or female owners to exceed the ownership limits.

The Notice describes an incubator program as:

> an arrangement whereby existing broadcasters share their talent, experience and financial resources with minorities and [women] . . . seeking to enter the mass media industry in exchange for regulatory concessions such as relief from certain multiple ownership restrictions.[126]

Commenters generally support the concept of an incubator program to increase ownership of mass media facilities by minorities and women. However, we question whether an incubator program will be successful if the Commission relaxes the national ownership rules as it has proposed in a companion proceeding.[127] Moreover, the program must be carefully structured to ensure that it serves its intended purpose. Finally, the Commission must adopt horizontal subscriber limits for cable before an incubator program can be used to increase minority and female ownership of cable facilities.

A. For the Incubator Program to Lead to Actual Ownership of Broadcast Stations by Minorities and Women, the Commission Should Not Raise the Present Ownership Limits

The incubator program will be a meaningless gesture if

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[126] Id. at ¶ 16. The Commission originally proposed the incubator program in 1992, in the context of relaxing the national and local radio ownership rules. Revision of Radio Rules and Policies, FNPRM, MM Docket No. 91-140, 7 FCC Rcd 6387 (1992). However, the Commission never issued a rule implementing the program.

[127] Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Review of Policy and Rules, Further Notice of Proposed Rule Making, MM Docket Nos. 91-221 and 87-8, FCC 94-322, released Jan. 17, 1995 [hereinafter FNPRM].

existing owners have no incentive to participate. Under the current television ownership rules, only broadcasters that are at or close to the national ownership limits will have that incentive. Thus, to determine whether the incubator program is likely to be effective, the Commission first needs to determine the extent to which existing television and radio station owners are close to the current ownership limits.

Commenters are concerned that only a few existing owners would have an incentive to incubate minorities and women. This concern is greatly increased by the Commission's proposal, in a related proceeding, to relax the present ownership limits.[128] Commenters oppose any relaxation of the current national ownership limits because it would create even less incentive for established owners to incubate minorities and women.

B. The Incubator Program Must Be Carefully Structured To Achieve the Goal of Increasing Ownership by Minorities and Women

To be effective, it is also important that the incubator program be designed to ensure that minorities and women will be able to acquire and operate broadcast stations. The Commission seeks comments on its proposal for the structure and scope of an acceptable incubator program.[129]

Commenters agree with the Notice's tentative conclusion to apply the incubator program to minorities and women, but not to

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[128] Id.

[129] Notice at ¶ 20 - 24.

all small businesses.[130] As discussed above, minorities and women have faced obstacles beyond those faced by small businesses in general. Moreover, minority and women owners will foster diversity by bringing to the public viewpoints that have generally been excluded.

The Notice also seeks comment on whether all minorities and women should be eligible for the incubator program or whether the Commission should employ a net worth threshold to ensure that the program is available only to minority and female operators who have the greatest need for capital.[131] Commenters support the concept of a reasonable net worth threshold. Limiting the program in this fashion will promote diversity by helping minorities and women who would otherwise be unable to own television and radio stations.

The Notice proposes that the incubator program include financial, operational and training assistance.[132]

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[130] Id. at ¶ 19; See also Comments of NABOB, at 5 in FNPRM, MM Docket No. 91-140, 7 FCC Rcd 6387 (1994).

[131] Id. at ¶ 17.

[132] Id. at ¶ 20. An example of an incubator program that has been successful in providing operational and training assistance, but no money, is ComTraim. ComTrain is an executive management training program for new minority commercial broadcast station owners. ComTrain pairs new owners (a person who has owned three years or less) with existing general managers of commercial stations owned by ComTrain Corporate sponsors. National Telecommunications and Information Administration, The Minority Telecommunications Development Program, Fact Sheet (summarizes the contributions MTDP has made to its growth and development of minority-owned businesses). Successful commercial station owners volunteer their experience and expertise in a two part training program.

In the first part of the program, new owners spend two to

Specifically, the Commission proposes that the substantial financial assistance could include direct equity participation, loan guarantees or long-term low interest loans, at perhaps, one-half the market rate.[133] While all of these forms of assistance are important, the Commission must assure that the financial assistance is significant enough to lead to actual ownership.

The Notice further proposes to require a successful incubator program be in place for at least one year before an incubating operator may acquire additional stations.[134] However, it expresses some concern that one year might be too long in such a volatile industry.[135] Commenters support requiring the incubating operator to incubate the new owner for one year to prevent an existing owner from failing to follow through on its commitment to provide continued financial and

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five days at assigned stations with the existing general manager and other key personnel to address predetermined issues of concern to the trainee. ComTrain Pamphlet. During the second phase of the program, minorities that are already "on air" obtain free consultation, instructions and expert advice in areas of their greatest need. Id.

According to Larry Irving, Assistant Secretary for Communications and Information, "[t]he program has been successful since its inception" and between June 1990 and May 1994, ComTrain trained 19 minority radio or television licensees. Discrimination in the Telecommunications Industry: Hearings Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103rd Cong., 2d Sess. 110, 111 (1994)(testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Dept. of Commerce).

[133] Id. at ¶ 20.

[134] Id. at ¶ 19, 22.

[135] Id. at ¶ 22.

technical assistance.

The Commission also seeks comment on whether it should require the minority or female incubated owner to hold the incubated facility for one year.[136] Commenters support the concept of a holding period to prevent trafficking. Not only will a holding period stop possible abuse of the policy, but it will ensure that the community benefits from the diverse programming offered by the minority or female owners of the incubated station. Indeed, Commenters urge the Commission to go beyond simply a one year rule and reinstitute a general anti-trafficking rule that would require all licensees to hold on to a license, no matter how acquired, for three years, subject of course, to reasonable waivers.[137]

The Notice proposes requiring an existing owner to incubate two minority or female-owned facilities for each additional facility it is permitted to acquire over the ownership limits.[138] Commenters believe that this proposal strikes a fair balance between the benefit to the existing owner, the benefit to

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[136] Id.

[137] See Comments of Black Citizens for a Fair Media et al, filed October 13, 1993 in Further Notice of Proposed Rulemaking in GC Docket No. 93-52, Reexamination of the Policy Statement on Comparative Hearings, released August 12, 1993, which describe the various public interest benefits associated with preventing trafficking in licenses. We note that the Commission has yet to act on this proposal, issued in the fall of 1993, to increase the holding period from one to three years for persons who secure a license through a comparative hearing proceeding.

[138] Notice at ¶ 19.

the new owner and the benefit to the public.[139]

The Commission also proposes that the facility acquired by the existing owner should be of comparable value to the one is incubated. It specifically proposes that the acquired station be no more than five markets above or below the incubated facility's market rank.[140] Commenters support the concept that facilities should be of comparable value. However, the Commission should address whether facilities can be of different types,[141] and whether a larger number of less valuable stations might be incubated in return for acquisition of a more valuable station.[142]

Finally, the Commission should allow existing owners to exceed only the national multiple ownership limits, not the local market rules. As the Commission states, "the threat of undue

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[139]We also believe it would be appropriate to limit the number of stations above the national limits that could be acquired pursuant to an incubator program. However, the number of stations that an owner should be permitted to own above the ownership limits depends on the Commission's decisions in the related Further Notice of Proposed Rulemaking for the television ownership rules. If the ownership limits are raised, we propose existing owners would be allowed to acquire fewer stations beyond the limits then if the limits are lowered or stay the same.

[140]Notice at ¶ 23.

[141]The Notice is unclear as to whether one incubator transaction could involve two different services, e.g., could an owner acquire a television station in exchange for incubating a cable system. If so, how will the Commission value both entities?

[142]For example, instead of incubating 2 television stations in exchange for acquiring one additional television station, could an owner incubate 4 FM stations of comparable value to the 2 television stations?

concentration may arise at the local level, particularly in small, less diverse markets."[143] It is at the local level, where the public's interest in viewpoint diversity is most directly affected by concentration. Implementation of the incubator program at the local level could enable one owner to control the majority of the voices in one small area. Although allowing owners to exceed the current national ownership limits also detrimentally affects diversity, the impact on diversity is more severe at the local level.

C. The Commission Should Also Adopt Policies to Promote Minority and Female Ownership of Cable Television Facilities

Although the Notice expresses its intent to provide greater opportunities for minorities and women to own cable television facilities as well as broadcast stations, the Notice does not discuss whether and how an incubator program might work with cable.[144]

According to a 1991 Minority Business Development Market Research Study, minorities control only 0.2% (15) of the

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[143] Notice at ¶ 24.

[144] Notice at ¶ 1. The Notice also mentions wireless cable and low power television. Commenters do not address these facilities specifically, since they are not aware of any data concerning ownership of these types of facilities. Commenters believe, however, that the Commission has an obligation to determine the extent to which minorities and women presently own these types of mass media facilities. If the same ownership patterns of conventional broadcasting and cable hold true in these facilities, the Commission should include them as well in any incentive program.

approximately 7,500 cable properties.[145] Commenters are unaware of any statistics documenting the level of female ownership of cable systems. However, there is every reason to believe that women are similarly underrepresented in cable ownership since entry into that business is extremely capital intensive.

Because 96% of homes are now passed by cable, the usual way to enter the cable business is to buy an existing system.[146] Consequently, the purchaser has to pay not only for the system, but also for the value of the subscribers. Such acquisitions require substantial quantities of capital.[147] As documented above, minorities and women have faced and continue to experience discrimination in access to capital. Application of the incubator program to cable might enable minorities and women to secure financing so they could compete for cable properties.

Ownership of cable facilities by minorities and women would

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[145]Notice at ¶ 5; See also Discrimination in the Telecommunications Industry: Hearings Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Finance and Urban Development of the House Comm. on Small Business, 103rd Cong., 2d Sess. (1994)(testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce).

[146]Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd. 1774 ¶ 18 (1994). Building a competing system, is as the Commission knows, extremely costly.

[147]For instance, in 1995, Cox Cable acquired Times Mirror Cable for an estimated $2.3 billion. TCI acquired TeleCable Corp. in 1995 for an estimated $1.56 billion. Hearings on the Federal Communications Commission's Tax Certificate Program: Hearings Before the Senate Comm. on Finance, 104th Cong., 1st Sess. (1995) (statement of Tyrone Brown, Esq., Wiley, Rein & Fielding).

also foster diversity of programming for the public.[148] Cable operators decide which programs will and will not be offered on the majority of channels. Moreover, cable operators may also own or produce programming. Therefore, cable owners have a substantial effect on the diversity of programming received by viewers and listeners.

Inclusion of cable in the incubator program, however, is problematic. Although the FCC adopted a national subscribership limit for cable of 30% of subscribers nationwide,[149] the Commission has stayed that limit pending the outcome of a court appeal.[150] Although Commenters believe that the horizontal ownership limits for cable will ultimately be upheld, at present, there would be no incentive for an owner to incubate a minority or female owned facility. Moreover, when and if the 30% limit goes into effect, it appears that only one company -- TCI -- will be close to (indeed it might even exceed) that limit. Thus, to provide an incentive for more cable companies to incubate minorities and women, the Commission should establish a lower

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[148]According to the Cable Competition Report, 62% of all television households who are currently passed by cable subscribe. Cable Competition Report (1994) at ¶ 19.

[149]Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 and the Vertical Ownership Limits, 8 FCC Rcd 8565 (1993). The Commission will permit ownership of additional cable systems, up to 35% of homes nationwide, if systems are minority controlled. Id. at ¶ 3.

[150]Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993) appeal pending sub nom., Time Warner Entertainment Co. v. FCC D.C. Cir. No. 93-5349 (1993).

limit.[151]

CONCLUSION

There is no dispute that minorities and women are seriously underrepresented as owners of broadcast and cable facilities. Therefore, the adoption of incentives are needed to foster programming diversity and to increase economic opportunities for minorities and women alike. Thus, the Commission may and should adopt an incubator program to increase minority and women access to capital so that they may realize actual ownership opportunities of mass media facilities. Moreover, the Commission should amend Ownership Form 323 to enable the Commission and the public to monitor the efficacy of these and other initiatives.

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[151]A Petition for Reconsideration filed by CME _et al._ on this point is still pending before the Commission. _Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 and the Vertical Ownership Limits_, _Petition for Reconsideration_ of Center for Media Education/ Consumer Federation of America, filed Dec. 15, 1993.

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APPENDIX A

Analysis of Employment Profile of Women-Owned Stations

To test whether women broadcast station owners hire more women overall and in the top four job categories than the respective national averages, we examined the employment profiles of a sampling of broadcast stations where women had an excess of 50 percent ownership interest. We found that of the seven stations we analyzed, five hired more women than the national average overall and in the top four job categories.

Methodology of the Sampling

Because the Commission does not collect information about the gender of licensees, we were forced to use alternative means to identify stations owned by women. We compiled a list of seven women-owned broadcast stations by consulting American Women in Radio and Television (AWRT).[152] Some women-owned stations were identified based on an annual survey of their membership[153] and others through word of mouth.[154] Therefore, our collection is only a sampling and not inclusive of all women-owned stations. See Chart at column (1).

Next we pulled each station's 1993 Form 395-B, Broadcast

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[152]For the purpose of this sampling, women-owned stations were defined as those stations where women had greater than 50 percent ownership interest.

[153]AWRT, Promoting Progress: 1995 Resource Directory, (1995) at 88.

[154]Once stations were identified as women-owned, we pulled each stations Ownership Form 323 to determine each woman's percentage of ownership. See Chart at column (2).

Station Annual Employment Report, from the Commission's public research files.[155] Using the employment statistics from the 395-B's, we computed the percentage of women employees overall at each station and those in top four job categories (officials and managers, professionals, technicians, sales workers) by dividing the number of women employees at the station and those in the top four job categories by the total number of employees at each station.

Using the 1990 Census Data Summary Report: State and County Total Percentages for Total Civilian Labor Force, County and City Data Book: A Statistical Abstract Supplement, U.S. Dept. of Commerce, Bureau of the Census (12th ed. 1994)(reporting 1990 census information), we identified the total percentage of women in the labor force for each station's county. We then divided the percentage of women employees overall at each station by the total percentage of women in the labor force in each station's county, to arrive at each station's percentage of parity.[156] See Chart at column (3). Using this same computation, we also determined parity for the top four job categories of each station. See Chart at column (5).

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[155]Figures from 1993 were used because that was the latest year national employment statistics were available from the Commission from its 1993 Broadcast and Cable Employment Report.

[156]For example, WJNZ-FM employed 57% women overall and 57% women in the top four job categories. There were 44.5% women in the work force in the county of WJNZ-FM. WJNZ-FM was at 128% (57% divided by 44.5%) of parity with the county for women employed at the station overall, and 128% (57% divided by 44.5%) of parity for women in the top four categories.

To determine how these stations compared to stations generally, we determined the national percentage of parity of women employees overall and in the top four positions. To get the national parity figures, we obtained the total percentage of women employed in broadcasting nationally (39.6%), the total percentage of women employed in top four job category nationally (32.8%), and the total percentage of women in the national labor force (45.6%) from the 1993 Broadcast and Cable Employment Report, News, July 26, 1994. Then, we divided the percentage of women employed in broadcasting nationally overall by the percentage of women in the national labor force to arrive at a 86.8% parity with the national labor force for women in broadcasting nationally. See Chart at column (4). Similarly, we computed parity with the national labor force for the women in the top four job category positions in broadcasting nationally (71.9%). See Chart at column (6).

Finally, we compared these national parity percentages to each station's parity percentages for the respective categories, overall and top four. Compare columns (3) and (4) for women employed overall at these stations; compare columns (5) and (6) for women employed in the top four job categories.

Our results demonstrated five, of the seven stations analyzed, hired more women than the national average overall and in the top four job categories. Moreover, four of the seven stations surveyed (WJNZ-FM, WCXT-FM, WFLI-TV, KQQK-FM) exceeded 100 percent parity with the national labor force for the employment of women overall. Similarly, three stations (WJNZ-FM, WCXT-FM, WOL-AM) exceeded 100 percent parity with the national labor force for the top four job categories.