List of Subjects in 47 CFR Part 73

Television broadcasting.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons discussed in the preample, the Federal Communication Commission amends 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.

2. § 73.3555 is amended by revising paragraphs (e)(2)(i), (e)(2)(ii) and the first sentence of Note 5 to read as follows:

§ 73.3555 Multiple ownership.

* * * * *

(e) * * *

(2) * * *

(i) *National audience reach* means the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

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Note 5: Paragraphs (a) through (d) of this section will not be applied to cases involving television stations that are ''satellite'' operations. * * *

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 91–221, 87–8; FCC 99–209]

Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's local TV multiple ownership rule and its radio/TV cross-ownership rule. This document also adopts a grandfathering policy for certain TV local marketing agreements and certain conditional waivers of the radio/TV cross-ownership rule. The purpose of this action is to balance the Commission's competition and diversity goals with the efficiencies and public interest benefits that can be associated with common ownership of same-market broadcast stations.

DATES: Effective November 16, 1999, except for the requirements that: (1) radio/TV cross-ownership conditional waiver grantees file with the Commission showings sufficient to convert their compliance or non-compliance with the Commission's revised radio/TV cross-ownership rule; and (2) holders of local marketing agreements (LMAs) that have become attributable under the Commission's revised rules file a copy of their LMA with the Commission. These requirements contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective dates for those sections.

FOR FURTHER INFORMATION CONTACT: Eric Bash, (202) 418–2120, Policy and Rules Division, Mass Media Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (''*R&O*''), FCC 99–209, adopted August 5, 1999, and released August 6, 1999. The full text of the Commission's *R&O* is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room TW–A306), 445 12 St. S.W., Washington, D.C. The complete text of this *R&O* may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857–3800, 1231 20th St., N.W., Washington, D.C. 20036.

Synopsis of Report and Order

I. Introduction

1. In this *R&O*, we revise our local TV multiple ownership rule and the radio/TV cross-ownership rule to respond to ongoing changes in the broadcast television industry. The new rules we adopt today reflect a recognition of the growth in the number and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership. At the same time, our decision reflects our continuing goals of ensuring diversity and localism and guarding against undue concentration of economic power. The rules we adopt today and in our related national television ownership and broadcast attribution proceedings, being adopted simultaneously with this *R&O*, balance these competing concerns and are intended to facilitate further development of competition in the video marketplace and to strengthen the potential of broadcasters to serve the public interest.

II. Background

2. The local TV multiple ownership rule currently prohibits an entity from having cognizable interests in two television stations whose Grade B signal contours overlap. The Commission rarely grants permanent waivers of the duopoly rule, reserving such relief for cases with unique or highly unusual circumstances. Under current policy, the time brokerage by one television station of another television station, even one in the same market, pursuant to a time brokerage or ''local marketing'' agreement (''LMA''), is not attributable, and accordingly these relationships are not subject to our multiple ownership rules. The radio-television cross-ownership rule generally forbids joint ownership of a radio and a television station in the same local market. We have presumed it is in the public interest to waive this rule in the top 25 television markets if, post-merger, at least 30 independently owned broadcast voices remain, or if the merger involves a failed station. Such waivers are available to permit ownership of up to one television, one AM, and one FM station per market. We have evaluated other waiver requests case by case, based on an analysis of five criteria (the ''five factors'' test).

3. This proceeding began in 1991 with the issuance of a *Notice of Inquiry* (''*NOI*''), 56 FR 40847, August 16, 1991, soliciting comment on whether existing television ownership rules and related policies should be revised in light of ongoing changes in the competitive market conditions facing broadcast licensees. After reviewing the comments received in response to the *NOI*, the Commission issued a *Notice of Proposed Rule Making* (''*NPRM*''), 57 FR 28163, June 24, 1992, containing a number of alternative proposals involving the national and local television ownership rules, and seeking comment on the extent and impact of LMAs in the broadcast television industry.

4. In 1994, in a *Further Notice of Proposed Rule Making* (''*FNPRM*''), 60 FR 06490, February 2, 1995, in this docket, the Commission set forth a competition and diversity analysis for examining our ownership rules. Based

on this analysis, the Commission proposed changes to the national television ownership rule, the local television ownership rule (otherwise known as the ''duopoly'' rule), and the radio-television cross-ownership rule. In addition, the Commission solicited comment on whether broadcast television local marketing agreements (''LMAs'') should be considered attributable for purposes of applying the ownership rules in a manner similar to radio LMAs.

5. On February 8, 1996, the Telecommunications Act of 1996 became law. Section 202 of the Act directed the Commission to make a number of significant revisions to its broadcast ownership rules. Section 202 also requires us to review aspects of our local ownership rules that were the subject of the *FNPRM*. Specifically, section 202 requires the Commission to: (1) conduct a rulemaking proceeding concerning the retention, modification, or elimination of the duopoly rule; and (2) to extend the top 25 market/30 independent voices one-to-a-market waiver policy to the top 50 markets, ''consistent with the public interest, convenience, and necessity.'' In addition, both the Act and its legislative history contain language regarding the appropriate treatment of existing television LMAs under our ownership rules. Finally, section 202 directs the Commission to conduct a biennial review of all of its broadcast ownership rules and to repeal or modify any regulation it determines is no longer in the public interest.

6. In view of the 1996 Act's directives regarding broadcast multiple ownership, the Commission in 1996 adopted a *Second Further Notice of Proposed Rule Making* (''*2FNPRM*''), 61 FR 66978, December 19, 1996, in this proceeding inviting comment on several issues in light of the 1996 Act. The Commission solicited further comment in light of its review of comments previously filed in this proceeding, and invited comments on a number of specific issues pertaining to the duopoly rule, the radio-television cross-ownership rule, and the treatment of existing television LMAs in the event they are deemed attributable under any rules adopted in our attribution proceeding.

7. Our ownership rules, particularly the local ownership rules at issue in this proceeding, serve a vital public interest by promoting competition and diversity in the mass media. These are bedrock goals—reaffirmed by Congress and the Supreme Court on numerous occasions—in carrying out our statutory mandate of ensuring that broadcast licensees serve the ''public interest, convenience, and necessity.'' With these goals in mind, and after carefully reviewing the record in this proceeding, we believe we should relax to some extent our local television ownership restrictions where the public interest benefits resulting from same-market common ownership outweigh the threat to diversity and localism. The record reflects that there has been an increase in the number and types of media outlets available to local communities.

8. Specifically, we have decided to modify our local television ownership rule as follows. First, we are relaxing our television duopoly rule by narrowing the geographic scope of the rule from the current Grade B contour approach to a ''DMA'' test. Thus, common ownership of two television stations will be permitted without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas (''DMAs''). In addition, we will allow common ownership of two stations in the same DMA if their Grade B contours do not overlap (a continuation of our current rule), or if eight independently owned, full-power and operational television stations (commercial and noncommercial) will remain post-merger, and one of the stations is not among the top four-ranked stations in the market, based on audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time the application is filed. We will also adopt three waiver criteria as follows. First, we will presume a waiver of the rule is in the public interest to permit common ownership of two television stations in the same market where one station is a ''failed station,'' as supported by a showing that the station either has been off the air for at least four months immediately preceding the application for waiver, or is currently involved in involuntary bankruptcy or insolvency proceedings. Second, we will presume a waiver of the rule is in the public interest where one of the merging stations is a ''failing'' station, as supported by a showing that the station has had a low audience share and has been financially struggling during the previous several years, and that the merger will result in demonstrable public interest benefits. Third, we will presume a waiver is in the public interest where applicants can show that the combination will result in the construction and operation of an authorized but as yet ''unbuilt'' station, supported by a showing that the permittee has made reasonable efforts to construct. For all of these waivers, we will also require a showing that the in-market applicant is the only buyer ready, willing, and able to operate the station, and that sale to an out-of-market applicant would result in an artificially depressed price.

9. With respect to the radio-television cross-ownership rule, we are adopting a new, three-part rule that permits some degree of same-market radio and television joint ownership. We will permit a party to own a television station (or two television stations if permitted under our modified TV duopoly rule or television LMA grandfathering policy) and any of the following radio station combinations in the same market:

- Up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 20 independent voices would remain post-merger;
- Up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 10 independent voices would remain post-merger; and
- One radio station (AM or FM) notwithstanding the number of independent voices in the market.

In addition, in those markets where our revised rule will allow parties to own eight outlets in the form of two TV stations and six radio stations, we will permit them to own one TV station and seven radio stations instead.

10. For purposes of the new radio-television cross-ownership rule, we will count as voices all independently owned, full-power, operational, commercial and noncommercial television stations licensed to a community in the DMA in which the TV station in question is located, and all independently owned and operational commercial and noncommercial radio stations licensed to, or with a reportable share in, the radio metro market where the TV station involved is located. In addition, we will count independently owned daily newspapers that are published in the DMA and have a circulation exceeding 5 percent in the DMA. Finally, we will count, as a single voice, wired cable service, provided cable service is generally available in the DMA. As with our revised duopoly rule, we will permit waiver of our new radio/TV cross-ownership rule where one station is a failed station. We will not, however, adopt a presumptive waiver based on a showing that one station is a failing station or that the combination will result in the construction and operation of an authorized but as yet unbuilt station.

We will consider further relaxation of this rule and waiver policies as part of future biennial reviews.

11. We have granted a number of radio-television cross-ownership rule waivers conditioned on the outcome of this proceeding. The majority of these waivers involve radio-television combinations that will now be permissible under the revised rule we adopt today. For those that are not covered by the revised rule, as well as for those for which an application was filed on or before July 29, 1999 (the date of the ''sunshine'' notice for this *R&O*) if such application is ultimately granted by the Commission, we will allow these combinations to continue, conditioned on the outcome of the Commission's 2004 biennial review. Parties who wish the Commission to conduct this review prior to 2004 may apply for such relief, using criteria set forth below, beginning one year after the date this *R&O* is published in the **Federal Register**. Any transfer of a grandfathered combination after the adoption date of this *R&O* (whether during the initial grandfathering period of after a permanent grandfathering decision has been made) must meet the radio/TV cross-ownership rule.

12. Finally, with respect to existing television LMAs, we have decided in our related attribution proceeding to attribute time brokerage of another television station for purposes of our multiple ownership rules where the brokered and brokering station are in the same market and the amount of time brokered is more than 15 percent of the brokered station's weekly broadcast hours. Once attributed, however, the majority of currently existing same-market television LMAs will not violate our new TV duopoly rule going forward, because they either will be in separate DMAs, or will constitute an otherwise permissible arrangement under the new rule or related waiver policies. We will permit those LMAs that do not comply with our new duopoly rule and waiver policies to continue in full force and effect, if entered into before November 5, 1996, the grandfathering cut-off date proposed in the *2FNPRM.* LMAs entered into on that date or thereafter must come into compliance with our new duopoly rule and/or waiver policies or terminate within two years of the adoption date of this *R&O.* Television LMAs entered into before November 5, 1996 will be grandfathered, conditioned on the outcome of the Commission's 2004 biennial review, at which time the Commission will reconsider their status. Parties who wish the Commission to review the status of their LMAs prior to the 2004 biennial review may apply for such relief, using the criteria specified below, beginning one year after the date this *R&O* is published in the **Federal Register**. During the initial grandfathering period, the parties to the LMA may renew and/or transfer the term of LMA that remains in the five-year period.

III. The Local Television Ownership Rule

A. Geographic Scope of the Rule

13. *Background.* Our local television ownership rule presently prohibits common ownership of two television stations whose Grade B signal contours overlap. In the FNPRM, we sought comment on whether the geographic scope of the rule should be changed to Grade A signal contours or to Designated Market Areas (''DMAs''). Based on the comments we received, we tentatively concluded in the *2FNPRM* that the geographic scope of the local television ownership rule should be based on a combination of DMAs and Grade A contours. We sought comment on that tentative conclusion in the *2FNPRM,* as well as comment about possible exceptions to and waivers of the rule to permit television duopolies in certain circumstances where they would serve the public interest.

14. *Discussion.* We have decided to narrow the geographic scope of the television duopoly rule so as to permit common ownership of two television stations provided they are in different DMAs without regard to contour overlap. We will also continue to allow common ownership of stations within the same DMA as long as their Grade B contours do not overlap. We have chosen this DMA test based on our belief that, compared to the current Grade B signal contour standard, DMAs are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products. Changing the geographic scope of the duopoly rule will consequently more accurately define a local television market and permit mergers of stations in different markets without harming local competition and diversity. Moreover, we believe that the mergers that will be allowed under our new rule can lead to improved television service and viewer choice.

15. There are several benefits to defining the geographic dimensions of the local television market by reference to DMAs. Most importantly, unlike a rule relying on predicted field strength contours, DMAs reflect actual television viewing patterns and are widely used by the broadcasting and advertising industries. DMAs reflect the fact that a station's audience reach, and hence its ''local market,'' is not necessarily coextensive with the area of its broadcast signal coverage. For example, a station's over-the-air reach can be extended by carriage on cable systems and other multichannel delivery systems, as well as through such means as satellite and translator stations. In designating DMAs and compiling DMA-based ratings of television programs, Nielsen Media Research, a TV audience measuring service, collects viewing data from diaries placed in television households four times a year. Nielsen assigns counties to DMAs annually on the basis of television audience viewership as recorded in those diaries. Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in that DMA. Nielsen uses its DMA viewing data to compile DMA-based audience ratings for television programs. These data are used by television stations in deciding which programming should be aired, and by advertisers and stations in negotiating advertising rates.

16. We recognize that we proposed in the *2FNPRM* to supplement the DMA test with a Grade A contour standard to prohibit common ownership of stations with Grade A signal contour overlap even when they are in separate DMAs. However, after considering the comments in response to this proposal, we believe a ''DMA-only'' test is more appropriate. Although a station may attract some viewers who live outside its designated DMA, the preponderance of its audience will reside within its DMA. Local advertisers use DMA-based ratings to make their purchases of advertising time on local television stations, television networks generally have only one affiliate in each DMA, and stations target their programming to viewers inside the DMA because these are the viewers that advertisers pay to reach. The record also indicates that there are a fair number of stations that lie in different DMAs and serve wholly different markets even though they may have slightly overlapping Grade A contours. In addition, a DMA-only standard is more straightforward and easy to apply in terms of administering the rule. We consequently will not adopt a Grade A component in our new definition of the geographic scope of the duopoly rule.

17. This new definition will generally be less restrictive than the current Grade B signal contour test. There may be

some situations, however, in which this is not the case, particularly in some geographically large DMAs west of the Mississippi River. In these situations, the DMA may be large enough that two stations situated in the DMA do not have overlapping Grade B contours. Common ownership of the two stations would be permitted under the existing rule but not under a strict application of the new DMA standard.

18. In the *2FNPRM,* we noted our belief that there are currently few stations within the same DMA that could be commonly owned under the existing Grade B signal contour standard that are not already jointly owned. We sought comment on whether we should, if we adopted a DMA/Grade A rule, grandfather existing joint ownership combinations that conform to our current Grade B test. We also sought comment on an alternative approach of adopting a two-tiered rule under which we would permit common ownership both under the new test using DMAs and in situations where there is no Grade B overlap.

19. It is our intention in this proceeding to relax the duopoly rule consistent with our competition and diversity objectives. It is not our intention to restrict combinations that would be permitted under our present Grade B signal contour test. To avoid this result, we will continue to permit common ownership of television stations in the same DMA where there is no Grade B overlap between those stations. Although such stations may compete to some extent for viewers and advertisers, we believe any harm to diversity and competition from permitting such combinations will be minimal and we wish to avoid instances in which application of our new rule would be more restrictive than our current duopoly rule. In addition, this approach avoids disrupting current ownership arrangements involving stations in the same DMA with no Grade B overlap.

B. Permitting Television Duopolies in the Same Local Market

20. *Background.* In both the *FNPRM* and the *2FNPRM,* we invited comment on whether, in certain situations, we should allow entities to acquire more than one television station in the same geographic market. We sought comment both on exceptions to our ''one-station'' local ownership rule, including the exception currently provided in our rules for television satellite stations, as well as on a number of possible waiver criteria.

21. *Costs and Benefits of Broadcast TV Station Duopolies.* We believe that the demonstrated benefits of same-market television station combinations support allowing the formation of such combinations in certain cases where competition and diversity will not be unduly diminished. The record in this proceeding shows that there are significant efficiencies inherent in joint ownership and operation of television stations in the same market, including efficiencies related to the co-location and sharing of studio and office facilities, the sharing of administrative and technical staff, and efficiencies in advertising and news gathering. These efficiencies can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station. In markets with many separate television licensees, the public interest benefits of common ownership can outweigh any cost to diversity and competition of permitting combinations.

22. While we conclude that the public interest would be served by permitting television duopolies in certain circumstances, we are not eliminating or relaxing the rule to the extent a number of commenters advocate given the important diversity and competition issues at stake. Television broadcasting plays a very special role in our society. It is the primary source of news and information, as well as video entertainment to most Americans, and we must continue to ensure that the broadcast television industry has a diverse and competitive ownership structure. Moreover, as discussed above, because the communications industry is undergoing rapid change and increasing consolidation, significant yet measured relaxation of the television duopoly rule is appropriate to allow us to monitor the results of these sweeping changes.

23. In light of these considerations, we have decided to adopt a modification to our duopoly rule, and three waiver tests, that are targeted to promote the public interest without appreciable harm to our competition and diversity goals. In particular, as described below, we will modify the TV duopoly rule to allow common ownership of two stations in the same DMA, if eight independently owned and operating commercial and noncommercial television stations will remain in the DMA post-merger, and at least one of the stations is not among the top four-ranked stations in the market, based on audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time the application is filed. In addition, we will presume that a waiver of the rule is in the public interest if the applicant satisfies a ''failed'' or ''failing'' station test, or involves the construction of an ''unbuilt'' station.

1. Modification of the Rule: Eight Voice/Top Four-Ranked Station Standard

24. *Background.* In the *2FNPRM,* the Commission sought comment on whether we should entertain joint ownership of stations that (1) have very small audience or advertising market shares and (2) are located in a very large market where (3) a specified minimum number of independently owned voices remain post-merger. We stated that the purpose of such a standard would be to enhance competition and diversity in the local market by allowing small stations to share costs and thereby compete more effectively. We further stated that such joint ownership could potentially serve the public interest if such stations were to use their economic savings to produce new and better-quality programming or related enhancements. Such advantages may be particularly helpful to small and independent UHF stations. We invited comment on the circumstances under which joint ownership should be permitted, and on the size of the market share we might adopt, the number and kinds of voices we should count in any minimum voice criterion, and whether we should include a market rank test.

25. *Discussion.* After considering the record, and our competition and diversity goals, we have decided to modify the duopoly rule to permit any two television stations in the same market to merge if:

• At least eight 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, and

• The two merging stations are not both among the top four-ranked stations in the market, as measured by audience share.

If any entity acquires a duopoly under this standard, it will not later be required to divest if the number of operating television voices within the market falls below eight or if the two merged stations subsequently are both ranked among the top four stations in the market; however, a duopoly may not automatically be transferred to a new owner if the market does not satisfy the eight voice/top four-ranked standard. In such a case, the transaction must either meet one of the waiver standards enunciated below, or involve a sale to separate parties. We will not include a market rank component in our new rule because we believe such a test is unnecessary given the station rank and minimum number of stations criteria we are adopting. We adopt this ''eight voice/top four-ranked station'' standard as a modification of the rule as opposed to the adoption of a waiver criterion in order to fashion a bright-line test, bring certainty to the permissibility of these transactions, and expedite their consummation, given that we do not believe as a general matter that they unduly compromise our competition and diversity goals. We delegate to the Mass Media Bureau the authority to grant any application that satisfies the eight station/top four ranked station standard, and presents no new or novel issues.

26. This standard provides measured relaxation of the television duopoly rule, particularly in the larger television markets. It will allow weaker television stations in the market to combine, either with each other or with a larger station, thereby preserving and strengthening these stations and improving their ability to compete. These station combinations will allow licensees to take advantage of efficiencies and cost savings that can benefit the public, such as in allowing the stations to provide more local programming. At the same time, the station rank and voice criteria are designed to protect both our core competition and diversity concerns.

27. The ''top four ranked station'' component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition. In addition, our analysis has indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved. Permitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over diversity of viewpoints in local news presentation, which is at the heart of our diversity goal.

28. The ''eight independent voice'' component of the rule provides a clear benchmark for ensuring a minimum amount of diversity in a market. Taking into account current marketplace conditions, the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity. Thus, under our new rule, at least eight independently owned and operating full-power commercial and noncommercial broadcast television stations must remain in the DMA post-merger. We will not include in our count of independently owned television stations those that are brokered pursuant to an attributable same-market LMA because a substantial portion of the programming of brokered stations is furnished by the brokering station. This gives the brokering station a significant degree of influence over the brokered station's operations and programming such that it should not be counted as an independent source of viewpoint diversity; indeed, it is for this reason we have decided to attribute such TV LMAs in our attribution proceeding.

29. We believe that an ''eight station'' test that focuses only on the number of full-power broadcast television outlets in the market is necessary for two reasons. First, we believe that broadcast television, more so than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans. As the Supreme Court recently stated, ''[b]roadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.''

30. Second, we are unable to reach a definitive conclusion at this time as to the extent to which other media serve as readily available substitutes for broadcast television. In the *FNPRM* and *2FNPRM*, we sought information about the extent to which other media serve as substitutes for television in the advertising and delivered video programming markets, and for purposes of diversity. For example, in the *FNPRM*, we stated that for the purpose of competition analysis, we would tentatively consider local advertising markets to include broadcast and cable television advertising, radio advertising, and newspaper advertising. For delivered video programming, we tentatively included commercial and noncommercial television stations and cable television. While we expressed our inclination to tentatively include MMDS, DBS, and television delivered by telephone companies, we expressed concern about the extent to which the latter three alternatives were actually available to most Americans and sought quantitative, behavioral studies estimating the extent to which broadcast television actually faced substitutes from any and all sources in the marketplace. Although we have received voluminous materials debating such substitutability, we have not received the quantitative, empirical studies that we sought in order to assess this issue in a complete and accurate fashion. Nor does there seem to be a consensus on the extent to which various media are substitutes for purposes of diversity. Thus, while we agree with those commenters who argued that different types of media, such as radio, cable television, VCRs, MMDS, and newspapers, may to some extent be substitutes for broadcast television, in the absence of the factual data we requested we have decided to exercise due caution by employing a minimum station count that includes only broadcast television stations.

31. Our ''eight voice/top four ranked station'' standard provides significant relaxation of the television duopoly rule while at the same time ensures that markets remain sufficiently diverse and competitive at the local level so that common ownership of two television stations in these markets does not threaten our core diversity concerns. We recognize that stations in markets with less than nine independent voices will not be able to take advantage of this standard. But we believe this is appropriate given that these markets start with fewer broadcast television outlets, and thus a lower potential for providing robust diversity to viewers in such markets. While we recognize, as several commenters argued, that smaller markets also benefit from the efficiency gains and cost savings associated with joint station ownership, it is in these small markets that consolidation of broadcast television ownership could most undermine our competition and diversity goals. Moreover, the three waiver standards we adopt today—the failed and failing station criteria, and the unbuilt station test—will, consistent with our competition and diversity goals, provide relief in a more tailored fashion for stations in smaller markets that are unable to compete effectively.

2. Waiver Criteria

a. Failed Stations

32. *Background*. We invited comment in the *2FNPRM* on whether, if an applicant can show that it is the only viable suitor for a failed station, the Commission should grant the application regardless of contour overlap or DMA designations. We noted that for purposes of our one-to-a-market rule waiver standard, a ''failed'' station

is a station that has not been operated for a substantial period of time, e.g., four months, or that is involved in bankruptcy proceedings. We asked whether this standard should be used in evaluating a request to waive the television duopoly rule.

33. *Discussion.* We are persuaded that the public interest would be served by adopting a failed station waiver standard for our revised television duopoly rule. A station that is off the air or in involuntary bankruptcy or insolvency proceedings can contribute little, if anything, to any type of diversity in a local market. Nor does such a station constitute a viable alternative in the local advertising market. As we concluded in adopting our current failed station waiver standard for the one-to-a-market rule, the benefits to the public of joint ownership under these circumstances outweigh the costs to diversity. In fact, dark or bankrupt stations actually disserve our goal of efficient use of the spectrum because those stations are holding valuable frequencies without providing service to the public. Permitting another local station to acquire a failed station will result in additional programming, perhaps an increase in diversity in the market, and more advertising time available for sale in larger quantities.

34. We have decided to define a ''failed station'' for purposes of our television duopoly rule as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. In addition, we will require that the waiver applicant demonstrate that the ''in-market'' buyer is the only reasonably available entity willing and able to operate the failed station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.

35. This standard is stricter than the failed station standard used in the context of our current one-to-a-market rule. First, we are limiting our TV duopoly failed station waiver to stations in court-supervised involuntary bankruptcy and insolvency proceedings. By excluding voluntary bankruptcy and insolvency proceedings, we hope to avoid the issue of whether an owner has filed for bankruptcy or insolvency simply in order to qualify for a waiver. We will extend our failed station waiver here to apply to both insolvency and bankruptcy proceedings, as the former are a state-regulated mechanism similar to bankruptcy. Second, we are requiring applicants to make a serious attempt to sell the troubled station to an entity that would not require a waiver of our revised duopoly rule. Waiver applicants must demonstrate that the ''in-market'' buyer is the only reasonably available entity willing and able to operate the station, and that selling to another buyer would lead to an artificially depressed price for the station. One way to make this showing will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received. We believe that a strict failed station waiver standard is warranted in view of the other steps we are taking today to relax the television duopoly rule. While there are now other limited criteria pursuant to which same-market television stations may combine, we hope to limit the special relief awarded to failed stations to those situations where this relief is clearly needed. As with our current one-to-a-market failed station waiver standard, we will be predisposed to grant applications that meet the waiver standard, but will entertain petitions to deny seeking to rebut the waiver request.

36. To qualify for a waiver under the failed station standard, we will require the waiver applicant to provide relevant documentation, *i.e.*, proof of the length of time that the station has been off the air, or proof that the station is involved in bankruptcy or insolvency proceedings. We will also require, in the case of a silent station, a statement that the failed station went dark due to financial distress, not because of other, non-financial reasons. This documentation will ensure that the waiver standard is applied only to stations facing financial difficulties. We will not require the waiver applicant to demonstrate that the market will contain post-merger a minimum number of voices. As noted above, we have concluded that the benefits to the public of preventing a station from going dark or bringing a dark station back on the air cannot harm and may help diversity and competition, regardless of the number of broadcast and other voices in the local market. Any combination formed as a result of a failed station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

b. ''Failing'' Stations

37. *Background.* The *2FNPRM* also invited comment on whether we should adopt a failing station waiver criteria, and, if so, the appropriate definition of a failing station.

38. *Discussion.* We will adopt a ''failing'' station waiver standard. It will permit two stations to merge where at least one of the stations has been struggling for an extended period of time both in terms of its audience share and in its financial performance. Permitting such stations to merge should pose minimal harm to our diversity and competition goals, since their financial situation typically hampers their ability to be a viable ''voice'' in the market. These stations rarely have the resources to provide local news programming, and often struggle to provide significant local programming at all. Allowing a ''failing'' station to join with a stronger station in the market can greatly improve its ability to improve its facilities and programming operations, thus benefitting the public interest. This waiver standard may be of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top four ranked station test.

39. We agree with the commenters that argued that it makes little sense to force a station to go dark or declare bankruptcy before considering whether it should receive a waiver of the duopoly rule to permit it to merge with another station in the market. Of course, determining when a station is ''failed'' is a more straightforward task, since there are clear, objective criteria for identifying such a status, i.e., a station is dark or in bankruptcy. A ''failing'' station standard, by contrast, will involve more of an individualized, case-by-case assessment to determine when a station is struggling to such an extent that permitting it to merge with another station will not undermine our competition and diversity goals and may in fact promote them.

40. With these considerations in mind, and based on the record before us, we establish the following criteria for granting waivers under a ''failing'' station waiver standard. We will presume such a waiver is in the public interest if the applicant satisfies *each* of these criteria:

(1) One of the merging stations has had low all-day audience share (*i.e.*, 4% or lower).

(2) The financial condition of one of the merging stations is poor. A waiver is more likely to be granted where one or both of the stations has had a negative cash flow for the previous three years. The applicant will need to submit data, such as detailed income statements and balance sheets, to demonstrate this. Commission staff will assess the reasonableness of the applicant's showing by comparing data

regarding the station's expenses to industry averages.

(3) The merger will produce public interest benefits. A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity. At the end of the stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

(4) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed station waiver applicants, one way to satisfy this fourth criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.

Any combination formed as a result of a failing station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

c. Unbuilt Stations

41. *Background.* In the *2FNPRM,* we invited comment on whether we should entertain requests to waive the local television ownership rule to permit a local broadcast television licensee to apply for a television channel allotment that has remained vacant or unused for an extended period of time. We stated there that it may not be in the public interest to allow allotted broadcast channels to lie fallow—particularly in markets where it might be possible to allow additional NTSC stations to come on the air without adversely affecting the DTV allotment table and the transition to digital television. Similarly, we asked whether, if it is possible to create new channel allotments in a market without interfering with nearby channels and without adversely affecting the DTV allotment table, the Commission should entertain applications by an incumbent television licensee to establish a new channel in its market.

42. *Discussion.* Since we adopted the *2FNPRM,* the rationale for a vacant allotment waiver policy has become less relevant. In the *DTV Sixth Report and Order,* 62 FR 26684, May 14, 1997, we eliminated vacant NTSC allotments in order to better achieve our DTV objectives of full accommodation, service replication and spectrum recovery. We further stated that new television stations should be operated as DTV stations, and that there would be no need to maintain vacant NTSC allotments that were not the subject of a pending application or rule making proceeding. Thus, with the licensing of new NTSC service coming to an end, we believe that the proposed rationale for a vacant allotment waiver policy has been largely vitiated because there would be few, if any, situations where that basis for a waiver would apply. As the development of DTV continues, it is possible that new channels may again become available for licensing. If so, we may reconsider this issue at that time or in the context of our biennial review of our multiple ownership rules.

43. Although we no longer find it appropriate to adopt a vacant allotment waiver standard, we have concluded that the public interest would be served at this time by adopting a duopoly waiver standard for ''unbuilt'' television stations. The unbuilt station waiver we adopt is premised on essentially the same logic as supports our failed and failing station waiver standards. A station that has gone unbuilt, like a built station that has gone dark, cannot contribute to diversity or competition. On the other hand, activation of a construction permit and construction of a station, even by the owner of another television station in the market if that is the only viable means to obtain service, increases program choice for viewers, may increase outlet diversity, and increases the amount of advertising time available for sale in the market. We believe that the benefits to the public of construction and operation of such a station, even if through joint ownership, rather than allowing the channel to remain unused, outweigh any costs to diversity and competition.

44. To qualify for a duopoly waiver under this standard, we will require that applicants satisfy each of these criteria:

(1) The combination will result in the construction of an authorized but as yet unbuilt station.

(2) The permittee has made reasonable efforts to construct, and has been unable to do so.

(3) The in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station and selling the construction permit to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed and failing station waiver applicants, one way to satisfy this criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received.

Any combination formed as a result of an unbuilt station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

d. UHF Combinations

45. *Background.* In the *2FNPRM,* we invited comment on the extent to which the Commission should distinguish between UHF and VHF stations in applying our TV duopoly rule.

46. *Discussion.* After careful consideration of the comments, we have decided not to create a UHF exception or UHF waiver policy for several reasons. First, a UHF exemption or waiver policy is an overbroad means of promoting the public interest. As we noted in our *R&O* eliminating the prime time access rule for television networks, many UHF stations are financially successful, are network affiliates, and are part of large station groups. Thus, a blanket exception or waiver for all UHF stations would unfairly benefit more powerful affiliates as well as struggling stations. Second, cable carriage compensates for many of the technical disadvantages faced by UHF stations vis-a-vis their VHF counterparts. Cable penetration is near 70 percent nationwide. Moreover, the Supreme Court's decision upholding the statutory must-carry rights of television stations removes a major source of uncertainty among UHF stations about their ability to obtain cable carriage. Third, deployment of DTV should eliminate, over the next several years, many of the remaining disadvantages of UHF stations. The Commission's power limitations for DTV licensees will likely reduce the technical discrepancy of UHF and VHF stations, and the multichannel capabilities of digital transmission should enhance the ability of UHF stations to compete in the video marketplace. Fourth, licensees may continue to take advantage of the satellite station exception to the TV duopoly rule, which is designed to assist financially struggling stations that cannot operate as stand-alone full-service stations. Finally, we believe that the financial problems faced by particular UHF stations can more appropriately be addressed, at least to some extent, by the other duopoly waiver criteria we are adopting today.

As discussed above, these criteria are targeted to assist stations facing financial hardships. We therefore will not create a waiver policy or exception to the TV duopoly rule based on whether a station is in the UHF or VHF band.

3. Satellite Stations

47. *Background.* Generally, television satellite stations retransmit all or a substantial part of the programming of a commonly-owned parent station. Satellite stations are generally exempt from our broadcast ownership restrictions. In the *2NPRM,* we noted that the Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations. Later we authorized satellite stations in smaller markets already served by full-service operations but not reached by major networks. More recently, we have authorized satellite stations in larger markets where the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station. We stated in the *2FNPRM* that we saw no reason to alter our policy of exempting satellite stations from our local ownership rules, but invited comment on this conclusion. All the commenters that addressed this issue supported continuing the exception of satellite stations from the duopoly rule.

48. *Discussion.* We believe that continued exception of satellite stations from the duopoly rule is appropriate. As we stated in the *2FNPRM,* our satellite station policy rests in part on the questionable financial viability of the satellite as a stand-alone facility. As such, our policy has furthered the underlying goals of our ownership restrictions by adding additional stations to local television markets where these stations otherwise would not have been established. In addition, the other criteria we use to evaluate satellite operations, including service to underserved areas, ensure that satellite operations are consistent with our goals of promoting diversity and competition.

IV. Radio-Television Cross-Ownership Rule

49. *Background.* The radio-television cross-ownership rule, or the ''one-to-a-market'' rule, forbids joint ownership of a radio and a television station serving substantial areas in common. In 1989, the Commission amended the rule to permit, on the basis of a presumptive waiver, radio-television mergers involving one television and one AM and one FM station, in the top 25 television markets if, post-merger, at least 30 independently owned broadcast voices remain in the relevant market, or if the merger involves a failed station. Our current policy also permits waivers on a case-by-case basis if the merger satisfies a group of five separate criteria.

50. In the *FNPRM,* we proposed to eliminate the cross-ownership restriction in its entirety or replace it with an approach under which cross-ownership would be permitted where a minimum number of post-acquisition, independently owned broadcast voices remained in the relevant market. We tentatively concluded there were two alternative approaches toward modifying the rule. If radio and television stations do not compete in the same local advertising, program delivery, or diversity markets, we proposed to eliminate the rule entirely and rely on our radio and television local ownership rules to ensure competition and diversity at the local level. Under the local radio ownership rules in effect at that time, this would have permitted entities to own one AM, one FM, and one television station in even the smallest markets, and up to 2 AM, 2 FM, and one television station in larger markets. In contrast, if we concluded that radio and television did compete in some or all of the local markets, we proposed to modify the one-to-a-market rule to permit radio-television combinations in markets where there are a sufficient number of remaining independent voices to ensure sufficient diversity and competition.

51. After adoption of the *FNPRM,* Congress passed the 1996 Act, which affects the radio-television cross-ownership rule in at least two ways. First, section 202(d) of the Act directs the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50, rather than top 25, television markets ''consistent with the public interest, convenience and necessity.'' Second, section 202(b)(1) of the Act liberalized the local radio ownership rules.

52. In our *2FNPRM,* based on the statutory changes to the local radio ownership rules, we requested further comment on our radio-television cross-ownership rule proposals. First, we sought further comment on whether the rule should be eliminated based on a finding that radio and television stations do not compete in the same market. Second, even if we consider television and radio stations to be competitors, we asked if the radio-television cross-ownership rule could be eliminated because the respective radio and television ownership rules alone can be relied upon to ensure sufficient diversity and competition in the local market. We also sought to update the record on a number of specific options for modifying, but not eliminating, the rule. In this regard, and consistent with section 202(d) of the 1996 Act, we proposed, at a minimum, to extend the top 25 market/30 voice waiver policy to the top 50 markets. However, we also invited comment on a number of options to change the rule beyond what was contemplated by section 202(d) of the 1996 Act. For example, we asked whether the presumptive waiver policy should be extended further to any television market where the minimum number of independent voices would remain after the merger. We also invited comment on whether the presumptive waiver policy should be extended to entities that seek to own more than one FM and/or AM radio station, and whether the Commission should reduce the number of required independently owned voices that must remain after a merger. Finally, we asked whether our ''five factors'' test should be changed or refined to be more effective in protecting competition and diversity.

A. Modification of the Rule

53. *Discussion.* We have determined that the public interest would be best served at this time by relaxing the radio-television cross-ownership rule to permit same-market joint ownership of radio and television facilities up to a level that permits broadcasters and the public to realize the benefits of common ownership while not undermining our competition and diversity concerns. Our new rule consists of three parts. First, we will permit a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 20 independently owned media voices remain in the market after the combination is effected. In those markets where our revised rule will allow parties to own a total of eight outlets in the form of two TV stations and six radio stations, we will also permit them instead to own eight outlets in the form of one TV station and seven radio stations. Second, we will permit common ownership of up to two television stations and up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 10 independently owned media voices remain after the combination is effected. And, third, we will permit common ownership of up to two television stations and one radio

station notwithstanding the number of independent voices in the market. In determining which stations are subject to the new rule, we will use the same contour overlap standards used in our present rule. We delegate to the Mass Media Bureau the authority to grant any application that satisfies the new radio/TV cross-ownership rule, and presents no new or novel issues. If a voice test is required to acquire a given combination (*i.e.,* any combination that includes more than one radio/TV combination), that combination will not later be required to be undone if the number of independent voices in the market later falls below the applicable voice test. However, a radio/TV combination may not be transferred to a new owner if the market does not satisfy the applicable voice standard at the time of sale.

54. As described below, we will eliminate our five factor case-by-case waiver standard. Waivers of our new three-part rule will be granted only in situations involving a failed station and in extraordinary circumstances in which the proponent of the waiver will face a high hurdle. We will define a failed station for purposes of our new radio/TV cross-ownership rule in the same manner as that term is defined for purposes of the failed station waiver we adopt today in connection with our television duopoly rule. Any combination formed as a result of a failed station waiver may be transferred together only if the combination meets our new radio/TV cross-ownership rule or our failed station waiver standard at the time of transfer.

55. *Rationale for Modified Rule.* We relax our radio/TV cross-ownership rule to balance our traditional diversity and competition concerns with our desire to permit broadcasters and the public to realize the benefits of radio/TV common ownership. We believe that the revised rule reflects the changes in the local broadcast media marketplace. The relaxed rule recognizes the growth in the number and types of media outlets, the clustering of cable systems in major population centers, the efficiencies inherent in joint ownership and operation of both television and radio stations in the same market, as well as the public service benefits that can be obtained from joint operation. At the same time, the voice test components of the revised rule also ensure that the local market remains sufficiently diverse and competitive.

56. The new three-part rule also ensures the application of a clear, reasoned standard. One of our primary goals in this proceeding is to provide concrete guidance to applicants and the public about the permissibility of proposed transactions. This minimizes the burdens involved in complying with and enforcing our rules. It also promotes greater consistency in our decision-making. Since development of the Commission's waiver policy in 1989, the Commission has granted a significant number of waivers in order to provide broadcasters relief from the one-to-a-market rule, which prohibited any common ownership of television and radio stations in the same market. Indeed, some commenters argue that this waiver process has come to govern regulation of same-market radio-television cross-ownership, rather than the rule itself. Today, we redirect our approach by amending the rule to provide a greater degree of common ownership of radio and television stations while at the same time limiting waivers of this new rule to only extraordinary circumstances. In addition, the new rule will ease administrative burdens and will provide predictability to broadcasters in structuring their business transactions.

57. A number of commenters argued that we should eliminate our radio-television cross-ownership rule entirely. We do not believe that course is appropriate at this time. We stated in the *FNPRM* that elimination of the rule might be warranted if we concluded that radio and television stations do not compete in the same local advertising, program delivery, or diversity markets. Although radio and television stations may or may not compete in different advertising markets, we believe a radio-television cross-ownership rule continues to be necessary to promote a diversity of viewpoints in the broadcast media. The public continues to rely on both radio and television for news and information, suggesting the two media both contribute to the ''marketplace of ideas'' and compete in the same diversity market. As these two media do serve as substitutes at least to some degree for diversity purposes, we will retain a relaxed one-to-market rule to ensure that viewpoint diversity is adequately protected.

58. Although we decline to eliminate our radio-television cross-ownership rule, the demonstrated benefits of same-market broadcast combinations support relaxing the rule and allowing such combinations in circumstances where we find that diversity and competition remain adequately protected. The record in this proceeding demonstrates that there are significant efficiencies inherent in joint ownership and operation of broadcast stations in the same market, even when the stations are in separate services (*i.e.,* radio-TV combinations). Among other benefits, these efficiencies often lead to improved programming and can help stations in financial difficulty remain on the air. The revised radio/TV cross-ownership rule we adopt today will establish clear guidelines that will permit common ownership of radio and television stations in markets where diversity and competition are preserved.

59. Turning to the specifics of the first two prongs of the new rule, we will use a ''voice count'' approach rather than also applying a market rank restriction as with our current top 25 market, 30 voice presumptive waiver policy. In particular, the first prong of our new rule, which permits a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market with at least twenty independently owned media voices, focuses on the number of independent voices remaining in the market post-merger, rather than market rank (*e.g.,* the top 100 markets). A rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market. As a number of commenters in this proceeding noted, a market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers. In addition, unlike a rule based on market rank, our revised rule will account for changes in the number of voices in a market resulting from consolidation, the addition of new voices, or the loss of any outlets. Mergers will be permitted only when the voice count is satisfied, thereby ensuring the preservation of a minimum level of diversity and competition in the market.

60. The second prong of our new rule permits a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market with at least ten independently owned media voices. This standard also focuses on the number of independent voices remaining in the market post-merger rather than market rank, and extends the benefits of common ownership to smaller markets. In this regard, our

revised rule permits broadcasters and the public in these markets to realize the same benefits of common ownership we have concluded are worthwhile for the largest markets.

61. The third prong of our new rule will allow common ownership of up to two television stations (provided that is permissible under our rules or TV LMA grandfathering policy) and one radio station notwithstanding the number of independent voices in the market. Based on the record before us, we find that the service benefits and efficiencies achieved from the joint ownership and operation of a television/radio combination in local markets further the public interest and outweigh the cost to diversity in these instances.

62. *Applying the Voice Count Tests.* We will apply the voice test under both prongs of our new radio/TV cross-ownership rule that include such a test as follows:

(1) We will count all independently owned and operating full-power commercial and noncommercial broadcast television stations licensed to a community in the DMA in which the community of license of the television station in question is located.

(2) We will also count all independently owned and operating commercial and noncommercial broadcast radio stations licensed to a community within the radio metro market in which the community of license of the television station in question is located. In addition, we will count broadcast radio stations outside the radio metro market that Arbitron or another nationally-recognized audience rating service lists as having a reportable share in the metro market. In areas in which there is no radio metro market, the party seeking the waiver may count the radio stations present in an area that would be the functional equivalent of a radio market.

(3) We will count all independently owned daily newspapers that are published in the DMA at issue and that have a circulation exceeding 5% of the households in the DMA.

(4) We will count cable systems provided cable service is generally available to television households in the DMA. For DMAs in which cable service is generally available, cable will count as a single voice for purposes of our voice analysis, regardless of the number of cable systems within the DMA, their ownership, and any overlap in service area.

63. In counting broadcast television and radio stations as ‘‘voices’’ we are being consistent with the voice count analysis used in our current ‘‘top 25 market/30 voice’’ presumptive waiver standard. That standard, however, counts radio stations licensed to the relevant *television* metropolitan market. Under our new rule, we will instead use the *radio* metropolitan market, and will include both radio stations licensed within the radio metro market and stations with a reportable share in that market. We believe it is important to count radio stations with a reportable share in the relevant market because those stations clearly serve as a source of information and entertainment programming for the relevant market. We have chosen to use the radio metro market rather than the television metro market for counting the number of independent radio voices because the former more accurately reflect the competitive and core signal availability realities for radio service in the market. All independently owned radio stations in the radio market can be presumed to be available to residents of that market because of signal reach. Radio stations outside the radio metro market may also be presumed to be available to all residents of the radio market if Arbitron, or another nationally recognized audience rating service, lists them as having a reportable audience share in the radio metro. Reportable audience share information is not generally available for television metro markets. Thus, use of radio markets will ease the burden on applicants seeking approval of assignment and transfer applications, and on the Commission staff reviewing such applications.

64. We will also include in our voice count daily newspapers and cable systems because we believe that such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as advertising outlets. Although we have not previously explicitly counted cable and newspapers as voices under our current top 25 market/30 voice presumptive waiver standard, we have counted these outlets in applying the case-by-case, five factor waiver standard. While we will count these media outlets in applying our amended rule, we will restrict the number of newspapers we will include and limit the weight we will ascribe to cable. Specifically, we will include all independently owned daily newspapers that are published in the DMA that have a circulation exceeding 5 percent of the households in the DMA. Our intent in this regard is to include those newspapers that are widely available throughout the DMA and that provide coverage of issues of interest to a sizeable percentage of the population. Although we recognize that other publications also provide a source of diversity and competition, many of these are only targeted to particular communities and are not accessible to, or relied upon by, the population throughout the local market. We will also include wired cable television in the DMA as one voice, since cable service is generally available to households throughout the U.S. We believe it is appropriate to include at least one voice for cable, where cable passes most of the homes in the market, because there are PEG and other channels on cable systems that present local informational and public affairs programming to the public. At this time we count cable as no more than one voice since most cable subscribers have only one cable system to choose from. In addition, despite a multiplicity of channels provided by each cable system, most programming is either originated or selected by the cable system operator, who thereby ultimately controls the content of such programming. As most cable programming available to a household is controlled by a single entity, we believe cable should be counted as a single voice in applying our voice test.

B. Waiver Criteria

1. Failed Stations

65. We will continue to grant waivers of our radio-television cross-ownership rule, on a presumptive basis, in situations involving a failed station. However, we will adopt the definition of a failed station used in the context of our television duopoly failed station waiver standard. In order to qualify as ‘‘failed’’ a station must be dark for at least four months or involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. In addition, we will require that the waiver applicant demonstrate that the ‘‘in market’’ buyer is the only reasonably available entity willing and able to operate the failed station and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station. As in the past, we will require the applicant seeking the waiver to provide relevant documentation, *i.e.*, proof of the length of time that the station has been off the air, or proof that the station is involved in bankruptcy proceedings. In addition, in the case of a silent station, we will require a statement that the failed station went dark due to financial distress, not because of other, non-financial reasons. Any combination formed as a result of a failed station waiver may be transferred together only

if the combination meets our radio/TV cross-ownership rule, or failed station waiver, at the time of transfer.

66. Our new waiver standard is significantly stricter than the failed station standard used in the context of our current one-to-a-market rule. As we stated in adopting our television duopoly failed station waiver, we are limiting the waiver to involuntary bankruptcy and insolvency proceedings to avoid the risk that an owner has filed for bankruptcy or insolvency simply to qualify for a waiver. We will extend the waiver to include stations in insolvency as well as bankruptcy proceedings, as the former is a state-regulated mechanism similar to bankruptcy. Finally, we are requiring that applicants make a serious effort to sell the troubled station to an out-of-market buyer in order to limit the relief afforded by the waiver to those situations in which it is clearly needed. In view of the other steps we are taking today to relax our radio/TV cross-ownership rule, we believe that it is appropriate to ensure that the relief offered by our failed station waiver is directed to stations that are clearly facing financial difficulty and that cannot be sold absent a waiver of our rule.

67. Our rationale for this waiver standard is the same as that of the failed station waiver standard we are adopting today for the television duopoly rule. We believe that the benefits to the public of joint ownership, namely preserving a bankrupt station or allowing a dark station to return to the air, do not pose costs from a diversity perspective. Once a station has been off the air for a substantial period or has become involved in involuntary bankruptcy proceedings (so that it is likely to go off the air), competition and diversity in a local market cannot be improved by forbidding joint ownership of that station with another station in the market. It is our view that two operating, commonly-owned stations serve the public better than one operational station and one nonoperational station that provides no service to the public at all. We note that Congress reached the same conclusion in the 1996 Act when it authorized an exception to the local radio ownership limits to permit an entity to exceed those limits if so doing would result in an increase in the number of stations in operation. Increasing the number of stations in a market provides additional voices to address community needs and issues and increases listeners' programming choices.

68. This waiver will not be extended to failing or unbuilt stations. Thus, evidence that a station is losing money (*i.e.*, a negative cash flow) is not adequate to qualify for the waiver. We do not believe that it is necessary at this time to permit such additional waivers in view of the measured liberalization of our radio/TV cross-ownership rule and the 1996 Act's liberalization of the local radio ownership limits.

2. ''Five Factors'' Waiver Standard

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

70. *Discussion*. In light of the modifications we are making today in the radio-television cross-ownership rule and our goals of protecting competition and diversity, we will eliminate the case-by-case, ''five factors'' waiver test we have previously employed. Our amended rule goes beyond the criteria pursuant to which we have delegated authority to the Commission staff to act on one-to-a-market waiver requests, most of which have been approved under the five factors standard. We have revised the rule based on our recognition that the benefits of joint ownership in many circumstances outweigh the harm to diversity, and have based that conclusion in large part on an assessment of the same general criteria identified in our current five factor waiver standard. In the event that extraordinary evidence exists that a waiver of our revised rule is warranted, the Commission will consider that evidence pursuant to our general waiver authority. Given the significant relaxation of our radio-TV cross-ownership rule, applicants seeking combinations that exceed the new rule will bear a substantially heavier burden than in the past in justifying joint ownership.

71. We are eliminating the five-factor waiver standard because it has been difficult to apply. After a number of years of experience in applying this test, we have come to conclude that the standard does not sufficiently protect our competition and diversity goals. We believe that our new, three-part rule, along with our failed station waiver, will be easier to administer, better protect the Commission's competition and diversity goals, and therefore further the public interest.

3. Existing Conditional Waivers

72. In a number of rulings since passage of the 1996 Act, the Commission has granted, conditioned on the outcome of this proceeding, applications for waiver of the radio-television cross ownership rule where the number of radio stations exceeded the radio limits in existence prior to the Act. The conditional waiver grantees are directed to file with the Commission within sixty days of publication of this *R&O* in the **Federal Register** a showing sufficient to demonstrate their compliance or non-compliance with our new rule. In situations where the revised rule is met, we delegate to the Mass Media Bureau the authority to replace the conditional waiver with permanent approval of the relevant assignment or transfer of license.

73. A number of the conditional waivers that have been granted will not comply with our newly revised radio/TV cross-ownership rule. Although parties that received these waivers were placed on notice that their proposed station transactions were subject to the outcome of this rulemaking proceeding, we nonetheless will extend these conditional waivers, until the conclusion of our biennial review in 2004, during which we will review the radio/TV cross-ownership rule itself. We will also extend this grandfathering relief to any pending application for conditional waiver, if filed on or before July 29, 1999 (the date of this ''sunshine'' notice for this *R&O*), and ultimately granted by the Commission. In 2004, the Commission will review these waivers, on a case-by-case basis, as part of its biennial review and determine the appropriate treatment of them beyond that point in time. In order to qualify for permanent grandfathering relief after 2004, conditional waiver grantees will be required to demonstrate that such relief is in the public interest, based upon, to the extent applicable to radio/TV combinations, the same criteria that we will use to review the LMAs that we have concluded to grandfather for a similar period of time. As is the case with the grandfathered LMAs, if conditional waiver grantees wish to establish greater certainty about the status of their waiver prior to the 2004 biennial review, they may make a showing using the 2004 biennial review criteria, beginning one year after the date that this *R&O* is published in the

Federal Register. Any transfer of a grandfathered combination after the adoption date of this *R&O* (whether during the initial grandfathering period or after a permanent grandfathering decision has been made) must meet the radio/TV cross-ownership rule or waiver policy in effect at the time of transfer.

V. Television Local Marketing Agreements

74. *Background.* A television local marketing agreement (''LMA'') or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming. Our current data indicate that there are at least 70 existing LMAs where the brokering and brokered station are in the same DMA. Most of these LMAs are in the top 50 television markets.

75. In our companion *Attribution R&O,* we have decided to attribute time brokerage of another television station in the same market for more than fifteen percent of the brokered station's broadcast hours per week and to count LMAs that fall in this category toward the brokering licensee's ownership limits. In the *2FNPRM,* we stated that we would decide in this proceeding how to treat existing television LMAs under any new attribution rules that we might adopt in the *Attribution* proceeding. In this *R&O,* we adopt policies to afford ''grandfather'' rights to existing television LMAs according to the provisions discussed below.

76. In the *2FNPRM,* we stated that, in the event that we found television LMAs attributable, we were inclined to extend some grandfathering relief to all television LMAs entered into before the November 5, 1996 adoption date of the *2FNPRM* for purposes of compliance with our ownership rules. We sought comment on an approach whereby such LMAs would not be disturbed during the pendency of the original term of the LMA in the event the cognizability of the LMA would result in violation of an ownership rule. We also tentatively concluded that television LMAs entered into on or after the adoption date of the *2FNPRM,* if they resulted in violation of any ownership rule, would not be grandfathered and would be accorded only a brief period within which to terminate. We also reserved the right to invalidate an otherwise grandfathered LMA in circumstances raising particular competition and diversity concerns, such as might occur in very small markets.

77. After reviewing the comments received in response to the *2FNPRM* in this proceeding and the *FNPRM* in our related attribution proceeding, the Commission concluded that the commenters had not provided sufficient information on a range of important factual issues related to television LMAs. To provide a more complete record, the Commission released a *Public Notice* on June 17, 1997 (62 FR 33792, June 23, 1997), requesting parties to any existing television LMA to provide certain information regarding the terms and characteristics of these agreements to help us determine, *inter alia,* the number of existing television LMAs, the date of origination and duration of these arrangements, and the efficiencies or public interest benefits that may have resulted from the LMA.

78. *Discussion.* We adopt our proposal in the *2FNPRM* to grandfather television LMAs entered into prior to November 5, 1996, the adoption date of that document, for purposes of compliance with our ownership rules. Television LMAs entered into on or after that date will have two years from the adoption date of this *R&O* to come into compliance with our rules or terminate. LMAs entered into before November 5, 1996 will be grandfathered until the conclusion of our 2004 biennial review, a period of approximately five years. As part of that review, the Commission will conduct a general review of the TV duopoly rule and a case-by-case review of grandfathered LMAs, and assess the appropriateness of extending the initial grandfathering period. Parties who wish the Commission to conduct this review prior to 2004 may apply for such relief, using the biennial review criteria, beginning one year after the date the *R&O* is published in the **Federal Register**. We now turn to a more detailed explanation of our decision on this issue.

79. *Section 202(g) of the 1996 Act.* Some commenters argue that the 1996 Act directs us to grandfather television LMAs permanently. Section 202(g) of the 1996 Act addresses the construction of section 202 with respect to LMAs. Section 202(g) states that ''[n]othing in this section shall be construed to *prohibit* the origination, continuation, or renewal of any television local marketing agreement that is *in compliance with the regulations of the Commission.*'' (Emphasis added.) As we stated in the *2FNPRM,* the plain language of this provision states that section 202 shall not be construed to prohibit any television LMA that is in compliance with the Commission's rules.

80. We do not regard section 202(g) as limiting our ability to promulgate attribution rules under Title I and Title III of the Communications Act affecting the status of television LMAs. As a result, we do not see section 202(g) of the 1996 Act as posing a legal restraint in resolving questions raised in the *FNPRM* as to (1) whether television LMAs in which a broker obtains the ability to program 15% or more of a broadcast television station's weekly broadcast output should be deemed an attributable interest (which has been decided in our companion *Attribution R&O*); and (2) whether grandfathering existing television LMAs from any applicable ownership rules that would follow from that attribution decision is appropriate.

81. We consequently believe that the 1996 Act left the Commission with the discretion to adopt a grandfathering policy with respect to television LMAs that appropriately addresses the equity, competition, and diversity issues these arrangements raise. Having said that, we fully recognize the need to avoid undue disruption of television LMAs that were entered into in good faith reliance on our previous rules at the time, and that these arrangements may in fact have resulted in significant public interest benefits. We now turn to striking the appropriate balance regarding these factors.

82. *Grandfathering Cut-Off Date.* We will adopt our proposal in the *2FNPRM* to grandfather television LMAs entered into before the adoption date of that document, *i.e.,* November 5, 1996. It was on this date that the Commission gave clear notice that it intended to attribute television LMAs in certain circumstances, and that LMAs entered into on or after that date that violated our local television ownership rule would not be grandfathered and would be accorded only a fixed period in which to terminate.

83. *Treatment of LMAs Entered Into on or After November 5, 1996.* LMAs that are not eligible for grandfathering relief—*i.e.,* those LMAs entered into on or after November 5, 1996, that are attributable under the new attribution criteria and that would violate the TV duopoly rule—will be given two years from the adoption date of this *R&O* to terminate. Even though the holders of such LMAs entered into after our grandfathering date could not have a legitimate expectation of being eligible for the grandfathering rights we adopt today, we believe that such a transition is appropriate to avoid undue disruption of existing arrangements and will allow the holders of LMAs to order their affairs. For example, the licensee

of a brokered station may need time to arrange for programming to replace that provided under the LMA; a two-year transition to do this will allow the licensee to avoid disruption of its service to the public. In addition, stations with non-grandfathered LMAs could, of course, apply for a TV duopoly under our new rule or waiver criteria, just as any other station owner in the market could. Applications based on a waiver may be based on circumstances as they existed at the time just prior to the parties entering into the LMA.

84. *Scope of Grandfathering Relief.* We believe television LMAs entered into prior to the November 5, 1996 adoption date of the *2FNPRM* should receive significant grandfathering relief. The parties to these LMAs entered into these arrangements when there was no Commission rule or policy prohibiting them. There consequently are strong equities against requiring them to divest their interests in these LMAs and upset the settled expectations established by these plans and investments. Doing so could impose an unfair hardship on these parties.

85. In addition to these equities, the record shows that a number of television LMAs resulted in public interest benefits. ALTV submitted a study showing that LMAs helped some struggling stations complete construction of their facilities or upgrade them, allowed others to add a local newscast or other local programming to their schedule, and more generally permitted stations to take advantage of operating efficiencies to serve their viewers better. We do not wish to disrupt these public interest benefits.

86. We consequently will grandfather television LMAs entered into prior to November 5, 1996, conditioned on the Commission's 2004 biennial review. During this initial grandfathering period and during the pendency of the 2004 review, these LMAs may continue in full force and effect, and may also be transferred and renewed by the parties, though the renewing parties and/or transferees take the LMAs subject to the review of the status of the LMA as part of the 2004 biennial review. At that time, the Commission will reevaluate these grandfathered television LMAs, on a case-by-case basis, to examine the competition, diversity, equities, and public interest factors they raise and to determine whether these LMAs should continue to be grandfathered. In order to qualify for permanent grandfathering relief after 2004, parties to LMAs entered into before November 5, 1996 will be required to demonstrate that such relief is in the public interest based upon the biennial review factors described below.

87. We believe that reevaluation of the LMAs is reasonable as the record shows that many parties entered into television LMAs, and made substantial investments in these arrangements, with the belief that they could be renewed or transferred. If any party to an LMA wishes the Commission to determine the status of its agreement prior to the 2004 biennial review, it may request the Commission to do so at any time beginning one year after this *R&O* is published in the **Federal Register**, using the biennial review factors noted below, to demonstrate that continuation of the LMA is in the public interest. (In addition, at any time the parties to an LMA may seek, just as any other applicant, to form a duopoly or justify an LMA indefinitely under our new rule and waiver policies. A showing based on voice counts must meet our new rule at the time the showing is filed; a showing based on a waiver may be based on the circumstances existing just prior to the parties entering into the LMA.) Whether LMA holders obtain a duopoly outright or permanent grandfathering relief for arrangements that do not comply with our new TV duopoly rule and waiver policies, such relief will not be extended to any transfers subsequent to 2004; any transfer of permanently grandfathered arrangements after that time must meet our duopoly rule or waiver policies in effect at the time of transfer.

88. As part of the 2004 biennial review, the Commission will examine the following factors to assist in its review of grandfathered television LMAs:

• Public Interest Factors—The FCC will assess the extent to which parties, by virtue of their joint operation, have achieved certain efficiencies allowing them, in turn, to produce specific and demonstrable benefits to the public. For example, the Commission may consider, among other things, the following: the extent to which broadcasters involved have fostered the regulatory goal of promoting localism, including locally-originated programming, such as news and public affairs programming; the extent to which the joint operations have made possible capital investments and technical improvements that have improved service; the extent to which the joint operations have increased the amount and investment in children's educational programming; and the extent to which the joint operations have otherwise produced specific and demonstrable benefits to the viewing public;

• DTV Conversion—The FCC will evaluate the extent to which the same-market joint operations are on or ahead of schedule to convert to DTV and digital service. We will examine the extent to which one station has enabled the other to convert to digital operations, and whether joint operation has expedited that conversion, as well as has produced more over-the-air programming using digital transmission.

• Marketplace Conditions—The FCC will evaluate the status of competition and diversity in the marketplace.

• Equities—In considering the appropriateness of grandfathering beyond the initial five year period, the FCC will take into account the capital investments the broadcasters involved have already made to improve the quality of the technical facilities of the stations involved, and weigh these equities against the competition and diversity issues involved.

89. *Filing Existing LMAs.* Those parties with existing LMAs that are attributable under our new attribution rules are directed to file a copy of the LMA with the Commission within thirty days of the publication of this *R&O* in the **Federal Register**.

VI. New Applications

90. Applications filed pursuant to this *R&O* will not be accepted by the Commission until the effective date of this *R&O*. We realize that the rules adopted in this *R&O* could result in two or more applications being filed on the same day relating to stations in the same market and that due to the voice count all applications might not be able to be granted. We will address how to resolve such conflicts in a subsequent action.

VII. Conclusion

91. For the reasons discussed, we adopt this *R&O* revising our local television ownership rules. We intend by these revisions to improve the ability of television broadcasters to realize the efficiencies and cost savings of common station ownership, and to strengthen their potential to serve the public interest. We believe that our decision strikes the appropriate balance between common ownership and our fundamental competition and diversity concerns, and ensures that our television ownership restrictions appropriately reflect ongoing changes in the broadcast television industry.

VIII. Administrative Matters

92. *Paperwork Reduction Act of 1995 Analysis.* This *R&O* has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new reporting requirements on

the public. Implementation of these new reporting requirements will be subject to approval by the Office of Management and Budget as prescribed in the Act. The new reporting requirements contained in this *R&O* have been submitted to OMB for emergency clearance.

93. *Regulatory Flexibility Analysis.* Pursuant to the Regulative Flexibility Act of 1980, as amended, 5 U.S.C. 601 *et seq.*, the Commission's Final Regulatory Flexibility Analysis in this document.

94. *Ordering Clauses.* Accordingly, *it is ordered* that, pursuant to the authority contained in sections 4(i) & (j), 303(r), 308, 310 and 403 of the Communications Act of 1934, 47 U.S.C. 154(i) & (j), 303(r), 308, 310 and 403, as amended, 47 CFR Part 73 *is amended* as set forth in the Rule Changes.

95. *It is further ordered* that, pursuant to the Contract with America Advancement Act of 1996, the amendment set forth in the Rule Changes *shall be effective* November 16, 1999.

96. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, *shall send* a copy of this *R&O*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

97. *It is further ordered* that this proceeding is terminated.

98. *Additional Information.* For addition information concerning this proceeding, please contact Eric Bash, Mass Media Bureau, (202) 418–2130.

Final Regulatory Flexibility Act Analysis

99. As required by the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *2FNPRM* in this proceeding. The Commission sought written public comment on the proposals in this document, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

I. Need For, and Objectives of, Report and Order

100. In February, 1996, the Telecommunications Act of 1996 (''1996 Act'') was signed into law. Section 202 of the 1996 Act directed the Commission to make a number of significant revisions to its broadcast media ownership rules. Section 202 also requires us to review aspects of our local ownership rules which were the subject of the *TV Ownership FNPRM* in this docket. Specifically, section 202 requires the Commission to: (1) conduct a rulemaking proceeding concerning the retention, modification, or elimination of the duopoly rule; and (2) extend the Top 25 market/30 independent voices one-to-a-market waiver policy to the Top 50 markets, ''consistent with the public interest, convenience, and necessity.'' In view of the 1996 Act's directives regarding broadcast multiple ownership, the Commission in 1996 adopted a *2FNPRM* in this proceeding inviting comment on several issues prompted by the 1996 Act. We seek to foster both competition and diversity in the changing video marketplace, and this *R&O* modifies the local ownership rules consistent with these goals.

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

101. Media Access Project, *et al.* (''MAP *et al.*'') submitted the only set of comments that was filed directly in response to the IRFA contained in the *2FNPRM.*

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

102. The amended rules will affect commercial television and radio broadcast licensees, permittees, and potential licensees. MAP asserts that the estimate contained in the IRFA of the number of broadcast radio and television licensees that qualify as ''small entities'' is flawed.

1. Definition of a ''Small Business''

103. Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3) defines the term ''small business'' as having the same meaning as the term ''small business concern'' under the Small Business Act, 15 U.S.C. 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA'').

104. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business, (13 CFR 121.201, Standard Industrial Code (SIC) 4833 (1996). Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.

105. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial religious, educational, and other radio stations. Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce ratio program materials are similarly included. However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.

106. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

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

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

108. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply

may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

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

110. Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 CFR 121.104(d)(1). The SBA defines affiliation in 13 CFR 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 CFR 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 CFR 121.103(a)(2). Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. Estimates Based on Census Data

111. The rules adopted in this *R&O* will apply to full service television and radio stations.

112. There were 1,509 television stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,594 operating television broadcasting stations in the nation as of June 1999. For 1992 the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments. Thus, the new rules will affect approximately 1,594 television stations; approximately 77%, or 1,227 of those stations are considered small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

113. The new rule will also affect radio stations. The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. As of June 1999, official Commission records indicate that 12,560 radio stations are currently operating.

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

114. The *R&O* imposes compliance requirements. Pursuant to the *R&O*, applicants will be required to file with the Commission upon the effective date of the rules showings to convert conditional waivers to permanent license grants under the new rules or waiver standards. In addition, licensees with existing local marketing agreements (LMAs) that are attributable under the revised rules will be required to file a copy of the LMA with the Commission within thirty days of publication of the *R&O* in the **Federal Register**.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

115. We believe that our revised TV duopoly rule, radio/TV cross-ownership rule, and related waiver policies strike the appropriate balance between allowing broadcast stations to realize the efficiencies of combined operations, and furthering our policy goals of competition and diversity. Both of our revised rules and their associated waiver policies allow small stations to reduce expenses through shared operations, but at the same time protect them from acquisition that could eliminate their voice, and from the exercise of undue market power.

116. In addition to having amended the geographic scope of our TV duopoly rule, we have also modified the rule to permit common ownership of two stations in the same DMA if at least eight independently owned and operated full power TV stations (commercial and noncommercial) will remain post-merger, and both of the stations are not in the top four-ranked stations in the DMA. The new rule ensures that small stations may combine operations, reduce expenses, and perhaps diversify programming. At the same time, both the market rank and the voice count components of the rule further our competition goal and protect small stations from their competitors. The market rank test ensures that the two largest stations cannot combine to dominate and exercise market power in the advertising and programming markets in which TV stations compete; the voice count test ensures that more than eight competitors must exist in the market before any two of them may combine to increase their market share. Both components of the new rule also further our diversity goal and preserve small stations in markets with less than eight voices.

117. We have revised our radio/TV cross-ownership rule to permit common ownership of one or two TV stations and up to six radio stations if twenty independent voices will remain post-merger; one or two TV stations and up to four radio stations if at least ten voices will remain post-merger; and one or two TV stations and one radio station regardless of the number of voices that will remain post-merger. As with our amended TV duopoly rule, the modified radio/TV cross-ownership rule will allow stations, including small stations, to realize economies of scale, but at the same time ensure that no market will become concentrated to such an extent that any one or series of combinations will dominate the markets in which broadcasters compete, or monopolize the media and sources of information for their audiences.

118. Our TV duopoly waiver policies, based on a showing of a ''failed'' station, a ''failing'' station, and the construction of an authorized but as yet unbuilt station, and our radio/TV cross-ownership waiver policies, based on a showing of a ''failed'' station, likewise accommodate small stations, while protecting our competition and diversity goals. Each of these waiver policies was designed to ensure that only truly financially distressed, which are typically smaller, stations, can benefit from them. The waiver policies also ensure that more financially successful in-market stations, which are typically larger and likely would value same-market broadcast assets more highly than out-of-market stations, cannot foreclose out-of-market buyers. The in-market buyer must demonstrate that it is the only purchaser ready, willing, and able to operate the station, and that sale to an out-of-market buyer would result in an artificially depressed price.

119. We also believe that our grandfathering policies for conditional

radio/TV cross-ownership waivers, and TV LMAs, may help small stations. For example, the record suggested that TV LMAs may have helped smaller, struggling stations to remain on or return to the air, and to diversity and expand their programming. The *R&O* grandfathers all LMAs entered into prior to November 5, 1996, and therefore permits them to remain in full force and effect, subject to further review in the Commission's biennial review in 2004.

120. For the above reasons, we believe that the Commission has taken steps not only to reduce the economic impact on small entities, but also to assist them realize the benefits of common operations, and to protect them from undue market power.

VI. Report to Congress

121. The Commission will send a copy of this *R&O,* including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of this *R&O,* including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *R&O* and FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

List of Subjects in 47 CFR Part 73

Television broadcasting.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reason discussed in the preamble, the Federal Communication Commission amends 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 and 336.

2. Section 73.3555 is amended by revising paragraphs (b) and (c) and Note 7 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) only under one or more of the following conditions:

(1) The Grade B contours of the stations (as determined by § 73.684 of this part) do not overlap; or

(2)(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. 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.

(c) *Radio-television cross ownership rule.* (1) This rule is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313 of this part) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described above in paragraph (1) of this section. An entity may not exceed these numbers, except as follows:

(i) If at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

(A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

(B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(ii) If at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) *TV stations:* independently owned full power operating broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license;

(ii) *Radio stations:*

(A) (1) Independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

(i) The TV station's (or stations') community (or communities) of license; or

(ii) The radio station's (or stations') community (or communities) of license; and

(2) Independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market.

(iii) *Newspapers:* English-language newspapers that are published at least four days a week within the TV station's DMA and that have a circulation exceeding 5% of the households in the DMA; and

(iv) *One cable system:* if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

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Note 7: The Commission will entertain applications to waive the restrictions in paragraph (b) and (c) of this section (the TV duopoly and TV-radio cross-ownership rules) on a case-by-case basis. In each case, we will require a showing that the in-market buyer is the only entity ready, willing, and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA. One way to satisfy these criteria would be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received. We will entertain waiver requests as follows:

(1) If one of the broadcast stations involved is a ''failed'' station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

(2) For paragraph (b) of this section only, if one of the television stations involved is a ''failing'' station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

(3) For paragraph (b) of this section only, if the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

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