rule would also indirectly advance the Commission's viewpoint diversity goal 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. In addition, while the Commission does not propose to retain the rule with the specific purpose of preserving the current levels of minority and female ownership, the Commission tentatively finds that retaining the existing rule would effectively address the concerns of those commenters who suggested that additional consolidation would have a negative impact on minority and female ownership of broadcast television stations. Ultimately, the Commission believes that its proposed limited modification of the rule will better promote competition, and that this benefit would outweigh any burdens, which would be minimized by the proposal to grandfather combinations.

270. The Further Notice of Proposed Rulemaking also tentatively concludes that retaining the existing failed/failing station waiver criteria would be in the public

interest. The Commission evaluated the various proposed waiver standards proffered by commenters, and is concerned 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 Commission is concerned that such relaxation would be inconsistent with the tentative conclusion that the public interest is best served by retaining 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. Waiver of the Commission's rules is meant to be exceptional relief, and the item tentatively 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.

271. Local Radio Ownership Rule. The Further Notice of Proposed Rulemaking seeks comment on whether the current local radio ownership rule remains necessary in the public interest and should be retained without modification. The Further Notice of Proposed Rulemaking seeks comment also on whether to retain the existing AM/FM subcaps.

272. The Commission tentatively finds that the current local radio ownership rule remains necessary in the public interest and should be retained without modification. The Commission believes that the rule is necessary to promote competition. In addition, the Commission believes 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." Similarly, the Commission tentatively 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. The Commission tentatively finds also that the local radio ownership rule is consistent with the goal of promoting minority and female ownership of broadcast television stations. Ultimately, the Commission believes that these benefits outweigh any burdens that may result from its proposal to retain the rule without modification.

273. The Commission agrees with commenters that supported retention of the AM subcaps in order to promote new entry. The Commission believes 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 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. While some commenters suggested that eliminating the subcaps could result in divestiture of properties that could be acquired by new entrants, the Commission tentatively finds that this speculative rationale is not persuasive. Therefore, consistent with Commission precedent, the Commission believes that the public interest is best served by retaining the existing AM subcaps, which would continue to further competition, and possibly also viewpoint diversity, by promoting new entry.

274. In addition, the Commission tentatively 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 in order to promote competition in local radio markets. As the Commission has noted previously, FM stations enjoy unique 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.

275. 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." For example, a study provided by Clear Channel found that throughout the 300 Arbitron Metro markets, there are 187 AM stations ranked in the top five in terms of all-day audience share. And according to NAB, AM stations are among the top revenue earners in some of the largest radio markets (e.g., New York, Chicago, and Los Angeles). Therefore, the Commission tentatively finds that retention of the existing AM subcaps is necessary to prevent a single station owner from acquiring excessive market power through concentration of ownership of AM stations in markets in which AM stations are significant radio voices.

276. In addition, the Commission tentatively concludes that it is not in the public interest to tighten the numerical ownership limits; therefore, the Commission sees no need to reassess the subcaps associated with each numerical tier, as proposed by Mt.

Wilson. Indeed, tightening the subcaps absent a concurrent tightening of the numerical ownership limits would result in an internal inconsistency in the rule, as an entity would be unable to own all the stations otherwise permitted under certain numerical tiers. For example, in markets with 30-44 stations, an entity currently may own up to seven stations, provided that no more than four of the stations are in the same service. If the subcap was tightened to three stations in the same service, an entity could then only own up to six stations, even though the rule's premise is that the public interest is best served by permitting ownership of up to seven stations in this particular market.

277. Newspaper/Broadcast Cross-Ownership Rule. The Further Notice of Proposed Rulemaking seeks comment on the Commission's previous finding, which has been upheld in the courts, that the current absolute ban on newspaper/broadcast cross-ownership, first adopted in 1975, is overly broad. The Commission continues to believe that some restriction on newspaper/broadcast cross-ownership is necessary to protect and promote viewpoint diversity in local markets; this view is consistent with the Commission's longstanding rationale for the NBCO rule. The Supreme Court has recognized the importance of the Commission's role in promoting viewpoint diversity, calling it a "basic tenet of national communications policy."

278. In addition, the Further Notice of Proposed Rulemaking seeks further comment on whether the restriction on newspaper/broadcast cross-ownership is necessary to protect and promote viewpoint diversity in local markets. The Further Notice of Proposed Rulemaking seeks comment on whether the absolute ban should be revised to allow combinations that would not unduly harm viewpoint diversity or localism. The Further Notice of Proposed Rulemaking specifically requests comment on whether the

prohibition on newspaper/radio combinations should be eliminated. The <u>Further Notice of Proposed Rulemaking</u> seeks comment on approaches that would retain a ban on newspaper/television combinations in all markets and further seeks comment on whether to entertain waiver requests on a pure case-by-case approach, assessing each request independently and considering the totality of the circumstances each proposed transaction presents, or on a case-by-case waiver approach that would include presumptions that favor or disfavor the grant of waiver requests in accordance with certain prescribed guidelines. The <u>Further Notice of Proposed Rulemaking</u> seeks comment on whether the Commission should provide for an exception to a newspaper/television cross-ownership prohibition if the merger applicant demonstrates that either the television station or the newspaper has failed or is failing. The <u>Further Notice of Proposed Rulemaking</u> also seeks comment on possible modifications to the 2006 rule to adjust for aspects of that rule that may be obsolete, difficult to prove or enforce, or ineffectual.

279. In the event that the newspaper/television restriction were to be revised, the <u>Further Notice of Proposed Rulemaking</u> seeks comment on the following aspects of the rule. First, should the obsolete analog Grade A contour be replaced with an approach that uses both the DMA and the digital the principal community contour (PCC) to determine when the newspaper/television prohibition applies in order to approximate the former analog contour approach as closely as possible? Second, should the four-factor test that all waiver applicants, even those entitled to a favorable presumption, were required to satisfy under the 2006 rule be eliminated? The <u>Further Notice of Proposed Rulemaking</u> suggests that the factors were vague, subjective, difficult to prove and enforce, and/or not directly linked to viewpoint diversity. Third, should the previous

local news exception permitted by the 2006 rule under which the Commission reversed the negative presumption against a waiver when 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 be eliminated? The Commission tentatively concludes that the potential difficulties in monitoring and enforcing such an exception would render it meaningless.

280. Radio/Television Cross-Ownership Rule. The Further Notice of Proposed Rulemaking seeks comment on whether the radio/television cross-ownership rule, which limits the combined number of commercial radio and television stations a single entity may own in the same market, is no longer necessary in the public interest, and whether it should be repealed. Based on the current media marketplace and the evidence adduced in this proceeding, the Further Notice of Proposed Rulemaking seeks comment on whether the local television ownership rule and the local radio ownership rule, which the Further Notice of Proposed Rulemaking proposes to retain with limited modification, adequately serve the goals this rule was intended to promote, namely, competition and diversity in local markets. Thus, the Further Notice of Proposed Rulemaking seeks comment on whether this additional prohibition on the cross-ownership of broadcast facilities is unnecessary. Further, the Further Notice of Proposed Rulemaking seeks comment on whether this simplification of the rules will have minimal effects in most markets.

281. The Commission tentatively finds that the radio/television cross-ownership rule is not necessary to promote competition. The Commission has found previously that most advertisers do not consider radio and television to be good substitutes for one another, and that television and radio stations neither compete in the

same product market nor do they bear any vertical relation to one another. This position is consistent with the long-standing conclusion of the Department of Justice, which considers radio advertising as a separate antitrust market for purposes of its competition analysis. Similarly, the Commission tentatively finds that most consumers do not consider radio and television stations to be substitutes for one another and do not switch between television viewing and radio listening based on program content. Nothing in the current record undermines the Commission's previous conclusion that a television-radio combination, therefore, cannot adversely affect competition in any relevant product market. Given that radio and television stations do not appear to compete in the same market and that the local television and radio rules would prevent significant additional consolidation even in the absence of this rule, the record does not suggest that repeal of the radio/television cross-ownership rule would harm competition.

282. The Commission tentatively finds that the radio/television cross-ownership rule is not necessary to promote localism. The Commission agrees with industry commenters who maintained that some limited cross-ownership could create efficiencies that could benefit the public should broadcasters choose to invest additional resources in the production of local news and information programming. When broadcasters engage in joint operations, whether those operations are focused on programming and news gathering or back office matters, the Commission believes it likely that financial efficiencies result. Such efficiencies could lead ultimately to consumer benefits in the form of additional station investments in equipment for radio or television newsrooms, an increase in staffing for news and informational programs, or additional local news coverage on radio stations.

283. The Commission considered carefully whether there is evidence in the current record that elimination of the radio/television cross-ownership rule would likely adversely affect minority and female ownership. The Commission believes that the current record does not establish that such harm is likely. Furthermore, the Commission does not believe that record evidence shows that the cross-ownership ban has protected or promoted minority or female ownership of broadcast stations, or that it could be expected to do so in the future. Notably, radio/television cross-ownership combinations were not the focus of commenters' concerns raised in response to the NPRM. In fact, no commenter to the NPRM presented empirical data or other analyses that established that repeal of this rule would harm competition, localism, or viewpoint diversity in local markets. The Commission tentatively concludes that the rule is not necessary to promote competition or localism, and the record reflects that most radio commercial stations do not broadcast significant amounts of local news and information. The current record does not suggest that minority/female-owned radio stations contribute more significantly to viewpoint diversity than other radio stations or broadcast more meaningful amounts of local news on which consumers rely as a primary source of information.

284. Moreover, while the Commission acknowledges the concerns raised by NABOB and others advocating for additional minority ownership opportunities, the Commission agrees with commenters, including NAB, that the low level of minority and female broadcast ownership cannot be attributed solely or primarily to consolidation. Nor has any commenter shown that these low levels of ownership are a result of the existing radio/television cross-ownership rule. The Commission recognizes the presence

of many disparate factors, including, most significantly, access to capital, as longstanding, persistent impediments to ownership diversity in broadcasting.

285. Dual Network Rule. The Further Notice of Proposed Rulemaking tentatively concludes 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.

286. The Commission tentatively 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, the Commission tentatively 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. The Commission also tentatively 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. Accordingly, the Commission continues to believe 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 tentatively 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.

287. In addition, the Commission tentatively finds that, consistent with past Commission findings, the dual network rule remains necessary to promote the Commission's localism goal. Specifically, the Commission tentatively 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.

288. Diversity Order Remand and Eligible Entity Definition. In addition to evaluating each of the broadcast ownership rules, the Further Notice of Proposed Rulemaking addresses the Third Circuit's remand of certain aspects of the 2008 Diversity Order. Based on the Commission's 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 Further Notice of Proposed Rulemaking proposes to

reinstate the revenue-based eligible entity standard and to apply it to the regulatory policies set forth in the Diversity Order. While the Commission does not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership, the Commission anticipates 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 encourage innovation and enhance viewpoint diversity. The Commission also believes that the benefits of reinstating the eligible entity standard and applying it to the regulatory measures set forth in the Diversity Order would outweigh any potential costs of the decision to do so. Accordingly, the Commission tentatively determines that this action will advance the policy objectives that traditionally have guided the Commission's analyses of broadcast ownership issues and will serve the public interest.

289. Shared Service Agreements. The Further Notice of Proposed Rulemaking provides further consideration of the regulatory treatment of various agreements for the sharing of services between broadcast stations. 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. Accordingly, in order 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, the Further Notice of Proposed

Rulemaking seeks comment on proposals to require the disclosure of such agreements. Specifically, the Further Notice of Proposed Rulemaking proposes a specific definition for a category of sharing agreements designated in the Further Notice of Proposed Rulemaking as Shared Service Agreements (SSAs). Because the Commission desires to expand its knowledge of these agreements, the Further Notice of Proposed Rulemaking proposes to adopt a broad definition of SSAs. The Further Notice of Proposed Rulemaking, however, seeks comment on whether to narrow the scope of the definition, seeking comment, for example, on whether a de minimis financial exception would be appropriate. The Further Notice of Proposed Rulemaking then seeks comment on various proposals for the disclosure of SSAs, including that commercial television stations be required to place copies of such agreements in their public inspection files, the filing of SSAs pursuant to 47 CFR 73.3613, or the adoption of a new filing process (e.g., a new form or a dedicated docket in the Commission's Electronic Comment Filing System (ECFS)). The Commission proposes that any disclosure requirement it may adopt be 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.

290. The Commission believes that disclosure of these agreements will further its understanding of the television marketplace and inform future policy decisions to address any potential negative impacts of SSAs on the Commission's competition, localism, and diversity goals. The Further Notice of Proposed Rulemaking tentatively concludes that disclosure will permit the Commission to better understand the operation of stations and to assess the impact, if any, of such combined operation on the television

marketplace and that members of the public will be able to gain a greater understanding of the relationship between independently owned stations that are parties to SSAs, which will allow them to evaluate whether this interaction has an impact on programming or other station operations.

2. Legal Basis

291. The Further Notice of Proposed Rulemaking is adopted pursuant to Sections 1, 2(a), 4(i), 303, 307, 308, 309, 310, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 308, 309, 310, and 403, and Section 202(h) of the Telecommunications Act of 1996.

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

292. 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. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). 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.

293. Television Broadcasting. The SBA defines a television broadcasting station that has no more than $35.5 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 with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. Census data for 2007 indicate that 2,076 such establishments were in operation during that year. Of these, 1,515 had annual receipts of less than $10.0 million per year and 561 had annual receipts of more than $10.0 million per year. Based on this data and the associated size standard, the Commission concludes that the majority of such establishments are small.

294. The Commission has estimated the number of licensed commercial television stations to be 1,387. According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of November 26, 2013, 1,249 (or about 90 percent) of an estimated 1,387 commercial television stations in the United States have revenues of $35.5 million or less and, thus, qualify as small entities under the SBA definition.

295. The Commission notes, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. This estimate, therefore, likely overstates the number of small entities that might be affected by this action because the revenue figure on which it is based does not

include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. 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 does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

296. Radio Broadcasting. The proposed policies could apply to radio broadcast licensees, and potential licensees of radio service. The SBA defines a radio broadcast station as a small business if such station has no more than $35.5 million in annual receipts. Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public." According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database as of November 26, 2013, about 11,331 (or about 99.9 percent) of 11,341 commercial radio stations have revenues of $35.5 million or less and thus qualify as small entities under the SBA definition. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. This estimate, therefore, likely overstates the number of small entities that might be affected by this action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

297. 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.

298. Daily Newspapers. The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees. 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." Census Bureau data for 2007 show that there were 4,852 firms in this category that operated for the entire year. Of this total, 4,771 firms had employment of 499 or fewer employees, and an additional 33 firms had employment of 500 to 999 employees. Therefore, the Commission estimates that the majority of Newspaper Publishers are small entities that might be affected by this action.

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

299. The Further Notice of Proposed Rulemaking proposes rule changes that will affect reporting, recordkeeping, and other compliance requirements. Each of these changes is described below.

300. The Further Notice of Proposed Rulemaking proposes modifications to several of the media ownership rules as set forth in Section A above. The proposals, if ultimately adopted, would modify several FCC forms and their instructions: (1) FCC Form 301, Application for Construction Permit For Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission may have to modify other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303-S and Form 323. The impact of these changes will be the same on all entities, and the Commission does not anticipate that compliance will require the expenditure of any additional resources.

301. In addition, the Further Notice of Proposed Rulemaking proposes changes that would affect reporting, recordkeeping, or other compliance requirements with regard to the proposed disclosure of SSAs. If this proposal is ultimately adopted, commercial television stations will be required to disclose all SSAs to the public and the Commission. Depending on the method of disclosure for SSAs that may ultimately be adopted, commercial television stations may be required to upload all SSAs to their online public file or place a copy of all SSAs in their physical local public inspection file. In addition, if the Commission were to require the filing of SSAs pursuant to 47 CFR 73.3613, commercial television stations would be required to file a paper copy of such contracts with the Commission; list the contracts on their FCC Form 323, Ownership Report for Commercial Broadcast Station; and either place the SSAs in their local public inspection

file or maintain an up-to-date list of all contracts reported on Form 323 and make such contracts available on request. Other proposed alternatives may include the creation of a new form for the filing of SSAs or the creation of a dedicated docket in the Commission's Electronic Comment Filing System that could be used for filing purposes.

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

302. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

303. 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 believes that the rules proposed in the Further Notice of Proposed Rulemaking, which are intended to achieve its policy goals of competition, localism, and diversity, will continue to benefit small entities by fostering a media marketplace in which they are able to compete effectively and by promoting additional broadcast ownership opportunities, as described below, among a diverse group of owners, including small entities. This Supplemental IRFA 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.

304. Local Television Ownership Rule. The Commission proposes to retain the local television ownership rule with only a minor modification, consistent with the proposal in the NPRM. In the NPRM, the Commission proposed to retain the rule but sought comment on a number of alternatives to this proposal. Specifically, the NPRM proposed to retain the top-four prohibition, eight-voices test, and numerical limits of the existing rule, while proposing to replace the Grade B contour overlap provision with a DMA-based approach. The NPRM also invited comment on whether to adopt a market size waiver standard, the impact of multicasting on the local television ownership rule, and the impact of the proposed rule on minority and female ownership.

305. Multiple commenters asserted that the Commission should retain, or tighten, the local television ownership rule to promote competition and create ownership opportunities for new entrants. In contrast, broadcast commenters asserted that the local television ownership rule should be eliminated or substantially relaxed as a result of competition for viewers and advertising revenue from non-broadcast video alternatives. A number of commenters argued that such relief is warranted particularly for broadcasters — including small entities — that operate in small and mid-sized markets. Broadcast commenters also support adoption of a more flexible waiver standard for small and mid-sized markets.

306. In the Further Notice of Proposed Rulemaking, the Commission tentatively finds that the local television ownership rule remains necessary in the public interest and should be maintained with a limited modification. Accordingly, under the

proposed modified 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)) 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. In addition, the Commission proposes to retain the existing failed/failing station waiver policy.

307. As noted above, the NPRM proposed to replace the Grade B contour overlap provision with a DMA-based approach. The Commission tentatively finds, however, that adoption of a DMA-based approach to replace the analog Grade B contour as the trigger for the rule would unduly expand the reach of the local television ownership rule in some DMAs, particularly in those DMAs that cover large rural areas in the western United States where numerous small television stations operate. Thus, the Further Notice of Proposed Rulemaking proposes to adopt instead the use of a digital NLSC as the functional equivalent of the analog Grade B contour, which is no longer relevant following the digital television transition. In the Further Notice of Proposed Rulemaking, the Commission tentatively affirms the NPRM's proposal to grandfather existing ownership combinations that would exceed the numerical limits under the revised contour approach, though the Commission proposes that, going forward, the sale of such combinations must comply with the local television ownership rule then in effect. The Commission believes 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 believes 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 believes that the rule, as modified, will continue to ensure that local television markets do 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.

308. The Further Notice of Proposed Rulemaking also addresses the competitive challenges faced by broadcasters that operate in small markets — including small entities — by proposing to retain the existing failed/failing station waiver policy. The Commission 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. Moreover, waiver of the Commission's rules is meant to be exceptional relief, and the Commission believes 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. However, the Further Notice of Proposed Rulemaking seeks comment on whether to relax the failed/failing station waiver criteria or establish additional grounds for waiver. For example, the items asks whether there are circumstances in which the Commission should refrain from applying the four-percent all-day audience share requirement or adopt a higher threshold.

309. Local Radio Ownership Rule. The Further Notice of Proposed Rulemaking proposes to retain the local radio ownership rule without modification, consistent with the NPRM. In the NPRM, the Commission proposed to retain the rule and sought comment on alternatives to this proposal. Specifically, the NPRM proposed to retain the AM/FM subcaps, which limit the number of radio stations in the same service that an entity can own. The Commission also sought comment on whether and, if so, how, to incorporate new audio platforms into the rule and sought additional comment on the impact of such platforms on the broadcast radio industry. In addition, the NPRM sought comment on whether to adopt a specific waiver standard for the local radio ownership rule and on how the proposed rule would affect minority and female ownership opportunities.

310. Several commenters supported the tentative conclusion to retain the local radio ownership rule, including the AM/FM subcaps. They asserted that the AM band, in particular, is a critical point of new entry in the marketplace. By contrast, many broadcast commenters supported eliminating or loosening the rule, including the AM/FM subcaps. In particular, NAB disputes the tentative conclusion that the subcaps promote new entry, asserting instead that elimination of the subcaps could spur market activity that leads to divested properties that could be purchased by new entrants, including small businesses and minority and women-owned businesses.

311. The Commission proposes to retain 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.

312. The Commission tentatively 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 tentatively 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 believes that retention of the local radio ownership limits, including the AM/FM subcaps, will foster opportunities for new entry in local radio markets, particularly by small entities. Moreover, the Commission believes that by limiting the consolidation of market power among the dominant groups, the rule will ensure that small radio station owners remain economically viable.

313. Newspaper/Broadcast Cross-Ownership Rule. The Further Notice of Proposed Rulemaking seeks additional comment on the NPRM's proposals regarding the newspaper/broadcast cross-ownership (NBCO) rule. The NPRM offered a myriad of tentative conclusions and inquired about detailed scenarios. In particular, the NPRM

sought comment on a number of alternatives, including whether to modify the top 20 DMA distinction, the top-four restriction, or the eight voices test. The NPRM also proposed to eliminate the use of a station's analog signal contour in favor of a DMA-based approach for triggering the rule.

314. The Commission received a substantial number of comments on the NBCO rule, several of which discuss issues that may be of interest to small entities. For instance, several commenters claimed that lifting the newspaper/radio cross-ownership restriction will revitalize local news on radio stations and will provide struggling newspapers with a broader base of financial support and an increased ability to reach audiences. In the Further Notice of Proposed Rulemaking, the Commission seeks comment on whether the restriction on newspaper/radio cross-ownership is no longer necessary to promote viewpoint diversity and therefore should be eliminated from the NBCO rule.

315. Additionally, in the Further Notice of Proposed Rulemaking, the Commission tentatively concludes that it should not adopt a bright-line rule allowing some newspaper/television combinations, even under narrowly prescribed circumstances. The Commission is aware that bright-line rules are more likely to produce predictable and consistent outcomes in an expeditious and less costly manner than rules that incorporate a waiver process, which is inherently more uncertain. The Commission is concerned, however, that a bright-line rule is too blunt an instrument to be used for allowing newspaper/television cross-ownership, no matter how limited. Of particular interest to small entities, the Commission also is concerned that a bright-line rule

allowing only certain combinations in the largest markets could foreclose merger opportunities in smaller markets where a combination might be acceptable.

316. Although the Commission tentatively concludes that a general prohibition on newspaper/television combinations in all markets is the appropriate starting point when considering the impact of newspaper/television cross-ownership on viewpoint diversity, it recognizes that particular combinations might be shown to be consistent with its diversity goal. Therefore, it proposes to entertain requests for waiver of the general prohibition. An approach that incorporates a waiver process would provide the Commission with the flexibility to take into account the particular circumstances of a proposed merger and potentially provide relief for broadcasters — including small entities — by allowing the combination of a newspaper and a television station where appropriate.

317. The Commission requests comment on what type of waiver process would enable it to identify any acceptable newspaper/television combinations most accurately and effectively. It asks whether it should implement a pure case-by-case approach that evaluates the totality of the circumstances for each individual transaction, 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. Additionally, the Commission seeks comment on an approach whereby the Commission would ascribe a favorable presumption to certain waiver applicants in the top-20 DMAs and a negative presumption to all other waiver applicants. It seeks comment on requiring as conditions for a favorable presumption that: (1) the proposed merger does not involve a television station ranked among the top-four

television stations in the DMA and (2) at least eight major media voices remain in the DMA following the transaction. The Commission seeks comment on the pros and cons, costs and benefits of both these approaches.

318. As noted above, the NPRM also proposed to eliminate the use of a station's Grade A contour in favor of a DMA-based approach for triggering the rule. As commenters note, however, because DMAs can be much larger in size than the former Grade A contour areas, the proposed DMA-based approach could expand the reach of the rule and prohibit cross-ownership when there is no overlap between the community in which a newspaper is published and the primary service area of a broadcast station. To avoid that possibility, the Further Notice of Proposed Rulemaking proposes instead to prohibit cross-ownership of a full-power television station and a daily newspaper 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 Principal Community Contour (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. Under this proposal, both conditions must be met in order for the cross-ownership prohibition to be triggered. Furthermore, the Commission proposes to grandfather those existing combinations that would exceed the ownership limit by virtue of the change to this new DMA/PCC approach. The Commission believes that this approach will avoid disruption of settled expectations and prevent any impact on the provision of television service by smaller stations. Moreover, the Commission believes that the newspaper/television cross-ownership limits — including the top 20 DMA distinction, the top-four restriction, and the eight voices test — will continue to foster

diffuse ownership among media outlets and thereby create more ownership opportunities for small entities.

319. Radio/Television Cross-Ownership Rule. In the Further Notice of Proposed Rulemaking, the Commission seeks comment on whether to eliminate the radio/television cross-ownership rule, which limits the combined number of commercial radio and television stations a single entity may own in the same market. In the NPRM, the Commission tentatively concluded that the radio/television cross-ownership rule is not currently necessary to promote the public interest. The Commission sought comment on a range of issues, including whether radio and television stations constitute different markets, whether repeal of the rule would encourage more and better competition in local media markets, whether repeal of the rule would result in additional broadcast consolidation, and what impact, if any, repeal would have on small, independent broadcasters, including those stations owned by minorities and women. The Commission indicated in the NPRM that changes in the marketplace and evidence from the media ownership studies specifically supported the tentative conclusion that the rule is not necessary to promote viewpoint diversity in local media markets.

320. Most broadcast commenters supported the Commission's tentative conclusion, and asserted that the cross-ownership rule is no longer necessary to protect the public interest, particularly in light of competition from new media technologies and Internet-based information outlets. Not all broadcasters, however, agreed. Mt. Wilson, an independent broadcaster, asserted that CBS, its primary competitor, is able to wield significant power in the radio market because of its ability to leverage its non-radio holdings, which, in turn, adversely affects the ability of independent radio owners in the

market to compete effectively. Mt. Wilson argued that elimination of the radio/television cross-ownership rule will benefit group owners, such as CBS, by allowing them to acquire additional co-owned radio stations in a market, and thereby giving them a further competitive benefit to the disadvantage of independent broadcasters.

321. Commenters who supported retention of the rule also expressed concern about the potential loss of viewpoint diversity in local markets if the rule were to be repealed. They were skeptical of conclusions in the media ownership studies that consolidated broadcast stations air more local content, and thus, contribute more to viewpoint diversity than independent voices. Commenters also asserted that the Commission must take into account the public's reliance on broadcast stations and newspapers as the primary sources of information for individuals to learn about their local communities and to participate in local civic affairs.

322. In addition, public interest commenters claimed that broadcast radio is one of the few remaining entry points into media ownership for women and minorities, and that its usefulness as such would potentially be limited if the radio/television cross-ownership rule were eliminated. Other commenters argued more generally that any media consolidation disproportionately affects opportunities for women and minorities to become and remain broadcast station owners and that female- and minority-owned stations thrive in markets that are less concentrated. NHMC et al. contended that strengthening, or at least retaining, broadcast ownership limits is one of the few race- and gender-neutral ways to increase broadcast station ownership by women and minorities, thereby, avoiding the constitutional concerns raised by race- and gender-specific remedies. NABOB asked that the Commission not take any action that would further

erode minority broadcast ownership, particularly given that new media outlets are not positioned to replace traditional broadcasters and the information services they provide to minority communities. NABOB contended that any deregulation allows consolidation and it asserted that consolidation enhances an entity's competitive advantage in obtaining advertising.

323. Consistent with prior Commission holdings, the Commission tentatively finds that the radio/television cross-ownership rule is not necessary to promote competition. The Commission has found previously that most advertisers do not consider radio and television to be good substitutes for one another and that television and radio stations do not compete in the same product market. This position is consistent with the long-standing conclusion of the Department of Justice, which considers radio advertising as a separate antitrust market for purposes of its competition analysis. The Further Notice of Proposed Rulemaking tentatively finds that most consumers do not consider radio and television stations to be substitutes for one another and do not switch between television viewing and radio listening based on program content. Contrary to Mt. Wilson's conflicting opinion, the Commission believes that the weight of the evidence in the record of this proceeding and precedent supports these tentative conclusions.

324. The Further Notice of Proposed Rulemaking tentatively concludes that the radio/television cross-ownership rule is not necessary to promote localism. The Commission agrees with industry commenters who maintained that some limited cross-ownership could create efficiencies that could benefit the public should broadcasters choose to invest additional resources in the production of local news and information programming. When broadcasters engage in joint operations, whether those operations

are focused on programming and news gathering or back office matters, the Commission believes it likely that financial efficiencies result. Such efficiencies could lead ultimately to consumer benefits in the form of additional station investments in equipment for radio or television newsrooms, an increase in staffing for news and informational programs, or additional local news coverage on radio stations.

325. The Commission seeks comment on whether the radio/television cross-ownership rule is not necessary to promote viewpoint diversity. In addition, the Further Notice of Proposed Rulemaking tentatively finds that the current record does not support claims that elimination of the radio/television cross-ownership rule would have a negative impact on minority and female ownership. Notably, radio/television cross-ownership combinations were not the focus of commenters' concerns raised in response to the NPRM. In fact, no commenter to the NPRM presented empirical data or other analyses that established that repeal of this rule would harm competition, localism, or viewpoint diversity in local markets. Moreover, while the Commission acknowledges the concerns raised by those advocating for additional minority ownership opportunities, the Commission agrees with commenters, including NAB, that the low level of minority and female broadcast ownership cannot be attributed solely or primarily to consolidation. Nor has any commenter shown that these low levels of ownership are a result of the existing radio/television cross-ownership rule. The Commission recognizes the presence of many disparate factors, including, most significantly, access to capital, as longstanding, persistent impediments to ownership diversity in broadcasting.

326. Shared Service Agreements. The proposed filing requirement for SSAs is not expected to have a significant economic impact on any entities, whether small or

otherwise. The filing requirement is limited to commercial television stations, so any small entities that are licensees of commercial radio stations and any small entities that are licensees of noncommercial television or radio stations are exempt from the filing requirement. Furthermore, the Commission believes that SSAs are generally executed for a period of multiple years, which likely limits the number of agreements that will be subject to the proposed disclosure requirement. However, the Further Notice of Proposed Rulemaking seeks comment on ways to limit the disclosure requirement that could reduce the burden while not negatively impacting the policy justifications for requiring disclosure. For example, the Commission asks whether any category of agreements between stations should be excluded from the definition of SSA in this proceeding, for instance by adopting a de minimis financial exclusion, limiting the definition to agreements that involve local news production or that only involve stations from the same local market. The Further Notice of Proposed Rulemaking also seeks comment on how much time should be provided for compliance with the proposed requirement, which could reduce the burden on all stations. Finally, the Further Notice of Proposed Rulemaking seeks comment on whether to limit the disclosure requirement to certain larger markets (e.g., the top 50 or 100 Designated Market Areas).

327. In addition, the Further Notice of Proposed Rulemaking seeks comment on multiple alternatives for the proposed disclosure requirement. These alternatives include placing the SSAs in the stations' public inspection files (online or physical), filing the agreements with the Commission, the creation of a new form for the filing of SSAs, or the creation of a dedicated docket in ECFS that could be used for filing purposes. This gives commenters the opportunity to demonstrate that one of these

alternatives may have less of an economic impact on small businesses and/or all entities. The Commission will consider all such comments.

328. Diversity Order Remand/Eligible Entity Definition. The Commission solicited comment in the NPRM on whether the Commission should reinstate the preexisting revenue-based eligible entity definition to support the measures the Third Circuit vacated and remanded as well as other measures the Commission may implement in the future. In addition, the Commission sought comment on whether re-adoption of the revenue-based standard would support the Commission's traditional diversity, localism, and competition goals in other ways, particularly by enhancing ownership opportunities for small businesses and other new entrants.

329. As noted above, the Further Notice of Proposed Rulemaking tentatively 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. Specifically, the Commission believes that reinstating the revenue-based standard will 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 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 encourage innovation and expand viewpoint diversity.

330. In addition, the Commission proposes to 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; (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. The Commission's intent in proposing the reinstatement of 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 the measures proposed in the Further Notice of Proposed Rulemaking will benefit small entities, not burden them.

331. The Commission tentatively concludes that it does not have sufficient evidence at this time to satisfy the constitutional standards necessary to adopt race- or gender-conscious measures. In evaluating the possibility of adopting a socially disadvantaged business (SDB) standard based on the definition employed by the SBA, or any other race-conscious standard, the first question the Commission must consider is whether the standard could be justified by a "compelling governmental interest." Assuming that such an interest could be established, the Commission then would have to be able to demonstrate that the application of the race-conscious standard to specific measures or programs would be "narrowly tailored" to further that interest. While the

Commission tentatively finds that a reviewing court could deem the Commission's interest in promoting a diversity of viewpoints compelling, the Commission believes that it does not have sufficient evidence at this time to demonstrate that adoption of race-conscious measures would be narrowly tailored to further that interest. Additionally, the Commission tentatively finds that it cannot conclude that the record evidence establishes a relationship between the Commission's interest in viewpoint diversity and the ownership of broadcast stations by women that would satisfy intermediate scrutiny. While the Commission acknowledges that the data show that women-owned stations are not represented in proportion to the presence of women in the overall population, the Commission does not believe that the evidence available at this time reveals 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. Further, the Commission tentatively finds that it does not have sufficient evidence to establish a compelling interest in remedying past discrimination.

332. In addition, the Commission reject commenters' arguments that the Commission is required to adopt an SDB standard or another race-conscious eligible entity standard in this proceeding in light of the court's instructions in Prometheus II. The Commission also disagrees with arguments that the Commission is not permitted to conclude this proceeding until the Commission has completed any and all studies or analyses that may enable it to take such action in the future consistent with current standards of constitutional law. The Commission intends to follow the Third Circuit's direction that the Commission consider adopting an SDB definition before completion of

this proceeding and evaluate the feasibility of adopting a race-conscious eligibility standard based on an extensive analysis of the available evidence. The Commission does not believe that the Third Circuit intended to prejudge the outcome of the Commission's analysis of the evidence or the feasibility of implementing a race-conscious standard that would be consistent both with applicable legal standards and the Commission's practices and procedures.

333. The Commission also declined to adopt at this time an eligible entity definition that incorporates the Overcoming Disadvantage Preference (ODP) standard proposed by the Commission's Diversity Advisory Committee in 2010. Commenters generally did not suggest criteria, other than race and ethnic origin, that could be considered in an individualized, holistic evaluation system like that approved in *Grutter*. Commenters recommended that the Commission replace its revenue-based eligible entity definition with an ODP standard as a race-neutral means of advancing ownership diversity. The Commission notes that it is not entirely clear whether the proposed ODP standard would be subject to heightened constitutional scrutiny. Moreover, the Commission believes that it does not have a sufficient record at present on a number of issues that would need to be resolved prior to the implementation of an ODP standard. Among other issues, no commenter provided input on (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. Even if the Commission could develop an adequate record on these issues, the Commission is concerned that it may lack the resources to conduct such individualized reviews. Moreover, the Commission would have to walk a very fine line in order to fully evaluate the potential diversity contributions of individual applicants without running afoul of First Amendment values. The Commission is concerned that the type of individualized consideration that would be required under an ODP standard could prove to be administratively inefficient, unduly resource-intensive, and inconsistent with First Amendment values.

334. The Commission also tentatively declined to act on various recommendations from commenters regarding the promotion of minority and female ownership. These recommendations 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. In addition, the Alliance for Women in Media, Inc. (AWM) asked the Commission to consider several actions to address the "historic underrepresentation of women" in ownership of broadcast stations and managerial positions in the broadcast industry. The Commission has already implemented some of these recommendations. Because the Commission believes that the remainder of these proposals would raise public interest concerns, may not provide meaningful assistance to

the intended beneficiaries, or are outside of the proper scope of this broadcast ownership proceeding, the Commission tentatively concludes that it should not adopt them here.

6. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

335. None.

D. Ordering Clauses

336. 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 Further Notice of Proposed Rulemaking IS ADOPTED.

337. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Further Notice of Proposed Rulemaking, including the Supplemental Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects 47 CFR Part 73

Radio, Reporting and record keeping requirements, Television.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 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 § 73.3555 by revising paragraph (b) to read as follows:

§ 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 (as determined by § 73.622) do not overlap; or

(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(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 Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. 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.

(2) [Reserved]

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