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

In the Matter of	)	
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

NOTICE OF PROPOSED RULE MAKING AND
FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 2001 **Released:** November 9, 2001

By the Commission: Commissioners Copps and Martin issuing separate statements.

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I. INTRODUCTION

1. In accordance with Sections 309(a) and 310(d) of the Communications Act of 1934 (the 1934 Act), the Commission issues new radio broadcast licenses and approves the assignment and transfer of those licenses only when those actions are consistent with the public interest, convenience, and necessity.[1] Pursuant to its public interest authority, the Commission historically has sought to promote diversity and competition in broadcasting by limiting by rule the number of radio stations a single party could own or acquire in a local market.[2] In Section 202(b) of the Telecommunications Act of 1996 (the 1996 Act), Congress directed the Commission to revise its local radio ownership rule to relax the numerical station limits in the ownership rules.[3] In the almost six years since the Commission implemented this congressional directive, the local radio market has been significantly transformed as many communities throughout the country have experienced increased consolidation of radio station ownership. In this proceeding, we seek to examine the effect that this consolidation has had on the public and to consider possible changes to our local radio ownership rules and policies to reflect the current radio marketplace.

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[1] 47 U.S.C. §§ 309(a); 310(d).

[2] See 47 C.F.R. § 73.3555(a) for the current version of the local radio ownership rule. In addition to limiting the number of radio stations that may be commonly owned, the local radio ownership rule in effect between 1992 and 1996 presumed that acquisitions of radio stations that proposed a combined audience share greater than 25% were contrary to the public interest.

[3] Pub. L. No. 104-104, § 202(b), 110 Stat. 110.

II. BACKGROUND

2. To guide our evaluation of the regulatory policies that we should adopt in light of the current radio marketplace, we review the background of the local radio ownership rule and the traditional interests that the rule was intended to advance.

A. Rules and Policies before 1992

3. The Commission first limited local radio ownership in 1938, when it denied an application for a new AM station on the ground that the parties that controlled the applicant also controlled another AM station in the same community.[4] The Commission found that the commonly owned, same service stations would not compete with each other and that granting the application could preclude a competitive station from entering the market.[5] Accordingly, "to assure a substantial equality of service to all interests in a community" and "to assure diversification of service and advancements in quality and effectiveness of service," the Commission held that it would allow commonly owned "duplicate facilities" only where it would fulfill a community need that otherwise could not be fulfilled.[6] Based on this policy, the Commission found that the "public convenience, interest or necessity" would not be served by grant of the application.[7]

4. In the early 1940s, this policy was codified in the Commission's rules.[8] AM licensees were prohibited from owning another AM station that would provide "primary service" to a "substantial portion" of the "primary service area" of a commonly owned AM station, except where the public interest would be served by multiple ownership.[9] FM licensees were prohibited from owning another FM station that served "substantially the same service area."[10] Between 1940 and 1964, the Commission determined on a case-by-case basis whether two commonly owned, same service radio stations served substantially the same area.

[4] *Genesee Radio Corp.*, 5 FCC 183.

[5] *Id.* at 186.

[6] *Id.* at 187.

[7] *Id.*

[8] *See Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Report and Order, 18 FCC 288, 290 (¶ 4) n.3 (1953) (*1953 Decision*) (citing 5 Fed. Reg. 2384 (1940), 6 Fed. Reg. 2284 (1941), and 8 Fed. Reg. 16065 (1943)); *id.* at 290-91 (¶ 8), 295-96; *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, First Report and Order, 4 FCC Rcd 1723, 1723 (¶ 5) (1989) (*1989 Decision*).

[9] *See, e.g.*, *1953 Decision*, 18 FCC 2d at 295-96.

[10] *See, e.g.*, *id.* Unlike the AM rule, the FM rule did not expressly provide for a public interest exception. *Id.*

5. In 1964, the Commission replaced its case-by-case analysis with a "fixed standard" consisting of a contour-based test that looked solely to the overlap of the radio stations' signals.[11] The new rule prohibited common ownership of same service stations when *any* overlap of contours occurred, not just the situation where there was a "substantial" overlap. The Commission explained that the purpose of the multiple ownership rules was "to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest."[12] The Commission found that the local radio ownership rule in particular was based on two principles: first, that "it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group;"[13] and second, that "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[14] Quoting *Associated Press v. United States*,[15] the Commission cited, as support for the local ownership limits, the principle that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[16]

6. In the early 1970s, the Commission briefly restricted local radio ownership further by prohibiting, with certain exceptions, common ownership of different service broadcast stations in the same market.[17] These limits were designed to advance diversity by maximizing the number of independent owners of broadcast media in a market, and the Commission rejected arguments that common ownership of local broadcast stations would enhance the ability of station owners to provide better quality, more responsive programming.[18] The Commission also found that common ownership of local broadcast stations could "lessen the degree of competition for advertising among the alternative media" and that common owners could "use practices [such as special discounts] which exploit [their] advantage over the single station owner."[19] On

[11] *See Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, Report and Order, 45 FCC 1476, 1484 (¶ 20) (*1964 Decision*).

[12] *Id.* at 1476-77 (¶ 2).

[13] *Id.* at 1477 (¶ 3).

[14] *Id.* (internal quotation marks omitted).

[15] 326 U.S. 1 (1945).

[16] *1964 Decision*, 45 FCC at 1477 (¶ 3) (quoting *Associated Press*, 326 U.S. at 20).

[17] *See Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, First Report and Order, 22 FCC 2d 306, 307 (¶¶ 5-6), 309 (¶¶ 10-13) (1970).

[18] *Id.* at 311-12 (¶¶ 21-23).

[19] *Id.* at 313 (¶ 25).

reconsideration, however, the Commission relaxed its new ownership restrictions to allow again, in all circumstances, a party to hold a single AM-FM combination.[20]

7. In 1989, the Commission relaxed certain technical aspects of the contour overlap test, which decreased the likelihood of contour overlap between closely located stations and thereby increased the ability of a single party to own those stations.[21] In making this change, the Commission determined that ownership diversity was not an end in itself, but a means of "promoting diversity of program sources and viewpoints."[22] The Commission determined that its rule change would not adversely affect programming and viewpoint diversity because the number of media outlets had increased since the contour overlap test was developed in 1964 and because the efficiencies that common ownership would generate could lead to programming benefits.[23] The Commission also cited the increase in media outlets and the competition that radio stations faced in the advertising market from television stations, cable systems, and newspapers to support its conclusion that relaxing the contour-based test would not harm competition.[24]

B. The 1992 Radio Ownership Proceeding

8. In a 1992 proceeding, the Commission found that increases in the number and types of media outlets warranted further relaxation of the rule.[25] Citing greater numbers of radio and television stations and the growth of cable, particularly cable radio networks, the Commission determined that relaxing the local radio ownership rule would not harm diversity or competition.[26] Specifically with respect to competition, the Commission found that the radio industry's share of the local advertising market, in which the Commission included television stations and cable systems, had remained flat.[27] Moreover, the Commission found that the inability of radio stations to realize the efficiencies arising from common ownership harmed diversity and competition by making it more difficult for radio stations to compete and to provide

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[20] The Commission indicated that it wished to examine the question of AM-FM combinations further. *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, Memorandum Opinion and Order, 28 FCC 2d 662, 671-72 (¶¶ 35-36) (1971).

[21] *1989 Decision*, 4 FCC Rcd at 1723 (¶ 1).

[22] *Id.* at 1724 (¶ 7).

[23] *Id.* at 1727 (¶¶ 31, 37).

[24] *Id.* at 1727 (¶ 33).

[25] *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2773-74 (¶ 35) (1992).

[26] *Id.* at 2757-58 (¶¶ 4-6), 2773-74 (¶ 35).

[27] *Id.* at 2759 (¶ 8).

valuable programming services.[28] Accordingly, the Commission decided to relax its ownership rules to permit greater consolidation of radio stations in the local market.

9. The Commission initially adopted a tiered approach, similar to the approach that would be adopted in the 1996 Act. Under the Commission's framework, although common ownership of stations with overlapping signals technically remained prohibited, an exception was created to allow common ownership of a specified number of radio stations based on the number of radio stations in the market. To determine the number of stations that could be commonly owned, radio markets were divided into four tiers, and the maximum number of radio stations that a single party could own was 3 AM and 3 FM stations in the top tier, *i.e.*, markets having 40 or more radio stations.[29] In markets with more than 15 radio stations (the top 3 tiers), the numerical limits were also subject to an audience share cap of 25 percent. Although the Commission recognized that the 25 percent limit was "substantially more restrictive than ordinary antitrust concerns would mandate," the Commission "decline[d] to base [the] common ownership restrictions solely on economic concentration considerations" because the restrictions also were "designed to protect and promote a diversity of voices – a concern distinct from antitrust objectives."[30] Both the market size and the audience share were calculated based on the relevant Arbitron market.[31] In adopting this framework, the Commission reserved the right to

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[28] *Id.* at 2774 (¶ 37).

[29] *Id.* at 2776 (¶ 40). The complete framework was as follows:

> In markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. Common ownership of one AM/FM combination will continue to be allowed in any event.
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> In markets with 15 to 29 radio stations, a single licensee will be permitted to own up to two AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
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> In markets with 30 to 39 radio stations, a single licensee will be permitted to own up to three AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
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> In markets with 40 or more radio stations, a single licensee will be permitted to own up to three AM stations and three FM stations, provided that the combined audience share of the stations does not exceed 25 percent.

Id.

[30] *Id.* at 2780 (¶ 50).

[31] *Id.* at 2778 (¶ 45). For stations that were not in Arbitron markets, the Commission used a contour overlap market definition under which a radio market was the area encompassed by the principal community contours of the commonly owned stations whose contours overlapped. For purposes of applying the numerical caps, the number of stations in the market was calculated based on the number of commercial radio stations whose principal community contours fell fully or partially within the radio market. To apply the audience share test in non-Arbitron markets, applicants were required to commission an audience survey for the counties that were located in whole or in part in the radio market. *See id.* at 2778-79 (¶¶ 45-46) & n.101; 2798.

"implement a full range of remedies" where "ownership levels in a particular market might threaten the public interest."[32]

10. On reconsideration, the Commission again modified its local radio ownership rule.[33] The rule still generally prohibited common ownership of overlapping stations, but the Commission revised the exception to allow common ownership of up to only 2 AM and 2 FM stations in all markets with 15 or more radio stations. In smaller markets, a single party could own up to 3 stations, of which no more than 2 could be in the same service.[34] The Commission also replaced the audience share cap with a provision that, in markets with 15 or more radio stations, "evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered *prima facie* inconsistent with the public interest."[35] The Commission explained that this provision was designed to prevent "excessive concentration" even if the combination complied with the 2 AM-2 FM limit.[36] The language of the rule indicated that the excessive concentration determination would be made under the public interest standard.

11. The Commission also altered the market definition for calculating the numerical caps; instead of Arbitron markets, the Commission adopted a contour overlap market definition.[37] To determine audience share, however, the Commission retained use of Arbitron markets, or, if Arbitron data was unavailable, the market created by the counties covered by the contours of the stations to be combined.[38] In certain cases, the Commission permitted applicants to make alternative showings to demonstrate that the proposed combination would not lead to excessive concentration.[39]

[32] *Id.* at 2783 (¶ 56) n.109. In particular, the Commission suggested that, in appropriate circumstances, it may order divestiture of a station if through audience growth "any station group reaches or exceeds a 40 percent local market share." *Id.*

[33] *See Revision of Radio Rules and Policies*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387 (1992) (*1992 Reconsideration Order*).

[34] *Id.* at 6393 (¶ 32).

[35] *Id.* at 6406.

[36] *Id.* at 6393 (¶ 32).

[37] *Id.* at 6395 (¶¶ 39-40).

[38] *Id.* at 6398 (¶¶ 52-53).

[39] *Id.* at 6399-400 (¶¶ 54-58). The Commission issued a second reconsideration order in 1994 in which the Commission maintained the rule adopted in the 1992 reconsideration order, except for certain technical modifications. *Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183, 7187-90 (¶¶ 24-39) (1994). In deciding not to modify the rule further, the Commission acknowledged that its new rule would increase concentration in smaller radio markets, while maintaining an unconcentrated market structure in larger markets. *Id.* at 7186 (¶¶ 17-18). The Commission concluded, however, that consolidation permitted greater efficiencies and could increase diversity by providing the means for marginal stations to come or remain (continued....)

C. The 1996 Act

12. In the 1996 Act, Congress directed the Commission to revise its local ownership rule. Specifically, Section 202(b)(1) of the 1996 Act, entitled "Local Radio Diversity—Applicable Caps," required the Commission to revise its local radio ownership rule to provide that:

> (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
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> (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
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> (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
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> (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.[40]

The Conference Report provides little additional detail concerning Section 202(b), stating merely that "[n]ew subsection [202](b) directs the Commission to further modify its rules with respect to the number of radio stations a party may own, operate or control in a local market."[41] In

(Continued from previous page)
on the air and by providing incentives for common station owners to offer diverse formats targeting different segments of the audience. *Id.* at 7186 (¶¶ 19-20).

[40] Section 202(b) also provides that the Commission may permit a party to exceed these limits "if the Commission determines that [it] will result in an increase in the number of radio broadcast stations in operation." 1996 Act, § 202(b)(2), 110 Stat. at 110-11.

[41] H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess. 162 (1996). The legislative history of Section 202(b) reflects the significant differences between the local radio ownership provisions of the Senate and House bills and Section 202(b). The Senate bill would have required the Commission to modify its broadcast ownership rules to eliminate numerical limits on the number of AM or FM stations that may be owned or controlled by one entity nationally or "in a particular market." S. 652, § 206(b)(2). The bill authorized the Commission to "refuse to approve the transfer or issuance" of a radio license if it finds that an entity would "obtain an undue concentration of control or would thereby harm competition." *Id.* Thus, the Senate bill would have replaced numerical and audience share limits with a case-by-case analysis focused on competition issues. The House bill would have eliminated the local radio ownership rule in its entirety, but would have authorized the Commission to deny an application for a station license, license renewal, or license assignment if the combination of the station and "more than one other nonbroadcast media of mass communication would result in an undue concentration of media voices in the respective local market." H.R. 1555, § 302(c) (July 4, 1995) (proposing to add new section 337(c) to the Communications Act). The term "medium of mass communication" was intended to include radio and television stations licensed to communities in the market, daily newspapers published in communities in the market, and cable television and other equivalent delivery systems that service communities in the market. *See* H. Rep. No. 104-204, pt. 1, at 118. The House bill also would have prohibited grant of such an application if it would result in "all the media of mass communication in such local market" being owned, operated, or controlled by "two or fewer persons or entities." H.R. 1555, § 302(c) (July 4, 1995).

particular, neither the 1996 Act nor the legislative history elaborates on the intended interplay between Section 202(b) and the public interest standard contained in Sections 309(a) and 310(d) of the 1934 Act.

13. In addition to Section 202(b), Congress enacted Section 202(h) in the 1996 Act. Section 202(h) directs the Commission to "review its rules adopted pursuant to this section and all of its ownership rules biennially . . . and [to] determine whether any of such rules are necessary in the public interest as the result of competition."[42] Section 202(h) further directs the Commission to "repeal or modify" any ownership rules that it finds to be "no longer in the public interest."[43] The legislative history provides little additional discussion concerning the implementation of Section 202(h).

D. The Commission's Implementation of Section 202(b) and Subsequent Decisions

14. The Commission responded to Congress's directive in Section 202(b) by issuing an order in March 1996 replacing a portion of the local radio ownership rule, including both the numerical station limits and the presumption that an audience share of greater than 25% was *prima facie* inconsistent with the public interest, with the language set forth in Section 202(b).[44] The Commission found that prior notice and an opportunity for public comment were unnecessary because the "rule changes [did] not involve discretionary action on the part of the Commission, [but] simply implement[ed] provisions of the Telecom Act that direct the Commission to revise its rules according to the specific terms set forth in the legislation."[45] The local radio ownership rule has not been altered since the Commission's March 1996 order.

15. In 1998, the Commission commenced a biennial review to examine whether the local radio ownership rule was "necessary in the public interest as a result of competition."[46] In its biennial review final report, the Commission concluded that the rule continued to serve the public interest.[47] Although the Commission noted that consolidation had produced financial benefits for the radio broadcast industry, the Commission expressed concern that consolidation

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[42] 110 Stat. at 111-12.

[43] *Id.* at 112.

[44] *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, Order, 11 FCC Rcd 12368.

[45] *Id.* at 12371 (¶ 5).

[46] *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 FCC Rcd 11276, 11276 (¶ 1) (1998) (*1998 NOI*) (quoting Section 202(h) of the 1996 Act).

[47] *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058, 11087 (¶ 52) (2000) (*Biennial Review Report*)

could be having an adverse affect on local advertising rates.[48] The Commission also expressed concern that consolidation could reduce diversity of viewpoint and source diversity.[49] Accordingly, the Commission decided to retain the local radio ownership rule without modification.[50]

16. In the 1998 biennial review proceeding, the Commission also decided to examine the method by which it defined the relevant geographic market and counted the number of commonly owned and independent commercial radio stations for purposes of applying the rule. The Commission expressed concern that its current method of defining radio markets might be achieving results that frustrate the Congress' intent and that, together with its method of counting stations in a market for various purposes, might be undermining legitimate expectations of broadcasters, advertisers and the public as to the size of the market and the number of stations in it.[51] The Commission accordingly initiated a rulemaking proceeding in December 2000 to examine possible revisions to its methodology for defining the market and counting the number of commonly owned and independent radio stations.[52]

17. The 1996 revisions to the local radio ownership rule enabled greater consolidation of radio station ownership at the local level, and, since 1996, thousands of assignment and transfer of control applications have been filed to effectuate this consolidation.[53] Although most of these applications were granted summarily, the Commission in certain instances faced concerns regarding the competitive impact of proposed transactions. In response to these concerns, the Commission concluded in a written decision that it had "an independent obligation [under the statute] to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."[54] In several written

[48] *Id.* at 11088 (¶ 55).

[49] *Id.* at 11089-90 (¶¶ 56-57).

[50] *Id.* at 11091 (¶ 60).

[51] See *id.* at 11093-94 (¶¶ 65-68) for a more complete explanation of the market definition methodology at issue in the MM Docket No. 00-244.

[52] *See Definitions of Radio Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 25077 (2000) (*Market Definition NPRM*).

[53] Radio station consolidation also occurred at the national level as a result of the elimination of national radio ownership limits. *See* 1996 Act, § 202(a), 110 Stat. at 110.

[54] *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 (¶ 8) (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)).

decisions since 1996, the Commission engaged in public interest analyses that considered the potential competitive impact of the proposed transaction.[55]

18. In addition to competitive analyses, in August 1998 the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition.[56] Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.[57] Most of these flagged applications that proposed radio concentration levels that were consistent with Commission precedent were granted on delegated authority. A number of applications that remain pending propose concentration levels that would exceed the levels previously approved in Commission-level decisions.

III. DISCUSSION

19. We propose to undertake a comprehensive examination of our rules and policies concerning local radio ownership. The radio industry has undergone substantial changes since 1996, and we are concerned that our current policies on local radio ownership do not adequately reflect current industry conditions. Our framework for analyzing proposed radio combinations particularly has led to unfortunate delays that do not serve well the interests of the agency, the parties, or the public. Our goal in this proceeding is to develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition.

20. We start with a review of the statutory framework from which we derive our regulatory authority and under which we implement our radio ownership policy. We next consider the traditional goals that have supported the local radio ownership rule – diversity and competition – and possible ways to measure and promote those goals in the modern media environment. After discussion of these subjects, we lay out possible changes to our radio ownership rules and policies. Our goal here is to consider the public interest advantages and disadvantages of various potential rule and policy changes as well as questions surrounding their implementation. In the final substantive section of this *Notice*, we adopt an interim policy to provide guidance on the processing of radio applications pending completion of this rulemaking.

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[55] *See, e.g., Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 (¶¶ 12-16) (1996); *Great Empire Broadcasting, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 (¶ 10) (1999); *Shareholders of AMFM, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 16062, 16066 (¶¶ 7-8) & n.10 (2000).

[56] *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

[57] *See AMFM, Inc.*, 15 FCC Rcd at 16066 (¶ 7) n.10.

A. Statutory Framework

21. We begin with a review of the relevant statutory framework. Before 1996, Commission regulation of local radio ownership was governed primarily by the statutory mandate of Sections 309(a) and 310(d) that the Commission regulate the granting and transfer of radio licenses consistent with the public interest, convenience, and necessity.[58] This public interest authority has long been held to authorize regulations, such as the local radio ownership rule, that are designed to promote the goals of diversity and competition.[59]

22. As a result of the 1996 Act, the broad public interest standards of Title III are no longer the sole congressional statement bearing on the question of local radio ownership. We also must consider the impact of Section 202(b) and the rule changes it mandated. In deciding prior cases, the Commission expressed the view that the numerical limits mandated by Section 202(b) were important tools for promoting our public interest concerns in local radio markets, but that competitive analyses were appropriate in particular cases where compliance with those limits did not fully address those concerns.[60] Because that view developed out of decisions issued in specific cases, the Commission never received the benefit of public input that a rulemaking proceeding would have afforded. This proceeding will provide us with that opportunity. Below we propose alternative views on the interplay between Section 202(b) and our public interest mandate. We seek comment on these views and invite comment on other possible interpretations of the relevant statutory provisions and the impact any such interpretation would have on our diversity and competition goals if adopted.

23. In addressing the three interpretations outlined below or other possible interpretations of the statutory framework, commenters should explain the relevance, if any, of Section 202(h)'s directive that the Commission review its ownership rules biennially to determine if they are no longer in the public interest as a result of competition. Does the instruction to modify or repeal ownership rules when they are no longer necessary in the public interest bear on the relationship

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[58] 47 U.S.C. §§ 309(a); 310(d). In addition, 47 U.S.C. § 303(r) authorizes the Commission, "as the public convenience, interest, or necessity requires," to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

[59] *See, e.g., FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding newspaper broadcast cross ownership rule as rational means to promote diversity); *United States v. RCA*, 358 U.S. 334, 351-52 (1959) ("in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication"); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding various broadcast ownership and network affiliation regulations issued under the public interest standard); *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (because "competitive considerations are an important element of the public interest standard," agencies must "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations"); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950) ("It is certainly not in the public interest that a radio station be used to achieve monopoly"); *American Broadcasting Co., Inc.*, Memorandum Opinion and Order, 7 FCC 2d 245, 251-52 (1966), *recon. denied*, 9 FCC 2d 546, 548 (1967).

[60] *See, e.g., AMFM, Inc.*, 15 FCC Rcd at 16066 (¶ 7).

between Section 202(b) and the public interest standard? Does Section 202(h)'s reference to competition affect our interpretation of the statutory framework? Aside from modifying or eliminating the local radio ownership rule if it is no longer in the public interest as a result of competition, are we permitted to revise or replace the current rule with another framework to address our public interest goals?

24. Commenters also are encouraged to explain how their interpretation of the relevant statutory provisions comports with traditional principles of statutory construction and the specific rule of construction set forth in Section 601(c)(1) of the 1996 Act. Section 601(c)(1) provides that: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[61] Does this savings clause limit the effect that Section 202(b) otherwise could have on the public interest standards of Sections 309(a) and 310(d)?

25. Numerical limits are definitive. One interpretation of the statutory framework is that Congress conclusively determined that the numerical limits specified in Section 202(b) establish radio station concentration levels that are consistent with the public interest in diversity and competition. Under this interpretation, we would not consider any public interest factors relating to diversity or competition beyond compliance with the numerical limits. We seek comment on the reasonableness of this interpretation. How consistent is this interpretation with the legislative history of the 1996 Act and Section 601(c)(1)? How effective are the numerical limits in vindicating diversity or competition concerns? If the limits are not effective, is it because of the numbers themselves or because of the contour overlap market definition we use?[62] What are the legal ramifications, if any, of Congress directing the Commission to revise its rules rather than amending the 1934 Act and, in particular, Section 310(d)?

26. Numerical limits address diversity only. Another possible interpretation of the statutory framework is that Section 202(b) addresses the diversity prong of our public interest analysis, while leaving competition concerns to be addressed by the general public interest standard. The heading of Section 202(b) – "Local Radio Diversity" – suggests this interpretation.[63] Does the absence of any mention of market share, a traditional element of anticompetitive market power, also suggest that Section 202(b) was not intended to address competition concerns? What significance, if any, is there to the fact that an audience share presumption was part of the local radio ownership rule before the 1996 Act, and that the revisions required by Section 202(b) removed that presumption? If Section 202(b) addresses diversity only, does it nevertheless affect the types of factors we could consider in a competitive

[61] 1996 Act, § 601(c)(1), 110 Stat. at 143.

[62] A detailed description of our contour overlap definition, *see Market Definition NPRM, supra.*

[63] Courts have recognized that titles and headings can be important tools in construing a statute or regulation. *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *Hardin v City Title & Escrow*, 797 F.2d 1037, 1039 (D.C. Cir. 1986). We note, however, that the Commission has not always given meaning to statutory headings. *See, e.g.*, Federal-State Board on Universal Service, *Report and Order*, 13 FCC Rcd 11501, 11584-11589 (interpreting Sec. 254(h) as not being limited to telecommunications services, despite the heading, "Telecommunications Services for Certain Providers").

analysis? If Congress addressed diversity through numerical caps, does that indicate that other considerations, such as advertising revenue or audience share, relate only to competition? We seek comment on this interpretation.

27. Numerical limits presumptively consistent with public interest. A third possible interpretation of the statutory framework is that Section 202(b) established presumptively permissible levels of radio station ownership and that, therefore, the Commission should rely on Section 202(b)'s numerical limits absent a specific reason to conclude that the rule is ineffective in addressing diversity or competition issues with respect to a particular proposed combination. This interpretation would harmonize the rule changes required by Section 202(b) with the statutory requirement that every grant, assignment, or transfer of a radio license be consistent with the public interest.[64] We seek comment on this interpretation. If Section 202(b) establishes a presumptively acceptable level of radio ownership, does it also indicate what factors would rebut that presumption (and who is responsible for demonstrating the presence of such factors), or has that question been entrusted to the Commission to resolve? If we conclude that Section 202(b) establishes a presumption, what is the risk, if any, that similarly situated applicants could be treated inconsistently based on procedural rather than substantive considerations, *e.g.*, whether a petition to deny is filed. Does this interpretation adequately address diversity and competition interests? Are there downsides to this interpretation that we should consider? In this regard, we specifically invite comment on the possibility that this approach could result in very disparate treatment of similar competitive situations based entirely on whether an interested party brought competitive concerns to our attention. Is this appropriate?

B. Promoting Diversity and Competition

28. If we determine that Section 202(b) permits us to exercise our public interest authority to promote diversity and competition in radio broadcasting, we seek to explore the contours of these public interest goals, which have been the touchstone of our rules and policies on local radio ownership. We undertake this analysis to guide us as we consider, in accordance with the statutory framework, revisions to those rules and policies to reflect the rapidly changing media marketplace. In that regard, we are especially interested in receiving comments that provide not only the theoretical justifications for adopting a particular regulatory framework, but also relevant empirical data on the effect that consolidation in the radio industry since 1996 has had on diversity and competition in local markets.

1. Diversity

29. Diversity is one of the guiding principles of the Commission's local radio ownership rule. This principle is intended to advance the values of the First Amendment, which, as the Supreme Court stated, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[65] The Commission has elaborated on the Supreme Court's view, positing that "the greater the diversity

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[64] *See* 47 U.S.C. §§ 309(a); 310(d).

[65] *See Associated Press*, 326 U.S. at 20.

of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[66]

30. In this proceeding, we intend to consider how our rules and polices concerning local radio ownership affect our goal of promoting diversity. To do this, we first must define the types of diversity we seek to ensure. The Commission previously has evaluated three aspects of diversity: viewpoint diversity, outlet diversity, and source diversity.[67] Viewpoint diversity ensures that the public has access to "a wide range of diverse and antagonistic opinions and interpretations."[68] Outlet diversity ensures that the public has access to multiple distribution channels (*e.g.*, radio, broadcast television, and newspapers) from which it can access information and programming.[69] Source diversity ensures that the public has access to information and programming from multiple content providers.[70] We seek comment on which one or more of these three types of diversity should guide our public interest considerations. Are there other aspects of diversity that we should consider? Parties commenting on this issue should explain in detail the how the public will be affected if we decide to emphasize one or more of these various aspects of diversity. We especially seek empirical data in support of parties' positions.

31. We also seek comment on how we should measure the success or failure of our diversity goal, however that goal is defined. Historically, the Commission has looked to the number of independent station owners as a proxy for source diversity and viewpoint diversity,[71] and Section 202(b) of the 1996 Act similarly speaks in terms of numerical limits on station ownership. We seek comment on the advantages and disadvantages of measuring diversity by looking, in whole or in part, to the number of independent station owners. What other measures of diversity, quantitative or qualitative, should we consider, and what tools do we have that enable us to measure diversity with a reasonable degree of accuracy? Are audience demographics an appropriate measure of diversity? Is competition an appropriate proxy for diversity, such that the presence of a competitive local market will assuage our concerns about diversity?[72] Should we take a radio owner's market share, audience share, or subscribership into account in measuring diversity, and if so, how? In considering the various potential ways to measure diversity, we also seek comment on how their use comports with the values and principles embodied in the First Amendment of the Constitution.

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[66] *1964 Decision*, 45 FCC at 1477 (¶ 3).

[67] *1998 NOI*, 13 FCC Rcd at 11278 (¶ 6).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *See 1989 Decision*, 4 FCC Rcd at 1724 (¶ 7).

[72] We seek comment elsewhere in this *Notice* about our use of competition analysis in evaluating our rules and policies concerning local radio ownership.

32. In searching for ways to define and measure diversity, we are especially interested in the particular impact of our analysis on the radio broadcast industry and radio listeners. We seek comment on whether there are attributes of radio broadcasting that should lead us to define and measure diversity in radio differently from other media. Consumers generally have access to news, public affairs, and entertainment programming from a variety of media outlets. On the other hand, two attributes of radio broadcasting – its ability to reach mobile users and its audio-only programming – may give radio stations singular access to the public in certain situations, most notably when listeners are in their cars or at their offices or other places of employment. Are those or other attributes of radio broadcasting sufficiently unique that we should look at radio separately for diversity purposes, or do consumers consider other outlets as substitutes for radio? Are there other attributes we should consider, and how does any particular attribute affect how we define and measure diversity in conducting our public interest analysis?

33. We also must consider the appropriate geographic area over which to measure diversity as it relates to radio broadcasting. The current local radio ownership rule contemplates that diversity in radio will be measured at the local level. This appears to be an appropriate result if diversity analysis is restricted to radio since radio stations that do not serve the local community do not contribute to media diversity in that community. Would the appropriate geographic area change if we consider other media, in particular Internet-related media such as Internet radio, as significant contributors of diversity? Does the appropriate geographic area for measuring diversity differ based on the type of information or programming involved, for example, local news and sports versus nationwide entertainment programming? Even if some aspects of diversity are not local in nature, should we nonetheless evaluate diversity at the local level in light of the value we traditionally have placed on "localism" in the broadcasting industry?[73] Should the appropriate geographic area for measuring diversity be coextensive with the relevant geographic market for competition purposes, which we examine below? We seek comment responding to these questions.

34. We also seek comment on whether the level of diversity that the public enjoys varies among different demographic or income groups. Although access to broadcasting services is available to all individuals in a community with the appropriate receiving equipment, access to other forms of media typically requires the user to incur a recurring charge, generally in the form of a subscription fee. Does this or other differences between broadcasting and other media reduce the level of diversity that certain demographic or income groups enjoy? What is the extent of any disparity in access to diversity, and how should we factor in that disparity in our diversity analysis? Parties commenting on this issue are encouraged to submit empirical data to support their positions.

35. As we have found previously, the current media marketplace appears robust in terms of the aggregate number of media outlets. As of June 30, 2001, the Commission had licensed 12,932 radio stations,[74] 1,678 full power television stations, 2,396 low power TV stations, and

[73] The Commission's localism policy historically has been grounded on the notion that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Sixth Report and Order* in Docket No. 8736, 1 RR 91:559, :624 (1952).

[74] FCC News Release, Broadcast Station Totals as of June 30, 2001 (July 13, 2001).

232 Class A TV stations.[75] Today, there are seven national commercial television broadcast networks. The nation was served in 2000 by 1,422 daily newspapers with a total circulation of 55.8 million,[76] and in 1996 by 7,915 weekly newspapers with a total circulation of approximately 81.6 million.[77] As of June 2000, cable television systems served 67.4% of TV households, or 67.7 million people.[78] These systems offered in the aggregate over 200 video programming services.[79] Direct broadcast satellite (DBS) providers now serve nearly 13 million subscribers, or over 15% of all households served by multichannel video programming distributors (MVPDs),[80] and other MVPDs serve another nearly 4 million subscribers. We also anticipate that satellite radio soon will become broadly available to the nation. In addition, as of November 2000, 56% of Americans had access to the Internet from their homes.[81] Although these national figures do not necessarily correlate to the level of diversity in particular local markets, the aggregate number of media outlets potentially available to the public, including outlets that have developed in just the last decade, may have some bearing on our diversity analysis. We accordingly seek comment on the significance of these figures and any other information about marketplace conditions that would inform our analysis.

36. Although the number of media outlets has grown, so has the concentration in their ownership. Historically, the Commission has had both local and national ownership limits for radio broadcast stations. Pursuant to the 1996 Act, the Commission eliminated the national ownership limit on radio stations, in addition to relaxing its local radio ownership rules. As a result, significant consolidation occurred in the national and local radio markets. At approximately the same time that the 1996 Act became law, there were approximately 5,100 owners of commercial radio stations nationwide, while now there are only approximately 3,800 owners, a decrease of 25%.[82] Local markets have seen similar consolidation. In March 1996, an Arbitron metro market had an average of 13.5 owners; in March 2001, the average was 10.3, a decrease of 22%.[83] Other media also appear to have undergone similar consolidation. For

[75] FCC News Release, Broadcast Station Totals as of June 30, 2001 (July 13, 2001).

[76] SRDS, *Circulation 2001*, at 1038.

[77] Newspaper Ass'n of America, Petition for Rulemaking, at 24 (filed Apr. 28, 1997).

[78] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6017 (¶ 19) (2001) (*Seventh Annual Report*).

[79] *Id.* at 6105, Table B-5.

[80] *Id.* at 6037 (¶ 61) n.235.

[81] *Id.* at 6054 (¶ 107).

[82] Mass Media Bureau Staff Report, *Review of the Radio Industry, 2001*, September 2001, p. 3. *www.fcc.gov/mmb/prd/radio.html.*

[83] *Id.* at 7.

example, in 1995 there were 543 entities nationwide that owned commercial TV stations,[84] while today there are only 360.[85] Does this consolidation in ownership offset the increases in media outlets? What is the relevance of this consolidation to our local radio ownership policies and to diversity in particular? Commenters are encouraged to submit empirical data on the impact of consolidation on diversity.

37. In examining the impact of greater media outlets and increased media consolidation, we note that there is considerable debate concerning the relationship between consolidation and viewpoint and source diversity. Traditionally, the Commission has focused on the number of different owners on the theory that a larger number of owners would help provide greater viewpoint or source diversity. In addition, multiple owners presumably are more likely to provide "divergent viewpoints on controversial issues," which the Commission has stated is "essential to democracy."[86] The Commission has noted, however, the contrary theory that "the greater the increase in concentration of ownership, the greater the opportunity for diversity of content."[87] Under that theory, competing parties in a market have a commercial incentive to air "greatest common denominator" programming, while a single party that owns all stations in a market has a commercial incentive to air more diverse programming to appeal to all substantial interests.

38. We seek comment on these competing theories and on any relevant empirical analysis of these theories. Should commonly owned media outlets be considered a single media "voice" in evaluating diversity? Does the answer depend on the type of programming involved, for example, entertainment programming versus news or public affairs programming, or on the type of media outlet involved? Does it make sense to treat increased media consolidation as contributing to diversity if the common owner exercises editorial discretion over news and programming? Even if some consolidation of media outlets does lead to greater diversity, is there a level of consolidation at which the maximum amount of diversity is achieved? How do we determine what that level is? In considering these questions, we are particularly interested in the actual experience of the radio industry. Has consolidation in local radio markets since 1996 lead to greater diversity? Commenters responding in the affirmative are encouraged to submit empirical data and analysis demonstrating both the increase in diversity and the causal link, as opposed to mere correlation, between the increase and greater consolidation in local markets. Commenters arguing that greater consolidation harms diversity also are encouraged to submit empirical data and analysis supporting their view. Evidence comparing the levels of diversity in local communities with different levels of radio concentration would be especially useful.

[84] Broadcasting & Cable Yearbook 1995, at A98-A123.

[85] BIA MasterAccess Database, Mar. 2001.

[86] *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report & Order, 50 FCC 2d 1046, 1074 (¶ 99) (1975).

[87] *Review of the Commission's Regulations Governing Television Broadcasting*, Further Notice of Proposed Rulemaking, 10 FCC Rcd 3524, 3551 (¶ 63) (1995).

2. Competition

39. Competition is the other principle underlying the Commission's local radio ownership rules and policies. Generally speaking, radio station groups compete with each other in two ways: they compete to attract listeners, and they compete to attract advertising dollars. These two forms of competition are interrelated since advertising revenue is used to finance the production of programming, which in turn helps attract listeners, which then enables radio stations to charge advertisers. Nevertheless, because there often is not a one-to-one ratio between audience share and station revenue, the degree of concentration in a market may differ depending on whether audience share or advertising share (or some other factor) is the relevant measure. At different points in the past, the Commission has relied on both measures. Between 1992 and 1996, the local radio ownership rule included, along with numerical limits, a presumption that a combination that created a station group with a greater than 25% audience share resulted in "excessive concentration" that was *prima facie* inconsistent with the public interest.[88] As consolidation in local radio markets increased as a result of the 1996 Act, the Commission began to examine in assignment and transfer cases the potential competitive effect of proposed transactions in the local radio advertising market. Because advertisers provide the financial support for programming on commercial stations and have an incentive to prefer programming with widespread appeal, the Commission has considered competition in advertising markets to enhance the welfare of consumers. In this proceeding, we seek to examine more fully our interest in the various types of radio station competition and to develop the appropriate standards and measures to help us evaluate how best to promote that interest in the modern media environment.

40. We begin by examining our interest in competition in light of current marketplace conditions. As Americans increasingly are willing to pay for information and programming by subscribing to programming services, like satellite radio services, for example, it is incumbent on us to define more precisely the goals of our competition analysis. Should we be interested in competition for listeners, competition for advertisers, or a combination of the two? With respect to advertising, does our authority to regulate the radio market justify our basing regulation on the level of competition in the radio advertising market? Are we interested in competition as a proxy for ensuring an appropriate level of diversity in a local community? If we conclude that Section 202(b) definitively establishes the levels of radio station concentration that are consistent with our diversity interest, how would this affect the role of our competition analysis, if at all? Is one objective of competitive analysis to ensure a healthy radio advertising market so that radio stations not affiliated with larger station groups in a community will be able to attract sufficient advertising dollars to support their operations and their ability to provide valuable news and programming services to the public? Is one objective to protect radio advertisers from any anticompetitive pricing or conduct that could occur if a single party achieved market power or monopoly using the public airways? What precisely are the harms consumers suffer as advertising prices rise, and what empirical evidence of these harms is available? We note also that our biennial review mandate requires us to consider whether our local radio ownership rule

[88] *See supra* Section II.B.

is no longer necessary in the public interest "as a result of competition."[89] One of the objectives of our competition analysis therefore must be to guide our biennial review examination. We seek comment on these objectives and on any other objectives that should guide the competition aspect of our public interest analysis.

41. Competition analysis requires us to define the relevant product and geographic markets in which radio stations compete, as well as the market share of the participants within the relevant market, and then weigh the competitive benefits of consolidation (*e.g.*, economies of scale and scope that may lead to lower costs and prices or superior products) against the harms (*e.g.*, the exercise of market power or reduction in output).[90] We seek information that would help us conduct our analysis.

42. We seek comment on the relevant product market. In determining the relevant market, should we look at the advertising market or the market for audiences? If we look at advertising, does radio advertising constitute a separate market from other forms of media advertising? In its enforcement of the antitrust laws, the Department of Justice (DOJ), looking at the advertising market, has taken the position that radio advertising constitutes a separate market,[91] finding that advertisers find value in certain of radio's unique attributes. First, unlike other media, radio is exclusively sound-based. Second, radio allows advertisers to focus narrowly on specific demographic groups (*e.g.*, women age 18 - 49). Third, radio allows an advertiser to build repetition or frequency by advertising at a reasonable price. Fourth, the cost of producing a radio commercial is much lower than producing a television commercial, thus allowing advertisers to change advertisements more often. Fifth, radio allows for fast turnaround of advertising copy. Sixth, radio can reach people driving in their cars. Consequently, according to the DOJ, advertisers considering one radio station generally perceive other radio stations as the closest substitute, and therefore radio stations tend to set the price of their radio advertising time based upon prices charged by other radio stations rather than those of alternative media.[92] We seek comment on the DOJ's analysis, both as it relates to the advertising market and the market for listeners. We recognize that many advertisers consider alternative media to be good

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[89] 1996 Act, § 202(h), 110 Stat. at 111-12.

[90] *Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 3524, 3532 (¶ 16) (1995).

[91] U.S. Dep't of Justice & FTC, *1992 Horizontal Merger Guidelines*, §§ 1.1, 1.2 (revised 1997) (*1992 Merger Guidelines*). In settlements requiring divestiture, the DOJ concluded that the sale of advertising time on radio stations constitutes the relevant market for antitrust purposes. *See, e.g.* Competitive Impact Statement, *United States v. CBS Corporation and American Radio Systems Corporation*, Case No. 98CV00819 (D.D.C. March 31, 1998); Competitive Impact Statement, *United States v. Hicks, Muse, Tate & Furst Inc.*, Case No. CV 98-2422 (March 31, 1998); Competitive Impact Statement, *United States v. Jacor Communications, Inc. and Citicasters, Inc.*, Case No. C-1-96-757 (S.D. Ohio, August 5, 1996); Competitive Impact Statement, *United States v. American Radio Systems Corporation and EZ Communications, Inc.*, Case No. 97CV405 (D.D.C. March 20, 1997).

[92] U.S. Department of Justice, Comments in Response to Public Notice, In re Application of Citadel Communications Corporation and Marathon Media L.P. for consent to Assignment of Licenses of Stations (April 26, 1999) at 7.

substitutes for radio advertising, but the DOJ's analysis indicates that alternative media are not good substitutes for a significant number of advertisers. Are there studies or empirical data that confirm or refute the theory that radio advertising is a separate market? Similarly, do listeners substitute other forms of media for radio, or do listeners tend to complement radio with other media? What is the evidence from local markets that have witnessed consolidation of radio station? Does the substitutability of radio and other media depend on the size of the geographic market at issue? We seek pertinent data that will help us determine the relevant product market.

43. We also seek comment on the relevant geographic market. We note that antitrust analysis defines the relevant geographic market as the region where a hypothetical monopolist that is the only producer of the relevant product in the region could profitably raise the price of the relevant product.[93] We tentatively conclude that the relevant geographic market is local in nature, but we seek comment on the precise parameters of that market. What would be the appropriate market if we focused on listenership rather than advertising? With respect to advertising, is there a distinct regional or national market we also should consider in our analysis? If so, what are the relative sizes, in terms of radio station revenue and media revenue, of those markets vis-à-vis each other and local advertising markets? Do some radio stations rely more on national or regional advertising than on local advertising, and, if so, what characteristics lead to that result? What are the implications of these different geographic market definitions for our competition analysis?[94]

44. Under the Commission's current local radio ownership rule, the geographic market is defined based on a system of mutually overlapping signal contours, which makes the geographic market endogenous to a common owner's particular station holdings.[95] Is this the appropriate basis for defining a relevant geographic market for purposes of a competition analysis? If so, why, and what are the benefits of this market definition? If not, what other geographic market definition should we use? The Commission before 1996 used the Arbitron radio metropolitan area as the relevant geographic market to determine whether a proposed combination implicated the 25% audience share presumption, and since 1996 to assess the competitive effects of a proposed transaction.[96] This market definition also is the one that radio

[93] *1992 Merger Guidelines* § 1.21.

[94] For example, out-of-market stations that can be heard in a local market may provide more competitive pressure on local radio stations with respect to national or regional advertisers, but not with respect to local advertisers.

[95] Specifically, we have defined the radio market "as that area encompassed by the principal community contours ... of the mutually overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations." *1992 Reconsideration Order*, 7 FCC Rcd at 6395 (¶ 39). *See also Biennial Review Report*, 15 FCC Rcd at 11091-94 (¶¶ 62-65). In the *Notice* issued in MM Docket No. 00-244, we sought comment on possible revisions to the market definition for purposes of applying the local radio ownership rule.

[96] *See, e.g., AMFM, Inc.*, 15 FCC Rcd at 16068 (¶ 15).

advertisers customarily recognize and rely on in making their purchasing decisions.[97] Are Arbitron markets the relevant geographic market for purposes of our competition analysis? Can Arbitron radio markets be manipulated to make a particular market or transaction appear less troublesome. If so, how should we deal with this issue? If we adopt the Arbitron market as the relevant geographic market, how should we treat "below-the-line" stations that Arbitron reports as having audience shares or reportable revenues in the relevant market?[98] Commenters advocating use of the Arbitron market should propose a relevant geographic market definition for radio stations not located in an Arbitron radio market. We also seek comment on any other potential geographic market definitions we should consider.[99]

45. Once we define the relevant product and geographic markets, how should we measure the market share of those that compete in the market? Accurately calculating market share is key because higher levels of concentration of the post-transaction firm could indicate a greater likelihood for the exercise of market power due to unilateral or coordinated effects. In many industries, market share is often measured as a function of revenue, although, as indicated above, we also have relied on audience share data to determine concentration levels. If radio advertising constitutes the relevant product market and the Arbitron market (where defined) is the relevant geographic market, we can readily obtain actual or estimated local advertising revenue from a commercial industry reporting service, such as BIA. If we rely on listenership, we also should be able to obtain audience share data from BIA or another commercial reporting service, at least for stations located in Arbitron markets. Alternatively, if the market includes media for which revenue data is not readily available, we could rely on circulation and ratings information, which presumably correlate to advertising rates, and therefore overall revenue and share. Even if we rely on station revenue, we could either look at the combined market share, as we used in implementing the 50/70 screen, or use the Herfindahl-Hirschman Index ("HHI") as a method of measuring pre- and post-acquisition market concentration.[100] We note that actions by the DOJ indicate that revenue share is a principal determinant in their evaluation of radio mergers, while HHI is less critical and we have taken a similar view.[101] In addition, the Commission has flagged

[97] The DOJ also generally has relied on the Arbitron market as the relevant geographic market. U.S. Department of Justice, Comments in Response to Public Notice, In re Application of Citadel Communications Corporation and Marathon Media L.P. for Consent to Assignment of Licenses of Stations (April 26, 1999) at 8-9.

[98] "Below-the-line" stations are classified as "out-of-market" stations by BIA Publications, Inc. in BIA's Master Access Database.

[99] Comments filed in MM Docket No. 00-244 will be included in the record in this proceeding.

[100] The HHI for a market is calculated by summing the squares of the individual market shares of all firms participating in the market. Under the Merger Guidelines approach, markets with an HHI below 1000 are deemed unconcentrated; those with an HHI between 1000 and 1800 are moderately concentrated; and those with an HHI above 1800 are termed highly concentrated. In cases where the post-merger market is highly concentrated, and an acquisition would result in an increase of more than 100 points in the HHI, the acquisition is presumed to be likely to create or enhance market power or facilitate its exercise.

[101] *See Great Empire Broadcasting, Inc., supra.* The following radio mergers that included settlements with the DOJ attest to the Department's recognition that an HHI over 1,800 may not necessarily imply adverse competitive consequences in a local radio market. *See, e.g.,* Final Judgment in *United States v. CBS Corporation and*
(continued....)

proposed transactions based on market share. We also seek comment on other sources of available data that we could use to determine market share and concentration levels. Although we have focused on advertising revenue and audience share as the principal potential measures of concentration, there may be other approaches we should consider.

46. Although a large market share in itself does not demonstrate market power, market power may be inferred when a party's market share is protected by high barriers to entry.[102] We seek comment on barriers to entry into the relevant product and geographic markets. We tentatively believe that the possible entry of additional stations would seldom be sufficient to counteract the exercise of market power.[103] While new entry is possible in some radio markets, it is unusual for a strong new signal to be placed into a market. Because of the scarcity of spectrum, a particular geographic area can support only a certain number of radio broadcasting signals. Generally, the good signals were taken many years ago, resulting in little unused capacity that could support new radio station entry.[104] If the relevant product market includes other forms of media, the barriers to entry may be different. We seek comment on our tentative conclusion regarding entry by new radio stations, and request comment on barriers to entry through other media that may be part of the relevant product market. We also seek studies or evidence, particular those relating to the radio industry's experience since 1996, that would support any finding we may make regarding entry barriers.

47. Although we believe that entry by new stations is unlikely, we seek comment on whether the mere existence of other stations in the market negates market power, even where the current market shares of those stations are low. Should we consider the number of other stations in the market and their signal strength, either as an alternative to or in addition to market share?

(Continued from previous page)

American Radio Systems Corporation, Case No. 98CV00819 (D.D.C. June 30, 1998); Final Judgment in *United States v. Hicks, Muse, Tate & Furst, Inc.,* Case No. CV 98-2422, (E.D.N.Y. Aug. 17, 1998); Final Judgment in *United States v. EZ Communications, Inc. and Evergreen Media Corp.,* Case No. 97CV00406 (D.D.C. Jun. 17, 1997); Final Judgment in *United States v. Westinghouse Electric Corporation,* Case No. 96 CV02563 (D.D.C. Mar. 10, 1997); Final Judgment in *United States v. Jacor Communications, Inc.,* Case No. C-1-96-757 (S.D. Ohio, Dec. 31, 1996).

[102] *United States v. Microsoft Corp.,* 253 F.3d 34, 54 (D.C. Cir. 2001) *(en banc).*

[103] Easy entry into an industry can offset the potential anticompetitive effects of other aspects of firm dominance, such as format dominance or signal strength dominance in a given geographic radio market. The assessment of the conditions of entry considers, in addition to the timeliness, likelihood, and sufficiency of entry, two important types of entry barriers, namely, (1) technical, economic, and regulatory barriers into any given geographic radio market, where "radio" constitutes a relevant antitrust market; and (2) mobility barriers that influence the cost to a radio station of switching from one programming format to another. Barriers into a local radio market may be substantial if no spectrum is available to permit an additional AM or FM station to enter the market. Similarly, mobility barriers between and among different radio formats may also be substantial, such as a talk-radio AM station that considers competing with a rock and roll FM station. In any given transaction, low entry barriers may offset the potential for increased market power due to increased concentration.

[104] We note that radio stations generally can and do change format in response to perceived profit opportunities. We believe that this ability to change format fairly rapidly and at relatively low cost may often defeat an attempt by a station group to dominate a format or target a demographic in a local market. We invite comment on this view.

We note that in order to attract more listeners, stations often change their programming format, sometimes radically (*e.g.*, from classical music to country and western). This suggests that radio stations with low market share may be able to increase their market share and provide a check on the leader's market power. We seek comment on this analysis. Is it easier to increase market share in the radio industry than it is in other industries? Or do market shares tend to remain static, with only small shifts in listening audiences? Further, does the amount of concentration in the market have an impact on the ability of stations to increase their market share? Is it easier for a station with a low audience share to increase its listenership in markets with low concentrations than it is in markets where one or two owners control a majority of the stations? What has been the experience of the radio industry since 1996?

48. After identifying and defining key market characteristics, we next consider the economic benefits and harms of permitting greater horizontal consolidation of local radio stations under common ownership. What are the benefits of these combinations, not only to the radio stations, but also to advertisers, and the public? Combining radio stations or radio groups may have the potential to produce efficiencies that result in cost-savings from co-locating facilities, consolidating support services, and eliminating redundant management positions. Advertisers may benefit from the combination from being able to access a variety of formats and demographic groups in a single transaction. In some cases, combining radio stations may strengthen several weak competitors, resulting in intensified rivalry with stronger competing stations that benefits both advertisers and listeners. In particular, cost savings produced by combining radio stations may result in lower prices for advertising if price competition post-transaction is intensified by the strengthening of former weak competitors. Some of the additional savings in advertising expenses could also be passed on to listeners in the form of enhanced content. We seek information on the nature and scope of efficiencies combinations might realize, and the nature and magnitude of benefits that flow through to advertisers and ultimately to consumers.[105] We seek evidence that horizontal radio combinations produce efficiencies that flow through to advertisers and consumers. Evidence of asserted efficiency gains should demonstrate that such gains arose because of the combination of local radio stations, as opposed to being caused by the unique circumstances of the common owner.[106] Studies showing that radio station combinations have lower advertising rates or greater programming benefits than separately owned stations would be particularly useful.

49. What economic harms might radio station consolidation bring? The potential harms of such combinations include creating and exercising market power. A particular combination may garner such a share of the local advertising market that advertisers believe they must advertise on the combination's media in order to reach consumers, such that the combination can

[105] For profit-maximizing firms, including monopolies, facing many customers, reductions in fixed costs that do not affect marginal cost ordinarily do not create an incentive to lower price. *See 1992 Horizontal Merger Guidelines* at § 4. If, however, the firm faces just one or few customers, then the seller may bargain with the customer or customers over price and other terms of sale. In this case, then reductions in the seller's fixed costs may be "shared" with the customers to an extent that reflects the relative bargaining power of the seller and buyer.

[106] For example, any efficiency gains created solely because the common owner also owns radio stations in distant markets, or because the common owner is vertically integrated with program producers, likely would not be relevant to the issue of whether consolidation of stations in a local market produces efficiency gains.

charge anticompetitive prices. A dominant firm could also bundle the advertising on its various stations in such a way so as to make it more difficult for rivals of one of those stations to compete. We seek additional information on the nature and scope of the economic harms that radio station combinations might bring. Studies and other evidence showing that advertising rates for radio station combinations are significantly higher after a consolidation than before a consolidation would be particularly useful. We also seek comment on associated harm to consumers. For example, if the existence of market power would prevent any efficiencies that otherwise would arise out of consolidation from flowing to the public, or would harm the incentive of radio stations to produce quality programming responsive to community tastes and needs, that may be a harm we should consider. Similarly, if a certain level of consolidation causes the market to "tip" such that independently owned radio stations could not obtain sufficient revenue to remain on the air or fulfill their public interest obligations, the public interest also may be harmed.

50. We are also concerned about the possibility that coordinated behavior would increase as the number of independently owned competitors in a local market declines.[107] Three factors could provide incentives for coordinated behavior in highly concentrated local radio markets: the ability to price discriminate, the ease of monitoring a collusive agreement, and the existence of barriers to entry. As such, a concentrated market may raise significant competitive concerns. We seek comment on the relationship between radio concentration and coordinated behavior, and the adverse effects such behavior would have on listeners and advertisers.

C. Specific Case Studies

51. To assist us in formulating our radio rules and policies, we seek not only theoretical arguments but specific empirical data on the effect that consolidation will have on the public interest. In the following paragraphs, we examine in detail particular local markets that have undergone substantial consolidation since 1996. We seek data on the public interest harms, if any, that have been caused by this consolidation. Has the public in these markets suffered from an unacceptable reduction in diversity? Have advertising rates increased? What has been the financial impact on independently owned radio stations? We also seek data on the specific benefits that consolidation has produced in those markets. Have the listeners received better quality radio programming, or greater diversity? Have efficiencies produced more radio voices than would otherwise have been possible? Has news and local affairs programming improved? We seek information that addresses these questions and any other public interest factors that we should consider in this proceeding.

52. Parties are encouraged to file information on any local market that they feel is relevant or helpful. In addition we would appreciate comments on three specific local markets that have experienced consolidation. The Arbitron metros that we seek information on are

[107] The basic economics of coordinated behavior among cooperative oligopolies are summarized in Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization*, 2d ed. (New York: HarperCollins, 1994), Chapter 6. In relatively concentrated markets, even as few as three independent competitors can nevertheless induce competitive-like market conduct, an empirical finding with direct relevance to maintaining competition in local radio advertising markets. *See* Timothy F. Bresnahan and Peter C. Reiss, "Entry and Competition in Concentrated Markets," *Journal of Political Economy* 99 (1991): 977-1009.

Syracuse, New York; Rockford, Illinois; and Florence, South Carolina. These markets illustrate significant differences in market structure and, presumptively, differences in the intensity of price competition in the local radio advertising market. Empirical evidence concerning the competitive behavior of the competing radio groups in each market would be helpful. Empirical indicators of market performance in these markets, such as changes in program quality or changes in the price of radio advertising, would also be useful. Evidence of possible harms to both listeners and advertisers that are the direct consequence of increasing consolidation would be most informative.

53. The Syracuse radio metro consists of three New York counties: Madison, Onondaga and Oswego. The population of the Syracuse metro is estimated to be 650,100.[108] This metro is the 75th largest metropolitan area by population and ranks 67th in terms of radio advertising revenue. The three Syracuse counties generated $7.2 billion in retail sales in 2000. Local advertising accounts for approximately 73 percent of station revenues. Appendix A contains a spreadsheet listing all of the stations belonging to the Syracuse metro and other stations that receive a share of the listening of Syracuse residents. Estimated revenue and the date that the station was acquired are presented along with other information.

54. The Rockford radio metro consists of two Illinois counties: Boone and Winnebago . The population of the Rockford metro is estimated to be 308,500. This metro is the 150th largest metropolitan area by population and ranks 139th in terms of radio advertising revenue. The three Rockford counties generated $3.9 billion in retail sales in 2000. Local advertising accounts for approximately 93 percent of station revenues. Appendix A contains a spreadsheet listing all of the stations belonging to the Rockford metro and other stations that receive a share of the listening of Rockford residents. Estimated revenue and the date that the station was acquired are presented along with other information.

55. The Florence radio metro consists of two South Carolina counties: Darlington and Florence . The population of the Florence metro is estimated to be 192,400. This metro is the 204th largest metropolitan area by population and ranks 181st in terms of radio advertising revenue. The three Florence counties generated $2.4 billion in retail sales in 2000. Local advertising accounts for approximately 80 percent of station revenues. Appendix A contains a spreadsheet listing all of the stations belonging to the Florence metro and other stations that receive a share of the listening of Florence residents. Estimated revenue and the date that the station was acquired are presented along with other information.

D. Options

56. In this section, we explore the potential ways we could use the results of the preceding diversity and competition analyses to formulate a concrete framework for addressing proposed combinations of radio stations in local markets. In prior cases, the Commission has both applied the local radio ownership rule, which set a ceiling on the number of stations that may be commonly controlled, and conducted a case-by-case analysis to determine whether the particular transaction was in the public interest. We could continue our current approach, rely

[108] The local market information presented here is based on the BIA database as of September 24, 2001.

exclusively on bright-line rules, analyze each case individually, or apply numerical limits for some aspects of the case, *e.g.*, diversity, and conduct a case-specific analysis for others, *e.g.*, competition. We seek comment on the various policy options.

1. Bright-line Rules or Case-by-Case Analysis

57. We first seek comment on the general advantages and disadvantages of relying on numerical limits or other bright-line rules to guide our public interest determination versus conducting a case-by-case public interest analysis. We see several advantages to the use of bright-line rules rather than case-by-case analysis. Because numerical limits can be easier to apply in any individual transaction, they help conserve scarce regulatory resources in deciding cases. Bright-line rules also provide greater certainty to industry participants, and help avoid long delays in regulatory decision-making. Thus, bright-line rules can result in substantially lower transaction costs than case-by-case analysis. Finally, bright-line rules apply to all industry participants uniformly.

58. We also see several advantages to conducting case-by-case analyses. A bright-line rule indiscriminately applied to all situations might allow undesirable concentrations of radio stations in certain instances and preclude desirable combinations in others. In the latter instance, a bright-line rule could prevent a more efficient firm from acquiring a less efficient firm, and could prevent combinations that would result in increased economies or efficiencies that would otherwise have passed through to advertisers or listeners in the form of lower rates or better programming. A case-specific analysis, on the other hand, would allow the Commission to take into account the nuances of the particular case, and to adapt more readily to changing market (and other regulatory) conditions.

59. We seek comment on the various trade-offs between bright-line rules and case-by-case analysis. The benefits of bright-line rules may be more likely to outweigh their costs when there are substantial similarities among cases or where relevant factual information would be difficult to obtain or evaluate. In these circumstances, it is more likely that simple application of an appropriately defined bright-line rule will achieve the "right" result. We seek comment whether the characteristics of the radio industry make it more susceptible to bright line strictures or case-by-case review or proposed radio combinations. What are the common characteristics of various radio combinations, and what differences do they have that would be difficult to encapsulate in a rule? Are there other characteristics that weigh in favor of relying on either predetermined rules or case-specific review in conducting a public interest review of a proposed combination? Are diversity concerns more amenable to being encapsulated in a bright-line rule than competition concerns?

60. We also seek comment on whether the advantages of both bright-line rules and case-by-case analysis be obtained by other regulatory tools, such as presumptions, processing guidelines, and screens. To what extent has the 50/70 screen been helpful, and what are its disadvantages? If appropriate, we could adopt a combination of rules, fact-specific analysis, and other formal and informal regulatory tools. We seek comment on the appropriate regulatory "mix" that would provide the greatest benefit to the agency, the industry, and the public.

2. Implementation of Radio Rules and Policies

61. We examine here a number of possible frameworks that we could adopt to implement our policies on local radio ownership. We discuss several below and seek comment on their advantages, disadvantages, and possible ramifications on our diversity and competition goals. We also invite suggestions for other possible frameworks that we should consider.

62. Rely exclusively on current numerical limits. To the extent we have the authority under the statutory framework to consider public interest factors other than compliance with the numerical limits of the local radio ownership rule, should we nonetheless rely on those limits to address our competition and diversity concerns? We seek comment on the advantages and disadvantages of relying exclusively on numerical limits. One advantage to this approach is its administrative simplicity. Our experience since 1996, however, suggests that one disadvantage to this approach is that compliance with numerical limits alone may not adequately address our competition goals, and perhaps not our diversity goal as well.[109] If we decide to rely exclusively on numerical limits, should we change the market definition we use to apply the rule to reflect more accurately the relevant geographic market? As discussed above, the Commission has expressed concern that the current methodology leads to irrational and unintended results. We have discussed this issue at length in the *Market Definition* proceeding,[110] and the comments that have been filed in that proceeding will be incorporated here. We seek any additional comments that would be useful in light of the broader policy issues raised in this proceeding.

63. Rely exclusively on modified rule. Another possibility we may consider is modifying the local radio ownership rule to revise the numerical limits or adopt a new framework entirely. We seek comment on whether our authority to tighten or loosen the numerical limits in the local radio ownership rule, or otherwise to alter the rule, is limited by the statutory framework.[111] To the extent we have the authority to make such changes, we seek comment on what changes we should make. Aside from revising the numerical limits, are there other standards we could adopt? For example, between 1992 and 1996, the rule provided for consideration of excessive market concentration, which was presumed to exist if a proposed radio combination would have had an audience share exceeding 25% in the Arbitron market. Do we have the authority to adopt an audience share limit,[112] and, if so, should we adopt a similar presumption or bright-line rule? Should such a limit replace or accompany a numerical limit? Would such a rule be beneficial in promoting diversity even if the relevant market is competitive, or would numerical limit best meet our concerns regarding diversity and a market share limit best meet our concerns regarding undue market power. Alternatively, if there is a sufficient amount of competition in the relevant

[109] For example, a combination of four radio stations with a total radio advertising revenue share of 20% will likely have a very different competitive effect from a combination of four radio stations with a combined radio advertising revenue share of 90%.

[110] *Market Definition NPRM*, 15 FCC Rcd 25077 (2000).

[111] *See supra* ¶ 23.

[112] *See supra* ¶ 26.

market, there may be sufficient incentive for stations to offer diverse programming, such that strict limits on common ownership may be unnecessary.

64. Commenters who propose a market share limit should discuss the following issues: Should we examine audience share, share of the advertising revenue, or some other measure?[113] If we adopt a presumption instead of a rule, what evidence would be sufficient to overcome the presumption? What percentage limit should we adopt, and why should we adopt it? For example, we could adopt limits that attempt to ensure the presence of at least three competitive firms. Commenters supporting this approach should explain how many firms should we seek to ensure remain in the market (counting all commonly controlled stations as one firm) and what maximum market share limit should we impose. Commenters should provide economic, other theoretical, and actual evidentiary support for such limits.

65.. Commenters proposing that we modify the local radio ownership rule to change the numerical limits or to include new standards or presumptions should also propose what action we should take with respect to existing combinations that would not comply with the revised rule? Should we require divestiture? Should we grandfather those station groupings? Should we permit assignment and transfer of potentially non-compliant station groups to third parties? What are the benefits and harms of adopting these various approaches?

66. Case-by-case competition analysis. Rather than attempting to establish a bright-line rule that would address competition issues, we could examine the public interest concerns of any proposed radio combination on a case-by-case basis. We could adopt an entirely case-by-case approach or conduct a case-by-case analysis within the context of specific rules or presumptions. For example, we could establish a screen that would permit all transactions falling below it to be granted without a competitive analysis. In addition, we could limit our case-by-case approach to competition issues, while using a bright-line rule to protect diversity. We seek comment on these alternatives.[114]

67. To the extent we are required to conduct a competition analysis of a proposed assignment or transfer control of a radio broadcast license, we nevertheless may have some latitude to consider the actions of the antitrust enforcement agencies, particular the DOJ,[115] in conducting any such competition analysis.[116] We note that our current practice is to await completion of any DOJ review of a radio transaction and consider the results of that review in our competition analysis. Should we continue that approach? How should we take into account the various possible outcomes of DOJ review, *e.g.*, early termination or issuance of a "second request" under the Hart-Scott-Rodino Act, entering into a consent decree with the merging

[113] *See supra* Section III.B.

[114] *See also supra* ¶ 57.

[115] Historically, the DOJ, not the Federal Trade Commission, has taken the lead in reviewing proposed radio station transactions.

[116] We do not, however, have the statutory authority to forbear from our public interest obligation with respect to broadcasting services.

parties, or full-fledged trial? In particular, given the DOJ's prosecutorial discretion, can we assume that non-action by the DOJ is the result of a determination that a proposed transaction does not raise competitive concerns? How should we treat cases where the transaction is below the newly revised Hart-Scott-Rodino threshold[117] and thus may not have been reviewed by the DOJ? What would be the legal and policy implications of adopting these or any alternative approaches?

E. Framework for Possible Case-by-Case Competitive Analysis

68. In this section, we consider what the framework for a case-by-case competitive analysis should be if we decide to adopt that approach. We lay out below certain possible frameworks and competitive factors we could take into account in evaluating a proposed radio station combination. We seek comment on these factors and on our framework generally.

1. General Framework

69. In evaluating the competitive impact of a proposed license transfer, we could adopt the framework that we have used for assessing market power in other contexts, which is also embodied in the antitrust laws.[118] We would first analyze each proposed radio combination by defining the relevant markets, both in terms of the relevant products and geographic scope,[119] and identifying the market participants.[120] Next, we would evaluate the effects of the transaction on

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[117] Under the new threshold, transactions valued at less than $50 million are not subject to review under Hart-Scott-Rodino. *See* Pub. L. No. 106-553, 114 Stat. 2762, 2762A-109.

[118] *1992 Merger Guidelines*, §§ 1.0 - 1.2. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756 (1997); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies For Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997); *Pacific Telesis Group*, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997); *Motion of AT&T Corp. To Be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17963 (1996); *Sprint Corporation*, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996); *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995); *BAMS-NYNEX Mobile*, 10 FCC Rcd 13368 (1995); *Market Entry and Regulation of Foreign Affiliated Entities*, Report and Order, 11 FCC Rcd 3873 (1995); *Craig O. McCaw & American Tel. & Tel. Co*, Memorandum Opinion & Order, 9 FCC Rcd 5836 (1994), *recon. denied*, 10 FCC Rcd 11786 (1995), *aff'd sub nom. SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); *Request of MCI Communications Corp. British Telecommunications PLC*, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994).

[119] *See 1992 Merger Guidelines*. *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962) (defining relevant product market in terms of reasonable interchangeability of a service or product and its substitute, while considering price, use, and quality); *United States v. FCC*, 652 F.2d 72, 97 (D.C. Cir. 1980); *Craig O. McCaw*, 9 FCC Rcd at 5845 ¶ 10, nn.27-28. With regard to the definition of the relevant geographic scope of relevant markets, see *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (defining relevant geographic market as an area in which a buyer may purchase a product or service from alternative sources, or in which the presence of other sellers restrains prices charged to buyers).

[120] *See 1992 Merger Guidelines* § 1.3.

competition in the relevant market, such as whether the transaction is likely to result in either unilateral or coordinated effects that enhance or maintain market power.[121] We would also consider whether the proposed transaction would result in transaction-specific efficiencies such as cost reductions, productivity enhancements, or improved incentives for innovation.[122] No single competitive factor taken alone would provide a definitive indicator of the level of competition or potential competitive problem.[123] We seek comment on this approach.

70. One alternative of the approach described above is to develop certain assumptions that would apply to all proposed radio station combinations. Earlier in this *Notice*, we sought comment about the relevant product and geographic markets to which radio belongs, barriers to entry, and the benefits and costs of consolidation.[124] Some factors such as the relevant product and geographic market and barriers to entry are likely to be relatively uniform across most proposed radio combinations such that we could presume that they are constant in all cases. Factors such as efficiencies and the ability to exercise market power may not be as generally applicable. We seek comment concerning the assumptions that we could consistently apply in evaluating applications proposing radio station combinations and the advantages or disadvantages of those assumptions. If we adopt certain assumptions, we propose that the party seeking to demonstrate that an assumption is not true in a particular case bears the burden of proof as to that fact. We seek comment on this proposal.

71. Another possible alternative to the basic analytical framework is to examine not only whether a proposed transaction could lead to the exercise of market power, but to take the additional step of considering whether that market power would harm consumers, as opposed to advertisers, of radio broadcasting services. Are there certain situations in which the exercise of market power would not harm consumers? Are there situations in which consumers would affirmatively benefit if we permitted a certain degree of market power in the relevant market? For example, would permitting some degree of market power in smaller geographic markets generate more diverse or better quality programming for the people living in those markets? If so, how do we draw the line between acceptable levels of market power and unacceptable levels of control over local media, and what are the relevant considerations we should examine to help us determine on which side of the line a particular transaction falls? We seek comment on these issues.

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[121] *See, e.g. Philadelphia Nat'l Bank*, 374 U.S. at 363 ("[A] significant increase in the concentration . . . must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."). *See also 1992 Horizontal Guidelines* at 41558 §§ 2.1, 2.2; *New York v. Kraft General Foods*, 926 F. Supp. 321, 359 (S.D.N.Y. 1995); *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824 (1996).

[122] *See 1992 Merger Guidelines* § 4 *et seq.*; *see, e.g., FTC v. University Health, Inc.*, 938 F.2d 1206, 1213 (11th Cir. 1991) (stating that defendants must show that acquisition would result in significant efficiencies that would benefit competition and the consumer).

[123] *See Great Empire Broadcasting*, 14 FCC Rcd at 11151 (¶¶ 15-16).

[124] *See supra* ¶¶ 42-50.

2. Specific Factors

72. We seek comment on the specific factors we should consider within our general framework. As discussed above, any competitive analysis of a proposed transaction must take into account the relevant product and geographic markets, the market participants and their relative market share, barriers to entry, potential efficiencies, and possible harms. To the extent not already discussed, we seek comment on how we should evaluate these factors in the context of a particular case. In addition, are there other factors we should consider?

73. First, we seek comment on how we should review applications proposing to assign or transfer control of existing station groups to a new owner. We tentatively conclude that we generally would not subject the transaction to competitive analysis if such transfers do not change the relative market share or competitive conditions. That will generally be the case if the new owner owns no other radio stations or other media in the relevant geographic market that may be in the relevant product market with radio. We invite comment on this tentative conclusion.

74. Second, we invite comment on how to treat under our proposed guidelines claims that a station is failing. Highly concentrated radio markets often contain stations with small revenue share that are independent of the one or two largest radio groups. Some applicants have argued that consolidation eliminates the possibility that a small player can remain competitive. In such cases, applicants often propose to sell their stations to the first or second largest group in the market. If the Commission grants this transfer, the transaction may augment the market power of the large station group in the local market for radio advertising. Such transactions often pose a trade-off between keeping a small station on the air together with the benefits it provides to advertisers and listeners versus a reduction in competition that may tip the current radio market structure toward a duopoly and its implied increase in market power.

75. In our decision revising the television ownership rules, we adopted several criteria to evaluate whether a failing station showing would justify waiver of the television duopoly rule in a particular case. We stated that we would presume a waiver would serve the public interest if each of the following criteria were satisfied:

- One of the merging stations has had low all-day audience share.
- 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. We required the applicant to submit data, such as detailed income statements and balance sheets, to demonstrate this and stated that the Commission staff will assess the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.
- The transaction will produce public interest benefits. A waiver will be granted where the applicant demonstrates that the tangible and verifiable benefits of the transaction outweigh any harm to competition and diversity. At the end of the stations' license terms, the owner of the combined stations must certify to the Commission that the public interest benefits of the transaction 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.

- 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 is 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.[125]

We further provided that a combination formed as a result of a failing station waiver could be transferred only if the combination met the revised duopoly rule or the waiver standards (including the failing standard just described) at the time of the transfer. We also concluded, "if necessary we will tailor these criteria further as we gain experience in administering the 'failing' station standard."[126]

76. We invite comment as to whether to use a similar approach in our competitive analysis. We believe this approach to failing station showings, including the criteria, may provide a useful starting point for our evaluation of failing station showings in the radio merger context. We invite comment on this proposal.

77. Third, we seek comment on how we should analyze applications proposing the granting of a new license or the acquisition of an unbuilt facility or a "dark" station. Competitive analysis focusing on concentration in the advertising market or audience shares would be insufficient to analyze these transactions because new licenses, unbuilt stations, and dark stations generally will not have an associated radio advertising business or audience share. In the absence of this data, what should we consider in determining the effect of a proposed transaction on competition? And how should we weigh the relevant public interest benefits and harms? Grant of these types of applications could have public interest benefits if they result in an increase the quality or quantity of radio programming available to listeners. If a large or dominant radio station group in a local market acquires a new license, unbuilt station, or dark station, however, it could cause a competitive market to tip toward consolidation or could eliminate a potential source of competition in markets that are not fully competitive. We invite comment on how we should analyze these competing considerations.

78. Fourth, we seek comment concerning how we should coordinate our competitive analysis with any DOJ review that may occur with respect to the same transaction. Where a transaction remains under review or investigation by DOJ, the Commission generally defers ultimate action on the applications. Where DOJ devises a remedy in a radio merger case, we propose to generally incorporate that remedy in our decision and would likely rely upon it in

[125] *Review of the Commission's Regulations Governing Television Broadcasting,* Report and Order, 14 FCC Rcd 12903, 12939 (¶ 81) (1999).

[126] *Id.* at 12940 (¶ 81).

most cases as a sufficient resolution of competition issues raised by the transaction.[127] We seek comment on this approach.

3. Treatment of Brokerage and Sales Agreements

79. Local Marketing Agreements and Time Brokerage Agreements. A local marketing agreement (LMA) and time brokerage agreement (TBA) 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."[128] In calculating the number of radio stations under common control for purposes of applying the local radio ownership rule, we attribute a same-market, brokered station to the broker if more than 15% of the stations' weekly broadcast time is brokered.[129] We do not, however, require station owners to obtain prior Commission approval before entering into LMAs or TBAs as long as the licensee continues to exercise ultimate control over the licensed station.[130] As a result, if a broker files an application to acquire its brokered radio stations, the Commission would examine the potential competitive impact of the proposed transaction as if two station groups were wholly independent economic actors.

80. As we consider whether and how to conduct case-by-case competitive analyses of radio transactions, we seek comment on the appropriate regulatory treatment of LMAs and TBAs. We have recognized that LMAs and TBAs permit the broker to exercise "a degree of influence" over the brokered station, and they can have a similar effect on competition as common station ownership in cases where the brokering station controls a significant portion of the sale and pricing of brokered station's advertising inventory.[131] To the extent we rely on bright-line rules to vindicate our competition concerns, we can take the competitive impact of LMAs and TBAs into account by continuing our policy of attributing brokered stations to their brokers. We seek comment on this proposal.

81. To the extent we decide to conduct a case-by-case analysis of proposed radio transactions, how should we evaluate LMAs or TBAs? Should we continue the practice of treating the merging parties as independent economic actors regardless of the economic realities of the relevant market? If we ignore economic realities, what purpose would our competitive analysis serve? On the other hand, if we treat the merging parties as a single economic unit because of a pre-existing LMA or TBA, what potential competitive harm would our analysis ever uncover? We could address this problem by requiring prior Commission approval of LMAs and TBAs, in some if not all circumstances. If so, what would those circumstances be? Rather than

[127] *See, e.g., Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841 (1996).

[128] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12591 (¶ 66) (1999) (*1999 Attribution Order*).

[129] 47 C.F.R. § 73.3555 Note 2(k).

[130] *See 1992 Reconsideration Order*, 7 FCC Rcd at 6402 (¶ 66).

[131] *1999 Attribution Order*, Report and Order, 14 FCC Rcd at 12594, 12598 (¶¶ 72, 87).

require prior approval of LMAs and TBAs, we could rely on our enforcement authority to require termination of LMAs or TBAs that are contrary to the public interest because of their effect on competition. We also could provide expressly for voluntary filings by parties that seek certainty as to whether their LMA or TBA is consistent with our policies. What are the costs and benefits of these various procedures? If we adopt new policies towards LMAs or TBAs, how should we apply those policies towards pre-existing agreements? We seek comment on these proposals and on any other proposals that we should consider with regard to the regulatory treatment of LMAs and TBAs?

82. Joint Sales Agreement. Unlike LMAs and TBAs, joint sales agreements (JSAs) involve primarily the sale of advertising time and not decisions concerning programming.[132] In the *Broadcast Attribution Order*, the Commission declined to attribute JSAs to sales agents provided the terms of the JSAs did not materially extend to programming or certain other station operations.[133] Although acknowledging that JSAs could raise competitive concerns, the Commission determined that JSAs limited to advertising sales did not "convey a degree of influence or control over station programming" or non-sales operations and that JSAs could promote diversity by "enabling smaller stations to stay on the air."[134] The Commission declined to require that JSAs be filed, but did require that they be placed in the station's public inspection file.[135] The Commission also noted that it retained the discretion to conduct a public interest review of JSAs on a case-by-case basis where competition or other concerns were raised.[136]

83. As with LMAs and TBAs, we seek comment on the appropriate regulatory treatment of JSAs. Even if we adopt a bright line rule, JSAs would not be attributable to the sales agent. Should we reconsider this blanket exemption to attribution in light of the new local radio ownership policy we intend to adopt? If so, what should our new rule be? To the extent we decide to conduct a case-by-case analysis of proposed radio transactions, how should we evaluate JSAs? Should we distinguish between JSAs and LMAs or TBAs in a case-by-case review of proposed transactions or in other contexts? What are the reasons for and against affording similar treatment to all three types of agreements?

IV. INTERIM POLICY

84. We set forth in this section the interim policy that the Commission will apply to guide its actions on radio assignment and transfer of control applications pending a decision in this proceeding. We recognize that certain guidelines need to be established both to handle currently

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[132] *Id.* at 12612-13 (¶¶ 122-23).

[133] *Id.* at 12612-13 (¶ 123).

[134] *Id.* at 12612 (¶ 122). Although the DOJ had argued in favor of attribution because of the potential competitive impact of JSAs, the Commission found that its concerns, unlike those of the DOJ, included not only competition but also diversity and reducing administrative burdens on licensees. *Id.*

[135] *Id.* at 12612-13 (¶ 123).

[136] *Id.*

pending radio assignment and transfer applications and to address any future applications filed while this proceeding is pending. At the same time, we are mindful of the concern that our policy not expressly or implicitly prejudge, or be viewed as prejudging, our ultimate decision in this proceeding. In that regard, we believe that any fundamental changes we make to our policy and procedures governing radio station combinations should be the result of the record in this rulemaking proceeding, and should not be implemented as an interim measure. We believe that the interim policy we are adopting today strikes a fair balance that addresses our statutory responsibilities while providing guidance to applicants and the public on the process the Commission will use to resolve pending applications during this interim period.

85. Consistent with our precedent and the principles mentioned above, we will continue to examine the potential competitive effects of proposed radio station combinations, and, and to that end, we will continue to rely on the 50/70 screen to bring to our attention proposed radio transactions that may raise competitive concerns. Under this screen, an application that proposes a radio station combination that would provide one station group with 50%, or the two station groups with 70%, of the radio advertising revenue share of the relevant Arbitron metro market, as reported by BIA, will be flagged when the Commission issues public notice that the application has been accepted for filing.[137] While we are aware that the utility and appropriateness of 50/70 screen has been the subject of disagreement, we are concerned that adopting another screen or set of processing guidelines on an interim basis would create significant confusion and uncertainty to applicants and could be seen as prejudging the rulemaking proceeding.

86. As the Commission has done in the past, we will presume that an application that falls below the screen will not raise competition concerns, and the staff will not conduct a further competitive analysis of those proposed transactions absent the filing of a petition to deny raising competitive issues. For applications that are flagged, the staff will review the facts and arguments contained in any pleadings that are filed, and will conduct a public interest analysis, including but not limited to an independent preliminary competitive analysis of the proposed transaction based on publicly available information and information in the Commission's records. In addition, the staff is authorized to request additional information from the parties to the extent required for the staff to issue or recommend a decision on the application. We establish the following generic categories of information that may be requested or received by the staff in conducting its competitive analysis:

- *Product market definition.* During the interim period, the Commission will presume that the relevant product market is radio advertising. The staff nevertheless should consider evidence from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising.

[137] We will continue the policy of not flagging proposed radio transactions that do not involve stations located in Arbitron metro markets.

- *Geographic market definition.* During the interim period, the Commission will presume that the relevant geographic market is the Arbitron metro market.[138] The staff nevertheless may ask for or receive evidence from the parties that the relevant geographic market in a specific case is larger, smaller, or otherwise different from the Arbitron metro market.

- *Market participants.* The staff may ask for or receive evidence concerning the firms that participate in the relevant product and geographic markets. The list of market participants should include firms that could enter the relevant product and geographic markets within one year without expending significant sunk costs of entry and exit in response to a small but significant and non-transitory increase in price. If the presumptive product and geographic market definitions are used, the list of market participants should include operating commercial radio stations and any "dark" station that might be expected to become operational in response to such an increase in price.

- *Market shares and market concentration.* The staff may ask for or receive evidence concerning the market shares of the market participants. If the presumptive product and geographic market definitions are used, the radio advertising revenues reported in the BIA Master Access Database will be presumed to be an accurate reflection of actual market shares, absent persuasive evidence that another measure of market share should be used. The staff may use market share data to calculate any HHIs that may be relevant for the staff's analysis.

- *Barriers to entry.* The staff may ask for or receive evidence concerning the barriers to entry into the relevant product and geographic markets, including the timeliness, likelihood, and sufficiency of entry to counter any potential market power.

- *Potential adverse competitive effects.* The staff may ask for or receive evidence concerning the potential adverse competitive effects of a proposed transaction. Relevant evidence may include direct proof of adverse competitive effects or facts that demonstrate that structural conditions (*e.g.*, a high market share and significant barriers to entry) will facilitate the exercise of market power. In asking for or receiving evidence of potential adverse competitive effects, the staff should consider the effect on competition, if any, that may have resulted from a pre-existing LMA, TBA, or JSA between the applicants.

- *Efficiencies and other public interest benefits.* The staff may ask for or receive evidence concerning any economic efficiencies that the proposed transaction would produce. In addition, the staff may ask for or receive evidence concerning other public interest benefits the proposed transaction would provide listeners or advertisers, such as improvements in the quality, scope, and quantity of community responsive programming, improved community service, and the furtherance of localism. Parties asserting that a proposed transaction will produce efficiencies or other public interest benefits should show both how the transaction will produce those benefits and how those benefits will flow through to listeners or advertisers.

[138] To the extent that the relevant geographic market for a proposed transaction involving radio stations not located in an Arbitron market is raised, it will be determined on a case-by-case basis without a presumption.

87. After completing its preliminary competitive analysis of the proposed transaction, the staff may grant any application that is consistent with the public interest and that may be granted on delegated authority. For applications that the staff cannot grant, we establish the following timetable to ensure that they are resolved expeditiously. For each application that, as of the date of adoption of this *Notice*, has been pending for over one year, within 90 days of the date of adoption of this *Notice*, the staff will distribute to the Commission a draft order recommending that the application either be granted or designated for hearing. For all other currently pending applications, within six months of the date of adoption of this *Notice*, the staff will distribute to the Commission a draft order recommending that the application either be granted or designated for hearing. For all applications filed after the date of adoption of this *Notice*, within six months of the date after such application is filed, the staff will distribute to the Commission a draft order recommending that such application either be granted or be designated for hearing. In all of these cases, the draft order shall include the relevant facts of the proposed transaction, and the staff's competitive analysis and recommendation, including any issues to be resolved at hearing (if the staff recommends a hearing). After receiving the draft order, the Commission shall then decide whether the relevant factors support grant (with or without conditions) of an application or whether the application should be designated for hearing.

88. For applications that the Commission decides to designate for hearing, the hearing designation order shall afford the applicants with the opportunity to elect instead to have their applications held pending completion of this rulemaking proceeding and having the outcome of this proceeding apply to their application. We provide this election because we believe it is appropriate to provide applicants with the ability to have their applications evaluated under our permanent radio rules and policies rather than our interim policy. We caution, however, that our provision of this election will not in any way prejudice or limit the range of actions we could take in processing pending applications, including designation for hearing, upon completion of this rulemaking.

89. The interim policy we outline above will apply to currently pending applications to assign or transfer control of radio broadcast stations. This interim policy also will apply to radio assignment or transfer applications filed on or after the date we adopt this *Notice* until we adopt a decision in this proceeding.

V. ADMINISTRATIVE MATTERS

90. Comments and Reply Comments. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 60 days after publication of the item in the Federal Register, and reply comments on or before 90 days after publication of the item in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

91. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or

rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

92. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room, 2-C207, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case, MM Docket Nos. 01-317, 00-244, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554.

93. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, (202) 418-2555 TTY, or bcline@fcc.gov. Comments and reply comments also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat.

94. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Martha Contee at (202) 4810-0260, TTY (202) 418-2555, or mcontee@fcc.gov.

95. Ex Parte Rules. This is a permit-but-disclose notice and comment proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

96. Initial Regulatory Flexibility Analysis. With respect to this *Notice*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this *Notice*. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the radio

broadcasting industry. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Notice*, but they must have a distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq*. (1981), as amended.

97. Authority. This *Notice* is issued pursuant to authority contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 307.

VI. ORDERING CLAUSES

98. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 this *Notice of Proposed Rulemaking* and *Further Notice of Proposed Rule Making* ARE ADOPTED.

99. IT IS FURTHER ORDERED that the Interim Policy set forth herein IS ADOPTED.

100. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A