market if Arbitron, or another nationally recognized audience rating service, lists them as having a reportable audience share in the radio metro.[175] 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.

113. As advocated by many commenters,[176] 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.[177] 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.

114. Various parties have urged the Commission to expand the types of media included as

[175] In determining the number of commercial radio stations in the radio metro, we will rely on the most recent audience share and home station data available at the time the application for the assignment or transfer of license is filed. In determining the number of noncommercial radio stations licensed in the radio metro market, we will rely on data contained in the most recent Commission ownership records. Similarly, we will rely on the most recent Nielsen data to determine the number of commercial television stations licensed within a DMA, and on the Commission's most recent ownership records to determine the number of noncommercial television stations in the DMA.

[176] *See, e.g.*, CBS Comments at 28; Paxson Comments at 23.

[177] *See, e.g., Illinois Valley Broadcasters, Inc.*, 11 FCC Rcd 13028, 13032 (1996); *WWNE Licensee, Inc.*, 13 FCC Rcd 12677, 12691, 12695-96 (MMB 1998); *Triad Skywaves, Inc.*, 12 FCC Rcd 6102, 6107 (MMB 1997).

voices for competition and diversity purposes beyond those we have decided to include. Numerous such media have been urged upon us: DBS, wireless cable, OVS, the Internet, etc. We have not adopted such expansive proposals. DBS and wireless cable generally do not currently provide local news and public affairs programming.[178] Moreover, we will not count any media that are not widely available within the community. OVS is at a very early stage of development and OVS systems have relatively few subscribers within the communities they serve.[179] In addition, at this time we believe it is premature to consider the Internet a "voice" for purposes of our new rule. Although the Internet is growing in popularity, many still do not have access to this new medium, and there is insufficient evidence in the record to support a conclusion that it should be included as a voice at this time. Finally, we do not have evidence that other media cited by some commenters (*e.g.*, direct mail, yellow pages, billboards) contribute in any substantive way to viewpoint diversity on local issues. We will have an opportunity to review our decision on this issue periodically in our biennial review process, and will revise the conclusion we have reached today if changing circumstances warrant.

B. Waiver Criteria

1. Failed Stations

115. 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.

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[178] DBS operators do have a public interest obligation to reserve between 4 and 7 percent of their channel capacity for noncommercial programming. *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 975-77 (D.C. Cir. 1996) (finding that this obligation, as a condition of being allowed to use a scarce public commodity, was in the public interest by assuring public access to diverse sources of information). DBS companies have commented in the past that they have a competitive disadvantage due to not being able to distribute local broadcast signals, including news programming, due to technological and copyright law obstacles. For a discussion of recent developments, see *Fifth Annual Report*, at ¶¶ 61-72.

[179] There are three operational OVS systems in the nation. Bell Atlantic operates an OVS system in Dover, New Jersey; and RCN operates OVS systems in Boston and New York. *See Fifth Annual Report*, at ¶ 117.

116. 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.

117. 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.[180] Increasing the number of stations in a market provides additional voices to address community needs and issues and increases listeners' programming choices.

118. 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

119. Background. We invited comment in the *Second Further Notice* 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 and competition within the affected market.

[180] Section 202(b)(2) of the 1996 Act.

120. Comments. A number of commenters argued that our present five factors test should either be eliminated or substantially revised. For example, ABC argued that the Commission should permit an applicant for waiver under the five factors test to justify joint radio-TV ownership on the basis of economic efficiencies alone, without having to make explicit programming or public service commitments.[181] Shockley believes the showings concerning cost savings, programming and service benefits, and types of facilities should be eliminated, and consideration limited to the number of media outlets already owned in the market by the applicant, any financial difficulties, and data concerning the level of diversity, competition, and unusual geography within the market.[182] Spectrum Detroit argued that the five-factors test, as applied by the Commission, has effectively rendered the current radio-TV cross-ownership rule a nullity. It supports either eliminating the waiver standard altogether, or replacing it with a waiver provision favoring local owners, small businesses, minorities, and women.[183] BCFM supported retaining the five factors test, but requiring all waiver applicants to promise concrete public interest benefits of common ownership, which promises would be enforced by the Commission.[184]

121. 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.[185] 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.[186] 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.

122. 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

[181] *See* ABC Comments at 13-14.

[182] See Shockley Comments at 7 -8.

[183] *See* Spectrum Detroit Comments at 24 - 26.

[184] *See* BCFM Comments at 8.

[185] *See Louis DeArias*, 11 FCC Rcd 3662, 3667 (1996) (delegating to staff authority to rule on uncontested one-to-a-market waiver requests that involve a proposed combination of 1 TV, 2 AM, and 2 FM stations in the top 100 television markets).

[186] *See* 47 C.F.R. § 1.3. *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

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.[187]

3. Existing Conditional Waivers

123. 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.[188] The conditional waiver grantees are directed to file with the Commission within sixty days of publication of this *Report and Order* 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.

124. A number of the conditional waivers that have been granted will not comply with our newly revised radio-television cross ownership rule. In particular, there are approximately thirteen conditional waivers involving joint ownership of a television station and seven or more radio stations in a single market. Although the parties that received these waivers were placed on specific 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 the "sunshine" notice for this *Report and Order*), 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.[189] 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

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[187] Any existing combination based on a five-factor waiver can be transferred together only if the combination meets our revised radio/TV cross-ownership rule or failed station waiver standard, at the time of transfer.

[188] *See, e.g., S.E. Licensee G.P.*, FCC 96-464 (released Nov. 27, 1996) (one TV, three AM, and four FM stations in Memphis); and *Stockholders of Infinity Broadcasting Corp.*, FCC 96-495 (released Dec. 26, 1996) (one TV, one AM, and five FM stations in Boston; one TV, three AM, and four FM stations in Detroit; one TV, three AM, four FM stations in San Francisco; one TV, three AM, and three FM stations in Philadelphia; one TV, three AM, and five FM stations in Chicago; one TV, two AM, and five FM stations in Los Angeles; and one TV, four AM, and three FM stations in New York City).

[189] *See infra* ¶ 148.

showing using the 2004 biennial review criteria, beginning one year after the date that this *Report and Order* is published in the Federal Register. Any transfer of a grandfathered combination after the adoption date of this *Report and Order* (whether during the initial grandfathering period or after a permanent grandfathering decision has been made) must meet the radio/TV cross-ownership rule or waiver policy in effect at the time of transfer.

125. We believe this additional relief is appropriate. In many of these cases significant periods of time -- up to several years -- have transpired since the grant of the conditional waivers. During this time the licensees in question have invested substantial resources in their stations, upgrading their facilities and program offerings. We do not wish to unduly disrupt these investments, and the public interest benefits they created, after such a passage of time.

VI. TELEVISION LOCAL MARKETING AGREEMENTS

126. 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.[190] 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. With respect to about 90% of these same-market LMA arrangements, the brokering party is an affiliate of ABC, CBS, Fox, or NBC. In addition to these "same-market" LMAs, there are at least 35 other time brokerage arrangements where the brokering and brokered stations are in different DMAs or the programming is supplied by an entity other than a television station.[191]

127. In our companion *Attribution Report and Order*,[192] 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 *Second Further Notice*, 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

[190] *TV Ownership Further Notice*, 10 FCC Rcd. at 3581. This is the definition we also use for LMAs in the context of radio. *See* 47 C.F.R. § 73.3555(a)(4)(iii).

[191] In the case of many out-of-market LMAs, an entity other than a television station brokers advertising/programming time for a television station. Some companies, such as Clear Channel, Sinclair, and Paxson, serve as the broker in a number of LMAs, both in markets where the company owns another television station and in markets where the company does not own a station. FCC staff analysis of information filed by parties to television LMAs in response to *Public Notice*, DA 97-1246, "Commission Seeks Further Information Regarding Television LMAs" (June 17, 1997). ALTV and Pegasus each filed an analysis of this information and noted the positive contributions provided by television LMAs. *See* ALTV Supplemental Comments (May, 1998); Pegasus Communications Corporation Supplemental Comments (June, 1998).

[192] *See Attribution Report and Order*, section III.C.

the *Attribution* proceeding.[193] In this *Report and Order*, we adopt policies to afford "grandfather" rights to existing television LMAs according to the provisions discussed below.

128. In the *Second Further Notice*, 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 *Second Further Notice* 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 *Second Further Notice*, 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.[194] 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.[195]

129. After reviewing the comments received in response to the *Second Further Notice* in this proceeding and the *Further Notice of Proposed Rule Making* 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 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.[196]

130. Comments. The majority of broadcasters who commented on this issue contended that our grandfathering proposal was too restrictive. For example, Sullivan, SJL, and Lockwood argued that LMAs should be permanently grandfathered.[197] Clear Channel Communications ("Clear Channel") contended that permanent grandfathering is the equitable way to treat broadcasters that, in good faith, made substantial investments in LMAs and generated substantial public interest benefits.[198] A number of broadcasters, including Pappas, Benedek, Glencairn, ALTV, LIN, and Malrite, advocated that, in addition

[193] See *TV Ownership Second Further Notice*, 11 FCC Rcd. at 21691.

[194] *Id.* at 21694.

[195] *Id.* at 21693-94.

[196] See *Public Notice*, DA 97-1246, "Commission Seeks Further Information Regarding Television LMAs" (June 17, 1997) ("LMA *Public Notice*").

[197] SJL Comments at 19-20, *Attribution Proceeding*, MM Docket Nos. 94-150, 92-51 and 87-154; Sullivan Comments at 4-6; Sullivan Reply Comments at 5; Lockwood Reply Comments at 4.

[198] Clear Channel Reply Comments at 2. *See also* Pappas Comments at 14.

to permanently grandfathering LMAs, we should relax the duopoly rule.[199] Several broadcasters also argued that Congress intended, under the 1996 Act, that existing LMAs would continue to exist[200] and to be transferrable and renewable.[201]

131. Broadcasters supporting adoption of our proposed general grandfathering policy included ABC, NAB, Miller Broadcasting, Inc. ("Miller"), and Montclair Communications, Inc. ("Montclair"). ABC, for example, stated that it had no objection to our proposal, provided that we limited grandfathering to the original parties to an LMA and for the original term of the agreement only.[202] NAB supported grandfathering LMAs in the event that we do not change the duopoly rule, or if the changes that we adopt would not permit some existing LMAs to be converted to ownership.[203] Miller contended that those who relied on our existing regulations ought not to be prejudiced in the process of our crafting new rules,[204] while Montclair urged that we not disrupt its three-year-old LMA.[205]

132. A number of commenters suggested that we adopt stricter regulations than those we proposed for television LMAs. BET and CCI advocated "sunsetting" LMAs after 24 months,[206] while Saga Communications, Inc. ("Saga") proposed terminating existing LMAs in six months, particularly in duopoly situations.[207] Jet Broadcasting Co. ("Jet") advocated that, in small television markets with four or fewer stations, LMAs that allow one-half or more of the television market's stations to be operated by a single entity, and that existed before the February 8, 1996 adoption of 1996 Act, should not be

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199 See, e.g., Pappas Comments at 10-14; Pappas Reply Comments at 12-14; ALTV Comments at 33-37; ALTV Reply Comments at 1-4; AK Comments at 20; Benedek Reply Comments at 7-8; Glencairn Comments at 2; LIN Comments at 20; Malrite Comments at 17-19.

200 *See* Paxson Comments at 30-36; Sinclair Comments at 4-9.

201 Pappas Comments at 13. *See also*, e.g., ALTV Comments at 35-36; Malrite Comments at 19-21; NAB Comments at 16-17.

202 ABC Comments at 15.

203 NAB Comments at 16.

204 Miller Comments at 6-7, 9. *See also* Mt. Mansfield Reply Comments at 5-6.

205 Montclair asserted that any disruption of its LMA would be detrimental to the public that is receiving improved service, as well as to the licensee's efforts to build a viable female-owned enterprise. Montclair Comments at 1-2.

206 BET and CCI proposed that grandfathering be limited to a two-year sunset provision, after which the grandfathering provisions would expire and all LMAs that were not in compliance with our ownership rules would be terminated. BET Comments at 4; BET Reply Comments at 6-7; CCI Comments at 10.

207 Saga also argued that LMAs are contrary to the public interest and should be prohibited in the future. Saga Comments at 11, *Attribution Proceeding*, MM Docket Nos. 94-150, 92-51 & 87-154.

grandfathered.[208] Retlaw and the public interest group MAP *et al.* both argued that existing LMAs should not be grandfathered except in compelling circumstances and only upon a showing that the LMA serves the public interest.[209] Post-Newsweek Stations, Inc. ("PNS") also opposed grandfathering existing LMAs except on a case-by-case basis,[210] while Westwind contended that we should not grandfather LMAs at all.[211]

133. Discussion. We adopt our proposal in the *Second Further Notice* to grandfather television LMAs entered into prior to November 5, 1996, the adoption date of that *Notice,* 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 *Report and Order* 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 *Report and Order* is published in the Federal Register. We now turn to a more detailed explanation of our decision on this issue.

134. 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.*"[212] (Emphasis added.) As we stated in the *Second Further Notice*, 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.[213]

135. We do not regard Section 202(g) as limiting our ability to promulgate attribution rules

[208] Jet also advocated that such LMAs be terminated within 90 days of the effective date of the Commission's rules, and forbidden in the future. Jet Comments at 12-13; Jet Reply Comments at 14-15.

[209] Retlaw also proposed requiring television LMAs to come into compliance with the new attribution standards within the shorter of one year from the adoption date of this *Report and Order*, or the termination date of the current LMA. Retlaw Reply Comments at 6-7. *See also* MAP *et al.* Comments at 27-28; MAP *et al.* Reply Comments at 22-23; McGillen Comments at 3.

[210] Post-Newsweek noted that there are at least 50 LMAs in existence, with 40 of them in the top 100 markets. Post-Newsweek Comments at 7-8 in MM Docket No. 96-222, 91-221, & 87-8 (national ownership proceeding).

[211] Westwind Reply Comments at 12.

[212] 47 U.S.C. § 202(g).

[213] *TV Ownership Second Further Notice*, 11 FCC Rcd. at 21691.

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 *TV Ownership Further Notice* as to 1) whether television LMAs in which a broker obtains the ability to program 15% or more of a broadcast television station's weekly broadcast output should be deemed an attributable interest (which has been decided in our companion *Attribution Report and Order*);[214] and 2) whether grandfathering existing television LMAs from any applicable ownership rules that would follow from that attribution decision is appropriate.[215]

136. We recognize that the *Conference Report* states that " . . . [Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation [*i.e.*, February 8, 1996] and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment."[216] We do not believe that this statement necessarily *requires* the Commission to extend *permanent* grandfathering rights to television LMAs that would result in a violation of our ownership rules. As one commenter stated, grandfather provisions do not necessarily involve the permanent exemption from a regulation's reach.[217] As we explain above, the plain language of the statute does not require us to grandfather LMAs permanently. Rather, we believe that the language of the 1996 Act gives us the discretion to adopt policies that avoid undue disruption of existing LMA arrangements while, at the same time, promote our competition and diversity goals. As Post-Newsweek Stations has stated, Section 202(g) "makes clear what the legislation was not intended to do, i.e., prohibit grandfathering; it does not address what the Commission should do. It left to the Commission to decide whether and how to regulate them, including as appropriate prohibiting them, phasing them out, grandfathering them or permitting them."[218]

137. While the Balanced Budget Act of 1997 is silent regarding television LMAs,[219] the

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[214] *See Attribution Report and Order.*

[215] *TV Ownership Further Notice*, 10 FCC Rcd. at 3583-84.

[216] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163, 164 (1996) ("*Conference Report*").

[217] *See* Letter of G. William Ryan, Pres. & CEO of Post-Newsweek Stations, to Commissioners, March 2, 1999, at 3, *citing Wisconsin Wine & Spirit Institute v. Ley*, 416 N.W.2d 914, 919 (Wis. Ct. App. 1987) (stating that a grandfather clause may "permit[] a temporary right to do a prohibited thing); *Minnesota v. Closer Leaf Creamery Co.*, 449 U.S. 456, 468 (1981) (noting that the legislation grandfathered existing entities "at least temporarily"); *Environmental Defense Fund v. EPA*, 82 F.3d 451, 455-56 (D.C. Cir.) (analyzing a grandfather provision that temporarily exempted entities from provisions of the Clean Air Act), *amended*, 92 F.3d 1209 (D.C. Cir. 1996).

[218] Letter of G. William Ryan, Pres. & CEO of Post-Newsweek Stations, to Commissioners, March 2, 1999, at 2.

[219] *See* H.R. 2015, 105th Cong., 1st Sess, H6033 (1997); Pub. L.105-33 (Aug. 5, 1997).

Conference Report to this legislation states that, with respect to the Commission's current broadcast ownership proceedings, the conferees " . . . expect that the Commission will provide additional relief (*e.g.*, VHF/UHF combinations) that it finds to be in the public interest, and will implement the permanent grandfathering requirement for local marketing agreements as provided in the Telecommunications Act of 1996."[220] In light of recent Supreme Court decisions, we do not believe that we should rely upon such *post hoc* legislative history to construe Section 202(g) of the 1996 Act.[221] As Post-Newsweek Stations points out, "long-standing rules of statutory construction prohibit the Commission from relying on a passing reference to a statute made in the legislative history of an unrelated, subsequent piece of legislation."[222]

138. 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.

139. Grandfathering Cut-Off Date. We will adopt our proposal in the *Second Further Notice* to grandfather television LMAs entered into before the adoption date of that *Notice, 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.[223] A number of commenters supported this decision.[224]

140. We will not adopt the suggestion of some commenters to adopt the date of enactment of the 1996 Act as the grandfathering date, for, as we explain above, we do not interpret the statute as intending that outcome. Neither will we follow the suggestion of MAP *et al.*, to adopt, at a minimum, the December 15, 1994 adoption date of the *TV Further Ownership Notice*. That *Notice* was superseded

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220 H. Conf. Rep., 105th Cong. 1st Sess., 143 Cong. Rec. at H6175 (1997).

221 *See O'Gilvie v. U.S.*, 519 U.S. 79, 90 (1996), *citing United States v. Price*, 361 U.S. 304 (1960); *Higgins v. Smith*, 308 U.S. 473 (1940). *See also Reno v. Bossier*, 520 U.S. 471, 484-85 (1997).

222 Letter of G. William Ryan, Pres. & CEO of Post-Newsweek Stations, to Commissioners, March 2, 1999, at 2-3, *citing Consumer Prod. Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 n.13 (1980) (Rehnquist, J.) (stating that a "mere statement" in a subsequent committee report provides "an extremely hazardous basis for inferring the meaning of a congressional enactment"); *South Carolina v. Regan*, 465 U.S. 367, 380 n.17 (1984).

223 *Second Further Notice*, 11 FCC Rcd at 21694, ¶ 89.

224 DC Comments at 7; LSOC Comments at 13; Pappas Comments at 14; Shockley Comments at 1-2; Waterman Comments at 2.

by the *Second Further Notice*, in which we sought further comment reflecting the enactment of the 1996 Act and the full range of the grandfathering issues regarding television LMAs. We therefore believe that November 5, 1996 -- the adoption date of the Second Further Notice -- is the more equitable grandfathering date.

141. Finally, we will not designate, as suggested by Miller and Sinclair, the adoption date of this *Report and Order* as the grandfathering date for television LMAs. As we stated in the *Second Further Notice*, television LMAs entered into on or after the adoption date of that *Notice* would be entered into at the risk of the contracting parties and, if in violation of any ownership rule, would not be grandfathered and would be accorded only a limited period in which to terminate.[225] We are not persuaded that we now should designate a later date in order to grandfather such LMAs knowingly entered into in the face of the clear notice we gave in the *Second Further Notice*.

142. 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 Report and Order 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.

143. Scope of Grandfathering Relief. We received a wide range of comments regarding what type of grandfathering relief television LMAs should receive. The majority of broadcasters generally favored grandfathering LMAs for their full terms and allowing unlimited transferability and renewability of LMAs.[226] Other parties supported shorter grandfathering terms and limiting the transferability of LMAs.[227] Still others opposed any grandfathering relief or only in limited cases.[228]

144. After examining the record in this proceeding, we believe television LMAs entered into prior to the November 5, 1996 adoption date of the *Second Further Notice* should receive significant grandfathering relief. The parties to these LMAs entered into these arrangements when there was no

[225] *Second Further Notice*, 11 FCC Rcd at 21694, ¶ 89.

[226] *See, e.g.*, Blade Comments at 6; Sinclair Comments at 9.

[227] *See, e.g.*, Mt. Mansfield Reply Comments at 5-6; Shockley Comments at 2.

[228] *See, e.g.*, Post-Newsweek Comments at 7-8; Westwind Reply Comments at 12.

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.

145. 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.[229] We do not wish to disrupt these public interest benefits.

146. 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.

147. 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.[230] 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 *Report and Order* 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.

148. 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

[229] ALTV Comments at 16.

[230] DC Comments at 7. *See also* Malrite Comments at 19-20.

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.

149. 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 with thirty days of the publication of this Report and Order in the Federal Register.

VII. NEW APPLICATIONS

150. Applications filed pursuant to this *Report and Order* will not be accepted by the Commission until the effective date of this *Report and Order*. We realize that the rules adopted in this *Report and Order* 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.

VIII. CONCLUSION

151. For the reasons discussed above, we adopt this *Report and Order* 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.

IX. ADMINISTRATIVE MATTERS

152. *Final Paperwork Reduction Act of 1995 Analysis.* This *Report and Order* contains no new or modified information collections subject to the Paperwork Reduction Act of 1995.

153. *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 Report and Order is attached as Appendix A.

154. *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, Part 73 of the Commission's Rules, 47 C.F.R. Part 73 IS AMENDED as set forth in Appendix B below.

155. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the amendment set forth in Appendix B SHALL BE EFFECTIVE 60 days after publication in the Federal Register.

156. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

157. IT IS FURTHER ORDERED that this proceeding is terminated.

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[231] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice of Proposed Rule Making* in this proceeding.[232] The Commission sought written public comment on the proposals in this *Notice*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[233]

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

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 Further Notice* in this docket.[234] 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 *Second Further Notice* 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 *Report and Order* modifies the local ownership rules consistent with these goals.

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

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 *Second Further Notice*. MAP et al. argues that relaxation

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[231] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[232] *Second Further Notice of Proposed Rulemaking, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 & 87-8, 11 FCC Rcd. 21655, 21698-21703 (1996) (*Second Further Notice*).

[233] *See* 5 U.S.C. § 604.

[234] *Further Notice of Proposed Rulemaking, In the Matter of Review of the Commission's Regulations governing television Broadcasting, Television Satellite Stations, Review of Policy and Rules*, MM Docket Nos. 91-221 & 87-7, 10 FCC Rcd. 3524 (1995) (*TV Further Ownership Notice*).

of the Commission's multiple ownership rules will harm small businesses that own broadcast stations, which it argues are disproportionately owned by minorities, women, and new entrants into the video programming market. Specifically, MAP et al. contends that increased group ownership by large businesses will put small broadcasters at a competitive disadvantage with larger stations that can offer advertisers lower and/or greater exposure. MAP et al. also states that relaxation of the rules will drive up the cost of stations, eliminating the ability of small businesses to purchase stations.[235] Several other parties make arguments essentially similar to MAP's in their general comments (*e.g.*, small broadcasters' ability to acquire attractive programming will diminish if the local ownership rules are liberalized).[236]

Addressing the duopoly rule in particular, MAP et al. opposes a failed station waiver, because it opposes television duopolies in general. It argues that such a waiver would be anticompetitive, would not promote viewpoint diversity, and would keep out new entrants, particularly minorities and women.[237] Sunbelt asserts that grandfathering existing common ownership arrangements would deny new entrants the efficiency advantages of multiple ownership enjoyed by existing broadcasters. This, it claims, would inhibit the entrance of new voices, particularly those of women and minorities, into the market.[238]

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

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.[239]

1. Definition of a "Small Business"

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").

The Small Business Administration defines a television broadcasting station that has no more than

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[235] MAP *et al.* IRFA Comments at 3-4.

[236] *See, e.g.,* Centennial Comments at 6; Sunbelt Comments at 1, 6-7; BET Reply Comments at 4-5.

[237] MAP *et al.* Comments at 17-18.

[238] Sunbelt Comments at 1, 6-7.

[239] MAP IRFA Comments at 2-3.

\$10.5 million in annual receipts as a small business.[240] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[241] Included in this industry are commercial, religious, educational, and other television stations.[242] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[243] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[244]

The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.[245] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[246] Included in this industry are commercial religious, educational, and other radio stations.[247] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce ratio program materials are similarly included.[248] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under

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[240] 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

[241] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

[242] *Id. See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833)" as:

> 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 here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

[243] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

[244] *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

[245] 13 C.F.R. § 121.201, SIC 4832.

[246] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

[247] *Id.*

[248] *Id.*

another SIC number.[249]

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."[250]

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

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.

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.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R § 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.

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[249] *Id.*

[250] While we tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the new rules on small television and radio stations, for purposes of this *Report and Order*, we utilize the SBA's definition in determining the number of small businesses to which the rules would apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations or other entities subject to the rules adopted in this *Report and Order* and to consider further the issue of the number of small entities that are radio and television broadcasters or other small media entities in the future. *See Report and Order, Policies & Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations,* MM Docket No. 93-48, 11 FCC Rcd 10660, 10737-38 (1996) (citing 5 U.S.C. § 601(3).

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 C.F.R. § 121.104(d)(1). The SBA defines affiliation in 13 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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

The rules adopted in this *Report and Order* will apply to full service television and radio stations.

There were 1,509 television stations operating in the nation in 1992.[251] That number has remained fairly constant as indicated by the approximately 1,594 operating television broadcasting stations in the nation as of June 1999.[252] For 1992[253] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[254] Thus, the new rules will affect approximately 1,594 television stations; approximately 77%, or 1,227 of those stations are considered small businesses.[255] 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.

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.[256] Official

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

[252] FCC News Release, Broadcast Station Totals as of June 30, 1999 (released July 19, 1999).

[253] Census for communications establishments are performed every five years ending with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, III.

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

[255] We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1999 total of 1594 TV stations to arrive at 1,227 stations categorized as small businesses.

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

Commission records indicate that 11,334 individual radio stations were operating in 1992.[257] As of June 1999, official Commission records indicate that 12,560 radio stations are currently operating.[258]

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

No new recording, recordkeeping or other compliance requirements are adopted.

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

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.

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.

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.

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

[258] FCC News Release, Broadcast Station Totals as of June 30, 1999 (released July 19, 1999).

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.

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 *Report and Order* 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.

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

The Commission will send a copy of this *Report and Order*, 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 *Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).