> When the unbuilt station signs on, the number of independent local voices would increase by one, but might still be insufficient to make room for another duopoly or TV/radio crossownership. Anticipating that scenario, the Commission should also afford the EDP Provider a vested right to the processing of its applications to fill out its complement of duopolized or crossowned stations. This right would vest on the date the contract with the SDB is filed with the Commission. This vested right would provide the large broadcaster with the secure knowledge that its public spiritedness in making a potentially risky investment in an SDB's unbuilt permit will be rewarded with a guaranteed opportunity to acquire a full complement of local properties.107/

This EDP Interest's nonattribution, coupled with this vested right to grow in the market, would powerfully incentivize companies to provide equity and debt to SDBs in a manner that promotes diversity. Nonetheless, in 2001, the Commission deferred this proposal because it had not yet reviewed the Section 257 studies.108/

Two years have since elapsed; thus, there is no longer any reason not to grant this proposal. In light of the Commission's application processing backlog, this proposal could not be more timely now.

6. Grandfathering Of Nonattribution of EDP Interests in SDBs

In the 1999 ownership attribution proceeding, MMTC proposed the grandfathering of the nonattributable nature of EDP Interests in SDBs, irrespective of whether the entity providing the EDP Interest (the "EDP Provider") subsequently acquires other properties which otherwise would cause the EDP Interest to be attributable to the EDP Provider. MMTC contended that while the EDP concept was "a well-intentioned effort to discourage fraud while also encouraging broadcasters to invest in or lend to small concerns" the new EDP rules "have an unintended consequence: they may discourage broadcasters from providing an EDP interest to any SDB anywhere in the country, irrespective of whether the potential EDP Provider is presently a same-market media entity or a major program supplier to the SDB."109/ MMTC explained that potential EDP providers, which are among the nation's largest broadcasters,

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107/ MMTC Television Ownership Reconsideration Petition, pp. 17-18; also in Initial Comments, pp. 109-110.

108/ Television Broadcasting - Reconsideration, 16 FCC Rcd at 1078 ¶33.

109/ Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, MM Docket No. 94-150 (Ownership Attribution) (filed October 18, 1999) ("Attribution Petition for Reconsideration"), p. 2. See also Initial Comments, pp. 110-112.

usually find it disadvantageous to hold small, potentially attributable interests in markets not critical to their growth strategies. These nonstrategic interests could become attribution time bombs that would explode upon a sizable merger or acquisition. In positioning itself for future acquisitions, a broadcaster will not want to laden its portfolio with these time bombs that would make its bid for an acquisition target noncompetitive with the bids of other companies.

An EDP Interest in an SDB would be an exceptionally volatile attribution time bomb. This EDP Interest could become attributable if the acquisition target owns another station in the SDB's market (a "Potentially Overlapping Station"). Thus, if an EDP Provider wishes to bid for this acquisition target, the EDP Provider would be compelled to structure its bid either to exclude or spin off the Potentially Overlapping Station, or to reduce or extinguish its EDP Interest in the SDB. These requirements would increase the cost, risk and time for such an acquisition, making the EDP Provider's bid for the acquisition target relatively less attractive to both the EDP Provider and the target. The opportunity costs of a foregone merger, or the merger's higher transactional costs if undertaken, would likely far exceed the profit potential of any EDP Interest in any SDB. Realizing this, most large broadcasters would probably not go to the trouble of providing EDP Interests to SDBs.

The nonstrategic nature of EDP Interests in SDBs helps explain why these interests are relatively rare even now. Converting them into attribution time bombs could wipe them out entirely, rendering a potentially valuable source of debt and equity unavailable to SDBs. This is the opposite of the small business investment climate the Commission wants to foster.110/

MMTC urged the Commission to cure this problem, and thus avoid any inadvertent disincentivizing of EDP interests in SDBs, by grandfathering otherwise nonattributable EDP interests in SDBs in situations where four conditions are met:

1. the EDP Provider merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP Interest in an SDB (an "Unrelated Transaction");

2. the Unrelated Transaction occurs at least a year after the EDP relationship was formed;

3. the Unrelated Transaction would otherwise cause the EDP Provider's EDP Interest in the SDB to become attributable; and

4. the EDP Provider and the SDB make an affirmative showing that the EDP Provider does not exercise undue influence over the SDB.111/

This plan would do much to expand SDBs' access to capital. Nonetheless, in 2001, the Commission deferred this proposal because it had not yet reviewed the Section 257 studies.112/

110/ Attribution Petition for Reconsideration, pp. 1-2; Initial Comments, p. 111.

111/ Attribution Petition for Reconsideration, p. 3; Initial Comments, p. 112.

112/ Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MO&O and Order on Reconsideration), 16 FCC Rcd 1109-1110 ¶24 (2001).

Two years have passed, and there is no reason not to grant this proposal.113/

D. The Commission Should Rule On Six Proposals That Would Promote Diversity and Competition Generally

Six regulatory proposals whose scope reaches far beyond the question of minority or SDB ownership were not mentioned in the Report and Order.

1. Mathematical Touchstones For Diversity

The Report and Order included a "diversity index" ("DI"),114/ which the Commission describes as "a method, based on citizen/viewer/listener behavior, of characterizing the structure of the 'market' for viewpoint diversity. We use the DI as a tool to inform our judgments about the need for ownership limits."115/ The idea of a diversity index was mentioned in an address given by Chairman Powell after the due date for comments in this proceeding.116/ However, the NPRM itself did not mention that a diversity index was contemplated.117/

We offered two formulas suitable for crafting and implementing rules to promote diversity. Our "Tipping Point Formula" established how the Commission could ensure that local radio markets could preserve independent owners. This formula was based on the premise that independent owners each need determinable and quantifiable revenue streams in order to stay afloat and provide service to the public. The formula acknowledges the existence of a "tipping point" in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of a market's cluster owners exceed this tipping point, the independents can no longer survive. By identifying this tipping point, the formula provides a rational basis for determining whether a transaction would limit diversity.118/

113/ The Commission held that the attribution rules themselves were outside the scope of this proceeding. Report and Order, ¶629. Nonetheless, this proposal addresses a matter that the Commission does regard as falling within the scope of this proceeding: the treatment of certain types of interests under the attribution rules. See, e.g., id. at ¶¶316-325 (discussing attribution of JSAs).

114/ Report and Order, ¶¶391-431.

115/ Id., ¶391.

116/ See Remarks of Chairman Michael K. Powell, Columbia Law School, January 16, 2003 (discussing desirability of creating an "HHI for Diversity").

117/ 2002 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, MB Docket No. 02-277 (Notice of Proposed Rulemaking), 17 FCC Rcd 18503 (2002) ("NPRM").

118/ MMTC Comments in MB Docket 01-317 (May 8, 2002) ("Radio Ownership Reply Comments"), pp. 22-27.

Our "Source Diversity Formula" expresses consumers' utility derived from marginal increases in source diversity.119/ The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale.120/ We pointed out, however, that neither our formula, nor any other social science formula that attempts to measure diversity, could be applied in practice before it is field-tested -- a task which would take several months.121/

Although the Commission acknowledged that there is pressure on small broadcasters to sell out to large ones,122/ it did not consider whether our Tipping Point Formula might solve this problem. Nor did the Commission consider our Source Diversity Formula as a basis for measuring diversity.123/

The Commission has a continuing obligation to know the long term impact of its rules. Thus, on reconsideration, it should consider each metric that could be useful in ascertaining whether the rules are helping or harming the public.

119/ See Diversity and Competition Supporters Reply Comments (February 3, 2003) ("Reply Comments"), pp. 17-24, and April 28, 2003 Letter, pp. 6-7 and n. 15.

120/ For example, there is a very significant marginal increase in a consumer's utility attributable to the fourth independent source, but a negligible increase in utility from the 400th source. See Reply Comments, p. 20.

121/ April 28, 2003 Letter, p. 6. Indeed, the Diversity Index itself has not been field-tested, and thus its use to validate the structural rules is premature.

122/ The Commission found that:

> Several commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to "sell out" to group owners. Specifically, the concern is that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner. As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups.

Report and Order, ¶229 (citing, inter alia, Radio Ownership Comments, pp. 23-24, 45). However, the Commission failed to evaluate our specific proposal to cure this problem.

123/ Not only did the Commission fail to consider our Source Diversity Formula as a measurement of source diversity, it held that there is an "explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we cannot conclude that source diversity should be a policy goal of our broadcast ownership rules." Report and Order, ¶45. This finding was certainly called into doubt by the two million individual commenters who valued source diversity enough to personally write to the FCC about it. That extraordinary fact alone proves that the Commission was wrong in suggesting that there is no evidence that consumers value source diversity. Indeed, if source diversity were not a goal of regulatory policy, there would be no reason, in a community too small to capture the attention of our overworked antitrust regulators, why ownership of all media by a single person should not be permissible. Presumably that person would ask the public to trust him to include diverse viewpoints on the air -- at least until license renewal time is over. That is frightening.

2. Zero Tolerance For Ownership Rule Abuse

Over much of its life, the Commission has been faced with endemic abuse of the structural ownership rules.124/ It is not hard to discern why: Commission enforcement resources are limited. Abuse is easy to conceal. Rulebreaking can be extremely lucrative.

When structural rules are relaxed, it becomes even more critical for the Commission to hold the line on abuse. Thus, we asked the agency to adopt a "zero tolerance policy." We asserted that the integrity and survivability of the structural ownership rules depend on strict enforcement.125/

Recently, the Commission addressed another area of law in which the temptation to cheat is great and the risk of getting caught is low: equal employment opportunity. In the 2000 EEO Report and Order, the Commission adopted elements of the proposed zero tolerance policy advocated by civil rights organizations participating in that proceeding.126/ In the MD/DC/DE Broadcasters case, the Court said nothing that casts doubt on zero tolerance EEO enforcement.127/

The Report and Order is silent about the consequences of abuse of its new regulations. Members of the public are afforded no comfort that the Commission will strictly hold the line on these rules in practice, and regulatees are provided no guidance about the extent to which the Commission will tolerate departures from strict compliance.

No structural rulemaking is complete without a discussion of enforcement and remedies. Given the long history of structural abuse in the absence of strict regulation, the Commission should adopt our zero tolerance proposal.

124/ See Initial Comments, p. 125 and ns. 208 and 209 (citing authorities).

125/ Id., pp. 123-127. See also Edwin Edwards, Sr., 16 FCC Rcd 22236, 22262 (Statement of Commissioner Michael J. Copps, Dissenting in Part and Approving in Part) (subsequent history omitted) (contending that certain challenged transactions between one company and another with which it operates stations under LMAs have "stretched the limits of the Commission's local television ownership rules" such that "[e]ach transaction moves the line to which all of our licenses are subject. And this decision moves it further still.")

126/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Report and Order), 15 FCC Rcd 2329, 2384-86 ¶¶135-40 (2000), recon. denied, 15 FCC Rcd 22548 (2000), reversed on other grounds sub nom. MD/DC/DE Broadcasters Ass'n. v. FCC, 236 F.3d 13, rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert denied, 122 S.Ct. 920 (2002) ("MD/DC/DE Broadcasters").

127/ Cf. MD/DC-DE Broadcasters, 236 F.3d at 18 (rejecting contentions that the new EEO rule "arbitrarily and capriciously increases the 'regulatory burden' on stations[.]")

3. Use Of JOAs As An Alternative To LMAs and JSAs

The Commission found that LMAs and JSAs adversely impact diversity; thus, it required ownership attribution of most JSAs and LMAs.128/ While this step promotes diversity, it also reduces the options available to financially troubled facilities seeking to survive. If an LMA or a JSA is no longer a viable option, the only choice available to the owner of a financially troubled station would be to sell the station to a company that can accept attribution.129/

The Communications Workers of America (CWA) offered a solution to this dilemma: joint operating agreements ("JOAs"). In the newspaper industry, JOAs have often proven instrumental in rescuing independent competing voices in a community.130/ We strongly endorsed CWA's idea,131/ which was the only alternative to JSAs and LMAs offered by any party.132/

Allowing and encouraging JOAs was a very significant proposal. A genuine JOA leaves each station's program creation, program organization and distribution, and sales strategy and implementation firmly in the hands of the station's licensee. At the same time, a genuine JOA allows both stations to take advantage of operational synergies for non-program, non-sales related functions, such as accounting, engineering, and physical plant management.

On reconsideration, we urge the Commission to hold that a genuine JOA is not attributable. As a protection against abuse (i.e., a JOA that is really a JSA or an LMA in disguise, to evade attribution), the Commission should require the parties to JOAs to make JOA agreements accessible on CDBS.

128/ Report and Order, ¶¶316-325.

129/ Indeed, the Commission's abandonment of the sales solicitation feature of its failed/failing/unbuilt stations policy actually encourages duopolization and discourages independent operation. See pp. 32-36 infra.

130/ See CWA Comments, January 2, 2003, pp. 4-5 and 48.

131/ Reply Comments, pp. 15-16.

132/ JOAs are being used in two television markets: Nashville, TN and Tallahassee, FL. See discussion in Reply Comments, p. 15 n. 30.

4. Opening FM Spectrum For New Entrants

The Commission has systematically broadened spectrum availability as a means of balancing consolidation with new entry.133/ Thus, in our Comments, we proposed three methods by which the FCC could open the FM radio spectrum to new entrants: (1) create two new classes of FM stations suitable for serving small communities; (2) perform a comprehensive engineering search of the FM spectrum to identify the most-needed new drop-in opportunities; and (3) replace FM station classes with pure interference-based criteria.134/

These are hardly radical proposals. Indeed, a recent study has demonstrated that third adjacent channel interference is no longer a significant source of harmful interference to FM radio stations.135/ This long-anticipated study opens the door to the potential creation of more low power and full power FM stations.

When the Commission allows more consolidated ownership of a resource, few countervailing steps are more logical than expanding the resource and opening it to new entrants. We hope that the absence of discussion of this subject in the Report and Order was just an honest mistake that the Commission will find it easy to correct on reconsideration.

5. Staged Implementation Of Deregulation, Together With A Negotiated Rulemaking

By implementing deregulation in stages, the Commission could measure the impact of deregulation while it is underway, and implement mid-course corrections when needed to protect diversity, competition, localism and minority ownership. Under our staged implementation

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133/ See, e.g., Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Allotments, Docket 80-90 (R&O), 94 FCC2d 152, 158 (1983) (noting that a "basic objective" of the Commission has been to provide "outlets for local expression addressing each community's needs and interests"); Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 (November 3, 1980) at ¶¶9, 12 ("any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable" (fn. omitted). A fine exposition of this approach is found in the separate statement of Chairman Fowler and Commissioner Dawson in the Low Power Television (R&O), 51 RR2d 476, 525 (1982):

> Low power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous.

134/ See Initial Comments, pp. 128-141.

135/ Mitre Technical Report, "Experimental Measurements of the 3rd Adjacent Channel Impacts of Low-Power FM Stations" (May, 2003), pp. 156-57 (finding that advances in receiver technology have essentially eliminated the need for regulations governing third adjacent channel interference).

proposal, the Commission would implement its new rules over a ten year period in five two-year stages. In even numbered years, the Commission would use quantitative tests to measure diversity, competition, localism and minority ownership. If these tests showed ill health on any of these four factors, the Commission would take corrective steps in the odd-numbered years. If a subsequent even-year measurement showed continued ill health, the Commission could apply the brakes until market conditions change.136/

Paxson Communications, for decades a leading advocate and incubator of minority ownership, offered a staged implementation proposal that is conceptually similar to ours.137/

Our concept was designed to enable the Commission to use staged implementation schedule as a vehicle for promoting SDB ownership. For example, if a company wants to undertake today a transaction not approvable until Stage 3 of deregulation (six years hence), the company would make three divestiture or incubator pledges and earn approval of its transaction six years before it would become routinely approvable.138/

Staged implementation takes on heightened importance in light of the dramatic changes in industry ownership structure that will occur in the wake of the Report and Order. In his expert testimony, Kofi Ofori states:

> Staged implementation of the rules has been recommended by the Diversity and Competition Supporters and also Paxson Communications. This recommendation is justified by the fact that most minority owned companies are small, and few of them have a fulltime business planner on staff or on retainer. Indeed, only a few minority owned companies are large enough to employ a corporate comptroller fulltime. Consequently, when new ownership rules are announced by a regulatory agency, small companies generally will need more time than other companies to adjust their business plans and strategies, seek new sources of funding, and perform the extensive entrepreneurial work required to seek out and pursue new acquisition opportunities. These activities require extensive management time, and a small company is often preoccupied with just staying afloat day to day. They cannot "turn on a dime" when the FCC changes its rules. The Diversity and Competition Supporters have referred to this as "shock effect" and that characterization accurately captures what happens to small companies when regulatory change occurs overnight. This "shock effect" could be overcome if the FCC elected to deregulate gradually and methodically.139/

136/ Initial Comments, pp. 84-90.

137/ See Paxson Communications Comments, pp. 6-14.

138/ Initial Comments, pp. 82-115.

139/ Ofori Statement, §1.

Associated with our proposal for staged implementation was a proposal for a negotiated rulemaking.140/ In a negotiated rulemaking, all stakeholders could work out their differences on, such matters as market definitions and the structure of a staged implementation plan.

Staged implementation could not be more germane to this type of proceeding. As Commissioner Adelstein noted, "[g]iven the potential harms in overhauling these longstanding rules in such a dramatic fashion, I advocate an incremental approach that will show the public at each step how it will benefit."141/

If these rules were adopted in error, they are essentially irreversible.142/ Thus, staged implementation is far preferable to relying on predictions that deregulation will work out fine -- predictions that could prove wrong.143/ One could argue that the industry needs "relief" now, but the record contained nothing to suggest that staged implementation could not be structured in a manner designed to afford any necessary relief within a reasonable time.

Staged implementation would both comply with and advance the objectives of Section 202(h) of the Telecommunications Act.144/ If a structural rule is found not "necessary in the public interest," staged implementation would be a prudent way to "modify" the rule as provided by Section 202(h).145/ Further, if staged implementation were adopted, it would be a

140/ See Initial Comments, pp. 145-147; Radio Ownership Comments, pp. 174-176.

141/ Dissenting Statement of Commissioner Jonathan Adelstein, p. 38. Commissioner Adelstein cited, in n. 79, Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 316 (7th Cir. 1994), in which the 7th Circuit declared that "caution in overturning a regulatory system that has been in place for many years strikes us as an adequate reason for an agency's deciding to continue the system in limited form for a brief period before decreeing total deregulation. Phased deregulation is common, practical, and sensible. Involving as it does judgmental considerations that are difficult to quantify, it is unlikely to flunk judicial review."

142/ See Prometheus Stay Order, pp. 2-3; see also Dissenting Statement of Commissioner Michael Copps, p. 8. The Commission has always been loath to require unwinds of acquisitions. See, e.g. Report and Order, ¶484 (finding that requiring divestitures of ownership combinations that do not comply with the new rules, would, inter alia, "be too disruptive to the industry.") Perhaps the most valid of axioms is the one that acknowledges that "possession is rather more than nine points of the law." Corporation of Kingston-upon-Hull v. Horner (Lord Mansfield, 1774); but cf. FCC v. FCCB, 436 U.S. 775, 802 (1978) (upholding the Commission's decision, upon promulgation of the newspaper/broadcast crossownership rule, to require divestitures in some markets where ownership concentration was particularly high).

143/ For this reason, it may be that "the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission's flexibility to exercise some control if increasing consolidation begins to have ill effects." Paxson Communications Comments, p. 14.

144/ Codified at 47 U.S.C. §161 (1996).

145/ See Initial Comments, pp. 99-101; Reply Comments, p. 30; April 28, 2003 Letter, p. 5. Nowhere in the legislative history of Section 202(h) is there an indication that Congress meant "eliminate or modify" to mean "eliminate all at once." Nor is there an indication that Congress intended the Commission to suspend its good judgment, or ignore the fruits of its own expertise, on the question of whether instantaneous implementation of massive changes in the marketplace would frustrate the very goals Congress sought to achieve in the legislation.

rule in its own right, and thus it would be subject to review every two years under Section 202(h).[146] If the staged implementation schedule is too lengthy, the Commission could tighten it in a subsequent biennial review. Consequently, although staged implementation could not get in the way of harmless or beneficial deregulation, it could prevent harmful deregulation.

The Commission should adopt staged implementation before a wave of transactions renders it largely moot. In doing, so, the Commission should convene a negotiated rulemaking to work out the implementation schedule and metrics under which the Commission can longitudinally measure diversity, competition, localism and minority ownership.[147]

6. <u>Market-based Diversity Credits As An Alternative To Voice Tests</u>

In our reply comments and in a subsequent letter, we proposed a system of market-based diversity credits as an alternative to voice tests. Under our proposal, a quantity of diversity credits would be given to SDBs, commensurate with the extent of their social and economic disadvantages. Diversity credits would also be given to the seller at the closing of a transaction that would result in greater structural diversity. If a transaction would add to concentration, the buyer would return a number of diversity credits to the Commission when the transaction closes. Finally, companies could buy or sell diversity credits to one another, thereby providing a market-based source of access to capital for SDBs.[148]

While this concept might seem unique, it is not new. A similar paradigm, in use for a decade at the EPA, has basically replaced much command-and-control environmental regulation with incentives, with promising results.[149]

146/ See Reply Comments, p. 31.

147/ Radio Ownership Comments, pp. 174-176; Radio Ownership Reply Comments, pp. 27-28; Initial Comments, pp 145-147.

148/ See Reply Comments, pp. 34-38; April 28, 2003 Letter, pp. 8-10.

149/ See, e.g., Robert N. Stavins, "Market-Based Environmental Policies", in Public Policies for Environmental Protection (1998); Robert N. Stavins, "What Can We Learn from the Grand Policy Experiment? Lessons from SO_2 Allowance Trading," 12 J. of Economic Perspectives 69 (1998). Professor Cass Sunstein's article, "Television and the Public Interest", 88 Calif. L. Rev. 499 (2000) explores how the environmental market-based paradigm could be applied to television programming. It is not a stretch to also apply this concept to television and radio ownership, as we have suggested.

One reason for having this rulemaking was that the Commission had difficulty justifying the use of voice tests.150/ Thus, a proposal whose adoption could supplant voice tests seems, an odd candidate for exclusion from the Report and Order.

Diversity credits have at least six distinct advantages over voice tests:

First, diversity credits incentivize diversity. Voice tests lack this attribute.

Second, diversity credits disincentivize consolidation. On the other hand, voice tests merely set a ceiling on consolidation. In this sense, diversity credits also provide more flexibility than voice tests, which bar all consolidation beyond a certain point even if the potential harm from a quotum of additional consolidation is slight.151/

Third, diversity credits place on the beneficiaries of consolidation the responsibility of paying for the remediation of some of consolidation's ill effects. Diversity credits do this by requiring those who undertake a consolidating transaction to relinquish some credits. If they lack sufficient credits, they would buy them from companies that add to diversity.152/ On the other hand, voice tests transfer all of the social costs of consolidation onto the general public.

Fourth, diversity credits serve as a mechanism to provide access to capital to SDBs. Moreover, a company's access to capital through diversity credits is directly commensurate with that company's, or its transaction's, contribution to diversity. By stimulating the flow of capital to SDBs and new entrants, diversity credits are a powerful and focused engine for minority and SDB ownership.153/ Voice tests lack this feature.

Fifth, diversity credits capture the measure of diversity more precisely than an inherently approximate voice test. Voice tests use small integers as their units of measurement.

Sixth, diversity credits are easier for the Commission to administer than voice tests, since the use of bright line rules and waivers is minimized when the market is deployed as an engine to

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150/ Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002), rehearing denied (August 12, 2002) ("Sinclair").

151/ Some aspects of diversity credits are unavoidably arbitrary (e.g., how many credits should be afforded to which companies, and for which transactions). Nonetheless, not being market-based, voice tests are more prone to arbitrariness. See April 28, 2003 Letter, p. 9.

152/ See Reply Comments, p. 36.

153/ Minorities' lack of access to capital is discussed in the Initial Comments, pp. 32-37. As the Commission has recognized, "access to capital is the most critical limitation on minority participation in the industry." Revision of Radio Rules and Policies (R&O), 7 FCC Rcd 2755, 2770 ¶28 (1992).

advance national regulatory policy objectives.

Thus, on reconsideration, the Commission should consider whether diversity credits are a viable alternative to voice tests. Following the lead of the EPA, the FCC should invite economists to review the concept and tailor it to the FCC's specifications and needs.

III. The Commission Should Reconsider Some Of The Deregulatory Steps It Has Taken 154/

A. The Commission Should Reconfigure Its Television Voice Tests To Reflect Only Those Voices That Americans Actually Receive

The NPRM sought comment on "whether the level of diversity that the public enjoys varies among different demographic or income groups" and, if there is a disparity in access to television signals, "how should we factor in that disparity in our diversity analysis?"155/

These were good questions, since fifteen percent of Americans cannot afford or receive cable or satellite programming.156/ Thus, we asked the Commission to make media service to these families a necessary goal of structural regulation.157/ In particular, we asked the Commission to base any voice tests on the signal count of stations actually received by these forty million Americans.158/

154/ We oppose many of the substantive deregulatory decisions reached in this proceeding, particularly the Commission's decisions to allow more TV-radio crossownership, more local television duopolies, and a higher national television audience cap. See Initial Comments, pp. 36-48. Other parties will address these widely debated issues, and we preserve them for appeal. We focus herein on three less publicized, but no less controversial deregulatory steps that should be revisited now.

One particular matter deserves attention: The Report and Order (at ¶280) provides that the Commission will rely on the Media Access Pro database, as prepared by BIA Financial Network, Inc., a private entity ("BIA"). BIA has constructed its database on the audience measurement data developed by Arbitron Co., another private entity ("Arbitron"). Neither of these entities make available to the public the information that would allow a party to determine whether a particular station is deemed by them to be in a particular radio market, the number of stations in such market, and what stations are "above the line" or "below the line." In order to not only access the information, but to make use of the information in required submissions to the Commission, a party must become a subscriber, which is quite expensive. Use of this information by a non-subscriber would constitute a violation of these entities' copyrights and expose applicants and potential applicants to liability. While this may not be a concern for large group owners, other parties, and especially new entrants and SDBs, may not be able to afford such expenses. The database is outstanding and BIA and Arbitron deserve full compensation for their efforts. Thus, if the Commission intends to require its regulated parties to rely on information developed by private entities, the Commission should ensure that this information is fully available (as it is not now) in the public domain or can be accessed and used at nominal cost to such parties.

155/ NPRM, 17 FCC Rcd at 18520 ¶48.

156/ See Initial Comments, p. 142 and n. 243 (citing Ninth Video Competition Report, 17 FCC Rcd 26901, 26975 (2002) (Appx B, Table B-1, Assessment of Competing Technologies).

157/ Initial Comments, pp. 142-145.

158/ See id., p. 145 ("[b]uilding upon its goal of universal telephone service, the Commission should adopt a goal of universal multichannel media and broadband services to all Americans. Until that goal is achieved, the Commission's structural rules should not be based upon a 'voice' test that includes voices unavailable to low income and rural families.")

Although the NPRM properly raised the issue, the Report and Order does not answer it. Instead, the Report and Order simply states that there is an "explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we cannot conclude that source diversity should be a policy goal of our broadcast ownership rules."159/ The Report and Order contains no discussion of the unavailability of signals to the poor and to rural Americans. It implicitly assumes that over 40,000,000 Americans without cable and satellite service simply do not matter in the crafting of numerical ownership caps.

It is doubtful that an agency can lawfully adopt a policy that implicitly holds that 15% of the public is irrelevant -- at least without directly explaining why that is the case. Imagine a civil defense shield, a public water system or an electricity grid that omits 15% of the public, or street lights, sidewalks and paved roads only for the wealthy parts of town.160/ Certainly the Commission's duty to regulate for "all the people of the United States"161/ requires the Commission to explain how it could be permissible to electronically disenfranchise a populace whose size rivals that of California.

If the Commission persists in using voice tests, it should count as voices only the television stations actually received off the air by every television household. This means that the Commission should:

- retract language justifying deregulation based on the presence of a "multichannel universe" that actually is beyond the grasp of 15% of the public;162/ and
- revise or reverse any decisions to deregulate, to the extent those decisions were based on the availability of this "multichannel universe."163/

159/ Report and Order, ¶45. See discussion at p. 20 n. 123 supra.

160/ Cf. Hawkins v. Town of Shaw, Mississippi, 461 F.2d 1171 (5th Cir. 1972). The Town of Shaw line of cases, applying 42 U.S.C. §1983, hold that a municipality cannot arbitrarily provide grossly inferior municipal services to its African American neighborhoods.

161/ 47 U.S.C. §151 (1996).

162/ See, e.g., Report and Order, ¶45 (abandoning longstanding protection of source diversity based on an "explosion of programming channels" in "the vast majority" of homes, irrespective of the absence of such "explosion" in the other 15% of homes.)

163/ See, e.g., id. at ¶143 ("[m]ost households subscribe to cable or DBS and receive DPV from cable networks and local broadcast television stations") and the counterintuitive assertion, offered without a shred of evidence, that "[t]he programming quality delivered to the minority of households that do not subscribe to cable or

[n. 163 continued on p. 30]

B. The Commission Should Reverse Its Authorization of Triopolies

The Commission's decision to authorize triopolies in large markets164/ was a surprise. It generated few comments, since the NPRM did not seek comment on the subject.165/

The triopoly decision was a solution in search of a problem. Large market full power television stations are almost always "a license to print money."166/ None of these stations is known to be in economic distress. Large city stations seldom are without the resources to provide full service to the public. No evidence in the record shows that diversity in large markets must be sacrificed to solve any particular urgent problem.

Furthermore, the Commission's decision omitted an important issue: the potential impact of large-market triopolies on competition and diversity on regional and national television ownership or on over-the-air television networking. Kofi Ofori, explains:

163/ [continued from p. 29]

DBS is protected by the majority of households that do subscribe. Although non-subscribing households have fewer programs choices than subscribing households, broadcasters cannot reduce the viewer appeal of their programming to non-subscribing households without also reducing the viewer appeal of their programming to subscribing households. Broadcasters deliver the same programming to both subscribing and non-subscribing households. Thus, the majority of households that subscribe to cable or DBS assure that non-subscribing households receive appealing programming" (id. at ¶144). This is wrong for three reasons:

First, it literally creates two regulatory systems: diverse viewpoints and competitive operations for the wealthy and non-rural among us, and "appealing" programming for everyone else. *The Commission did not explain why it is acceptable for 40,000,000 rural and low income Americans to settle for ostensibly "appealing" but non-diverse programming.*

Second, it is based on a term the Commission did not define. Although the Commission defined "diversity" and "competition", *it did not define "appealing."* We have no idea what the Commission thinks "acceptable" means.

Third, the underlying premise is false. Programming designed for DPV homes may be "appealing" to urban and wealthy Americans, but it is seldom designed to serve *rural and low income Americans.* New York and Los Angeles-skewed entertainment fare often treats rural America as a joke. See, e.g., Joel Ryan, "Cajuns Ragin' at Hillbillies," April 10, 2003, www.earthlink.eonline.com/News/Items/0,1,11604,00.html?tnews (reporting that 43 Members of Congress and the Louisiana State Senate opposed CBS' "Real Beverly Hillbillies" program because of its alleged humiliating and stereotyping of poor and rural Americans). The continued exclusion of minorities from entertainment and news programming is well documented. See CWA Comments, pp. 59-62; National Association of Hispanic Journalists Comments, pp. 6-9. A recent law review article contains the definitive treatment of this subject. Leonard Baynes, "WHITEOUT: The Absence and Stereotyping of People of Color by the Broadcast Networks in Primetime Entertainment Programming," 45 Ariz. L. Rev. 293 (2003). It would have been more accurate to say non-subscribing households are burdened with programming that is "appealing" to urban and wealthier Americans.

164/ Report and Order, ¶¶134, 203.

165/ Regarding triopolies, the NPRM should have contained "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3).

166/ See Applications for Renewal of Standard Broadcast and Television Licenses for Oklahoma, Kansas, and Nebraska, 14 FCC2d 2, 9 (1968) (Statement of Commissioners Kenneth Cox and Nicholas Johnson) ("Broadcasters receive from the Government a license which constitutes, especially in the case of television, a grant of great power and wealth, 'a license to print money[.]'")

The Commission's discussion of triopolies shows that it considered the impact of triopolies on the local markets in which triopolies would be permitted. However, the Commission did not consider the potential impact of its triopoly decision on competition and diversity in other local markets and on the national television programming marketplace.

In the nine markets with at least eighteen television stations apiece, it will now be possible to assemble "triopolies." These markets are New York, NY; Washington, D.C.; Phoenix, AR; Salt Lake City, UT; Los Angeles, CA; Philadelphia, PA; San Francisco, CA; Boston, MA; and Dallas- Ft. Worth, TX. In each of these nine markets, there is an average of eleven commercial stations that are not affiliated with one of the top ranked stations and are eligible to form triopolies. If sizable new independent television groups are to be built, the flagship stations for these groups -- or the hubs from which spokes of smaller stations will be associated regionally -- must be drawn from this critical pool of stations. By allowing these stations to be triopolized to take advantage of in-market synergies, the stations will never be able to contribute to multi-market synergies attendant to multi-city station group operations. Yet it is the station group model, rather than the duopoly or triopoly model, that carries far more public interest value. Station groups counterbalance the homogenized news and entertainment programming associated with network programming aired on the top four stations. Second, station groups provide more opportunity for upward career mobility from a company's small to large stations. Triopolies reduce local competition while not offering any of these benefits.

Furthermore, in the nine markets ripe for triopolization, there are only 54 commercial stations that are not owned and operated ("O&Os") or affiliated with one of the six major English-language networks (ABC, CBS, NBC, FOX, WB and UPN), or Paxson, Univision, Telemundo or Trinity. It is these 54 stations, and these stations only, that are the eligible candidates to serve as the core properties for any new national television network that might be created. Unless a company seeking to build a national television network is affiliated with a major film studio (*e.g.* the WB), it is essential that the company have O&Os in the top markets. These O&Os form the basis for program production, for national advertising, and (because they are so profitable) for revenue generation to support the growing network before it, too, attains profitability.

The triopoly decision effectively takes these 54 independent stations off the table for a potential new network startup, and caps forever the number of major television networks at its current level. To appreciate this, recall that we had almost as many TV stations in 1985 as we have today. Yet, if the triopoly rule had been adopted in 1985, there would never have been the Fox Network and, later, UPN or WB. The reason is that ABC, NBC and CBS would have bought up the stations that could otherwise have been brought together to form competing networks and reprogrammed those stations with material complementary to, and not competitive with, ABC, NBC and CBS.

If there were a new major television network, it would probably be aimed at a major underserved audience: children and youth, minorities, or religious people (or some combination of these). The triopoly rule will make this achievement impossible.167/

CWA has offered a less restrictive alternative to triopolies: JOAs.168/ A JOA has the advantage of providing synergies through joint back-office operations while the stations involved

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167/ Ofori Statement, §4 (fns. omitted). See also p. 35 infra (discussing statistics on top 50 market independent stations upon whose availability a new network would depend, and concluding that two new networks could probably be assembled).

168/ See discussion at p. 22 supra.

remain economic and programming competitors. Instead of allowing triopolies, the Commission should consider allowing three-station JOAs and (in very compelling cases) a duopoly joining together with a third station in a JOA.

At a minimum, before the Commission authorizes any triopolies, it should perform a study of the potential impact of triopolies on the national television marketplace. It could then revisit the triopoly question in a subsequent biennial proceeding.

C. The Commission Should Undo Its Repeal Of The Sales Solicitation Feature Of Its Failed/Failing/Unbuilt Station Policy

Even while deferring consideration of whether to ban discrimination in the sale of a station,169/ the Commission unexpectedly repealed its only policy specifically aimed at ensuring that minorities would have a chance to buy the rare television station that comes into the market. That policy is the sales solicitation feature of its failed/failing/unbuilt station policy (the "Sales Solicitation Feature").170/ The Sales Solicitation Feature has three attributes not shared by any other policy at issue in this proceeding: (1) it was created expressly to protect minority and female ownership; indeed, it is the only structural policy with that objective; (2) it is only four years old, and (3) the record contained no evidence that the policy was harmful. When it repealed the Sales Solicitation Feature, the Commission did not mention any of these factors.

In 1999, for the the first time, the Commission authorized the sale, to in-market operators, of failed and failing stations and unbuilt construction permits.171/ Several parties, including NTIA, expressed concern that this step would discourage minority and female ownership. In response to these concerns, the Commission created the Sales Solicitation Feature:

169/ See discussion at pp. 10-12 supra.

170/ Report and Order, ¶¶225. The potential elimination of the Sales Solicitation Feature was not mentioned in the NPRM. Only two parties (the NAB and Pappas Telecasting Companies) sought repeal of the Sales Solicitation Feature. See Report and Order, ¶222 and n. 481. Thus, the public was unaware that the Sales Solicitation Feature might be repealed. Further, it apparently went unnoticed that we had endorsed the Sales Solicitation Feature. See April 28, 2002 Letter, pp. 18-19 and n. 37 ("a television duopoly is sometimes regarded as a situation in which only an in-market competitor would be a realistic purchaser. However, even in a duopoly situation, the Commission has recognized that an out of market buyer might place more value on a standalone property than an in-market prospective duopolist....For example, an out of market buyer may plan to build synergies based on programming or based on regional operations. Those synergies might be just as attractive from a business standpoint as the synergies flowing from a duopoly.") This endorsement of the Sales Solicitation Feature was made while addressing a different issue (equal transactional opportunity), as we had no clue that this proceeding encompassed the possible repeal of a four-year old noncontroversial policy which stood as the Commission's only express protection for minority and female television ownership.

171/ Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12938-41 ¶¶77, 81, 86 (1999 (subsequent history omitted) ("1999 Television Ownership Order").

> Although we share the concern expressed by NTIA, MMTC, BET, MAP *et al.*, and AWRT about new entry into broadcasting, the apparent decline in minority and female ownership of broadcast facilities, and the need to encourage broadcast ownership diversity, we are not convinced that that concern undermines our reasons for establishing a failed station waiver policy....as discussed below, to quality for the waiver, an applicant must demonstrate that the in-market buyer is the only reasonably available candidate willing and able to operate the station, and that selling the station to an out-of-market buyer would result in an artificially depressed price. To satisfy this element of the waiver standard, applicants will be required to give public notification that the station is for sale. Thus, minorities and women interested in purchasing a station will have an opportunity to bid. We remain very concerned about the more general problem of the decline in minority broadcast ownership and possible mechanisms to increase minority and female ownership in broadcasting, but nonetheless believe our failed station waiver criteria serve the public interest. The Commission has made a number of efforts separate from this proceeding to address minority and female ownership issues, and we hope to take further steps in this area.172/

Some of the rules at issue in this proceeding date back over 50 years, but the Sales Solicitation Feature is just four years old. It is rare for the Commission to repeal any rule just four years after its birth.

In the Report and Order, the Commission did not mention the impact of repeal of the Sales Solicitation Feature on the prospects of new, minority, and female entrants seeking to acquire the handful of available television stations. Nor did the Commission address the impact of the repeal of the Sales Solicitation Feature on the potential for new over-the-air networks. Instead, for the first time in its history, the Commission stated that it actually prefers consolidated ownership to independent ownership.

> First, for failed, failing, and unbuilt stations, we retain the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. We agree with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.173/

Let us take as true that "in many cases" the in-market competitors would be viable buyers. Further, for the sake of argument we will assume that new entrants or other out-of-market buyers could prevail against an in-market buyer only in "unusual" circumstances,174/

172/ 1999 Television Ownership Order, 14 FCC Rcd at 12936-37 ¶74 (fns. omitted).

173/ Report and Order, ¶225 (citing, in n. 490, NAB Comments at 80 n. 148).

174/ There was no record evidence that purchases by out of market buyers were "unusual." For example, the first purchase by minorities of full power television stations since 1999, Corporate Media Consultants Group's acquisition of WPFO-TV Portland and WCAV-TV St. Croix in March, 2003, was by an out-of-market new entrant.

although reasonable people can disagree over whether "unusual" means 10% of the time or 30% of the time. Certainly, though, "unusual" is not so infrequent that it would be a waste of effort to afford new entrants and out of market operators an opportunity to bid. Rather than ensuring that more of those ostensibly "unusual" circumstances could actually come to pass, the Commission took away new entrants' only opportunity to at least try to outbid an in-market operator to acquire a standalone television station.

For the first time in its history, the Commission has crossed a sacred line: formerly, it permitted consolidation; now it is preferring and promoting consolidation. And for only the third time in its history, it provided no advance notice when doing away with a policy created to protect minority ownership.175/

The decision to allow an in-market broadcaster an advantage in transactions over out-of-market prospects puts enormous leverage in the hands of in-market companies seeking to acquire troubled properties in their markets. It does this by rewarding licensees for dispensing with transparency in transactions -- an attribute that the Commission elsewhere says it prizes.176/ Now an in-market company can approach a weak facility and offer to take it over -- conditioned on the weak facility's owner's promise not to offer the station to others outside the market. The Commission and the public would never know that the in-market company has strong-armed its weaker competitor and closed off the possibility that new entrants will get a chance to enter new markets.

Instead of helping in-market companies exclude outside competitors, the Commission should try to help outside competitors enter new markets. After all, a duopoly or triopoly is not the only way value can be created in television. For example, an out-of-market buyer could build value through regional synergies, or by offering a unique type of programming (e.g. Spanish

175/ The other two anti-minority decisions occurred with no advance warning in 1985 in Clear Channel Repeal, 102 FCC2d at 558 (repealing the AM clear channel eligibility criteria), and a year later in Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications (NOI), 1 FCC Rcd 1315, 1319 ¶¶24-25 (1986) ("Minority Ownership Policy Suspensions") (suspending the distress sale and comparative hearing minority ownership policies). Minority Ownership Policy Suspensions so shocked and disgusted the civil rights community that the next day an emergency meeting was held at which MMTC was founded.

176/ See Report and Order, ¶52 ("[w]e see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities.")

(e.g. Spanish language, Asian languages, or Christian) which the in-market broadcasters are unfamiliar or uninterested, or which they are incapable of offering.177/

Indeed, unless the repeal of the Sales Solicitation Feature is reconsidered, the growth prospects of companies specializing in programming targeted to minorities and to religious people will be particularly hard-hit. For these companies, only a very small number of independent stations, not affiliated with a major network, are on the table as acquisition targets. Indeed, in the top 50 television markets, only 85 commercial stations (less than two per market) are not affiliated with one of the eight major English language networks or one of the two major Spanish language networks.178/ Many of these independent stations are failed or failing stations. It is already difficult enough for new entrants to compete with in-market broadcasters to acquire stations. Repeal of the sales solicitation feature would make it even more difficult for new entrants to prevail in bidding contests -- or even to learn of the existence of these opportunities.

Finally, the repeal of the Sales Solicitation Feature -- combined with the decision to allow triopolies -- will essentially foreclose for all time the possibility that an entrepreneur could assemble the O&Os necessary to build a new national over-the-air network.179/ With the exception of WB (whose co-parent, AOL-Time Warner, has a huge film library and unparalleled in-house production capacity) it is essential for an over-the-air network to have a solid base of O&Os. The O&Os are necessary both to ensure national distribution in most of the critical large markets and to guarantee the economic stability of the network. It is still possible for two more over-the-air networks to be created by buying (or having friendly affiliations with) a sufficient

177/ Ofori Statement, §5.

178/ Statistic was derived by MMTC from the BIA Television Yearbook (Spring, 2003). Excluded affiliations were for ABC, CBS, Fox, NBC, WB, UPN, PAX, Trinity, Univision and Telemundo.

179/ Such a network would probably fill one of three major national "format holes" -- children/youth, minorities or religion. See p. 31 supra. Certainly it would be a profound achievement if one or two of these networks could be created. Commissioner (later Chairman) Quello has pointed out that the creation of the fourth network contributed profoundly to, inter alia, "the financial health of both independent and affiliated television stations...competition to the three established national broadcast networks and their affiliates...economic, programming, and marketing support to enable many independent UHF stations to achieve stability and profitability...[and] children's, minority-oriented and news programming." Fox Television Stations, Inc. (Second MO&O), 11 FCC Rcd 5714, 5731 (Separate Statement of Commissioner James H. Quello) (subsequent history omitted).

number of large-market independent stations.180/ By restoring the Sales Solicitation Feature, the Commission can protect against the disappearance of these stations into duopolies and triopolies and their consequent removal from the pool of potential O&Os for new networks.

IV. The Commission Should Relax And Update Its Community Of License And Transmitter Site Rules

As the Court of Appeals has pointed out, an agency cannot continue to administer regulations whose predicate has disappeared.181/ The time has come to consider whether the Commission's community of license and transmitter site rules for radio,182/ in their present form, are actually impeding the growth, competitiveness and ownership diversity of the radio industry, and the local service objectives of Section 307(b) of the Act.183/ Further, it is time to examine whether the rules arbitrarily and artificially restrain minorities and new entrants at the very moment in the Commission's history when minorities and new entrants have the greatest need for relief.

Section 307(b) does not instruct the Commission to adopt any particular form of community of license rules. It was written to afford the Commission considerable discretion in choosing where stations should be located:

> In considering applications for licenses and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as provide a fair, efficient, and equitable distribution of radio service to each of the same.184/

180/ As noted, there are 85 top-50 market independents. See p. 35 supra. Creation of a new network almost surely requires ownership of a station serving New York and Los Angeles; New York has four independents and Los Angeles has eight (the largest number in any market). However, nineteen markets have only one independent, and ten markets have none. The average top 50 market has fewer than two. Thus, realistically, there are at most two more opportunities to create a new network, unless duopolies and triopolies make network ownership infeasible for an entrepreneur.

181/ Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) ("[e]ven a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears," citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)).

182/ By "community of license and transmitter site rules" we refer to the AM and FM allotment criteria and the attendant transmitter site location rules. The transmitter site rules, which control the proximity of a station's transmitter site to its community of license, are found in 47 C.F.R. §73.182(c), §315(a) and §515. The interpretations of these rules policies, lore and other esoterica would fill a treatise. For simplicity, most of our discussion herein focuses on the commercial FM rules. We are not proposing modification of the television rules at this time, given the difficulty of effectuating such a modification in the midst of DTV conversion.

183/ We also note that the decision to use Arbitron-based market definitions is difficult to reconcile with the transmitter site rules' use of coverage contours, rather than the economic relationship of the station to the market, as the basis for decisions over where a station may locate its transmitter and its base of operations.

184/ 47 U.S.C. §307(b).

The FM allotment criteria were last revised in 1982.185/ They harken back to an era when there were far fewer radio stations, and when receiver technology limited the effective range of reception of many stations. Further, since 1982, America has experienced a rapid urbanization of society, and growing racial, cultural and language diversity in large communities. These factors are far outpacing the availability of large city radio signals.186/

The community of license and transmitter rules undermine diversity and localism in three ways:

First, they artificially prevent large cities from having the number of local stations required to serve the cities' growing and more diverse populations. With more signals come more niche program offerings -- exactly what these diverse communities need. Thus, the relative paucity of full coverage big-city signals imposed by the community of license and transmitter site rules inhibits diversity.

Second, they deprive local communities of truly local service. High powered exurban stations seldom if ever "serve" the towns that technically serve as their communities of license.187/ Instead, they aim at nearby large markets, where they are often not fully competitive because they lack full market coverage.188/

Third, they cause poor service to minorities, who typically are confined by segregation and wealth disparities to central cities. Yet minority owned FM radio stations are disproportionately licensed to the suburbs -- a consequence of nonminorities' 50-year first-mover advantage in securing the more attractive center city allotments.189/

185/ The FM allotment priorities were last thoroughly reviewed and revised in Revision of FM Assignment Policies and Procedures (Second Report and Order), 90 FCC Rcd 88 (1982). The priorities are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters; with co-equal weight given to priorities (2) and (3). Id. at 91. A thorough discussion of the history of these policies and their relationship to Section 307(b) can be found in The Suburban Community Policy, The *Berwick* Doctrine, and the *De Facto* Reallocation Policy (Report and Order), 93 FCC2d 436 (1983).

186/ See p. 41 infra.

187/ In a textbook example of why bigger is not always better, a Class A FM in Frederick will serve Frederick far better than a Class C. The Class C will aim to serve Washington, but the Class A will have to serve Frederick in order to survive.

188/ See p. 40 infra.

189/ See pp. 42-44 infra.

Thus, we propose that:

1. A licensee whose station is in an Arbitron market should be able to choose any community of license in its Arbitron market, as long as its operation there would not violate the interference rules.

2. A licensee whose station is not in an Arbitron market, yet draws the majority of its listeners from an Arbitron market, should be allowed to relocate to any community in that market if, in doing so, it does not violate the interference rules.

3. A station's 60 dbu contour should be required to cover 50% of the population of the community of license.

The first priority for move-ins would be stations owned by SDBs; the second would be lower powered suburban facilities that could become competitive full market signals if moved in.190/ After all of the move-in applications are processed, filing windows for drop-ins and signal upgrades would open up to allow for backfilling of the spectrum freed up by the move-ins. Consistent with the Section 307(b) priorities, these filing windows would open in this order:

1. Full power drop-ins that provide new or competitive local service whose audience will primarily be a rural community;

2. Rural LPFMs;

3. Rural translators;

4. Urban translators; and

5. Class of service, power, and tower height upgrades of full power stations.191/

Under this new paradigm to facilitate move-ins, not every exurban station could relocate, because relocation may be constrained by interference criteria rather than the community of license and transmitter site rules. However, where the community of license and transmitter site rules are the only impediment to a station becoming a move-in, our proposal would make it much easier to effectuate the move-in. And as shown infra, these new urban move-ins would also free up spectrum for new drop-ins tailored to provide rural service.

Under the current community of license and transmitter site rules, a commercial FM licensee is required to put its citygrade signal over at least 80% of the land area of the community

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190/ These two first-in categories of move-ins would each include a great many minority owned stations. As noted herein, minority owned FM stations tend to be lower power and suburban facilities. See pp. 43-44 and ns. 210 and 211 infra.

191/ Other paradigms for a new set of community of license and transmitter site rules could also serve the public better than the current rules. We hope that the newly-created Localism Task Force will include this subject on its agenda.

of license.192/ This requirement has four attributes -- the 80% coverage requirement, the use of "land area" as one way to define the requirement, the obligation to meet the test with a citygrade signal, and the definition of a "community." As shown below, none of these criteria is rational.

Perhaps the 80% coverage requirement could be justified on the theory that some line-drawing is inevitable.193/ However, a noncommercial FM can put its signal (a 60 dbu signal at that)194/ over just 50% of the population or land area of the community of license. Noncommercial stations have a greater obligation than commercial stations to meet community needs -- yet, ironically, noncommercial stations are allowed to put weaker signals over their communities than the signals of otherwise similarly situated but entertainment-oriented commercial stations. Thus, to be consistent, a 50% coverage rule should apply to both commercial and noncommercial stations.

The use of "land area" as one of the measuring tools for citygrade coverage is illogical, because land does not listen to radio, people do.195/ It follows that a rational transmitter site rule must be phrased only in terms of the percentage of the community's population covered by the signal, not the percentage of its land.

Further, the requirement that the contour covering the community of license should be the 70 dbu (citygrade) contour is outmoded, as well as irrationally inconsistent with the use of a 60 dbu contour for noncommercial FMs. In the early days of radio, citygrade coverage was a useful construct, because early tube-based radio receivers were so rudimentary that they could not deliver low-interference audio unless they were physically close to the station's transmitter. Today, even the most picky audiophiles record music off the air from stations that provide 60 dbu coverage to their homes.

192/ The relevant transmitter site rule is 47 C.F.R. §73.315(a). For simplicity, we focus on the commercial FM rule only, but similar considerations would also apply to the AM rule and the noncommercial FM rule.

193/ See, e.g., Sinclair, 284 F.3d at 159.

194/ See 47 C.F.R. §73.515.

195/ See Report and Order, ¶273 ("[w]e understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations. But radio stations serve people, not land; and while radio signals may overlap over uninhabited land or even water, people in the United States tend to be clustered around specific population centers" (fns. omitted)).

Finally, the operational definition of a "community of license" has degenerated into a legal fiction that can include crossroads so tiny that the licensees do not visit them and the residents are unmindful that their communities have radio stations. Ages ago, a broadcaster chose a community to serve, then developed a radio station to suit the community's needs. Now it is the other way around: a broadcaster builds or buy a radio station that serves a market, and to achieve this, an engineer finds a community that serves the broadcaster's needs.

Understandably, almost everyone who purchases a radio station not located in a population center tries to move it closer to the population center of the market. Thus, a tiny hamlet will suffice as the "community of license" as long as it satisfies engineering constraints.196/ The station need not, and usually does not, serve any needs unique to that community of license.197/

At one time, the community of license and transmitter site rules helped rural areas receive local service. But there is a better way to meet that need: allow exurban stations to move in to population centers, and then use the rural spectrum freed up from these move-ins to seed the rural towns with new allotments. Some of this freed-up spectrum could be occupied with

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196/ Examples abound in which an applicant seeks to construct a high powered station in a small town with the real intention of serving a much larger community. The Commission has been exceedingly tolerant of this practice. See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Salem and Sioux Falls, South Dakota), 6 FCC Rcd 5798 (Mass Media Bureau, 1991) (allowing construction of a Class C-1 FM station in tiny Salem, SD over an objection that contended that the facility was really a de facto reallocation to Sioux Falls). In another typical case, the Bureau reallotted Channel 265A from Pana, IL to Macon, IL, a community of 1,213 people with "a number of churches, organizations, and businesses that serve the Macon Community, including many incorporating "Macon in their names, e.g.,...Macon Motel, Macon Motors, Macon Night Owl, Inc....it is important for Macon to have its own local radio station to address local issues and to provide local information for the growing Macon population [and] those traveling through Macon on U.S. Route 51[.]" Amendment of Section 202(b), Table of Allotments, FM Broadcast Stations (Pana, Taylorville and Macon, Illinois), 16 FCC Rcd 12588 12589 ¶¶4, 5 (Media Bureau 2001). This was high fiction, of course, since unmentioned in the decision was the fact that Pana is 35 miles from Decatur (population 82,500) while Macon is a suburb eight miles south of Decatur.

197/ Broadcasters' obligation to provide service tailored to the community-specific needs of their communities of license was removed since 1981, when the Commission issued Deregulation of Radio, 84 FCC2d 968 (1981) (subsequent history omitted). That decision relieved radio stations of the obligation to provide any locally originated programming. Id. at 998-99. Now it is an open secret in the radio industry that a station need only specify generic needs such as "environment" or "health care" on its quarterly Issues-Programs List and then "serve" those needs with generic national programming, such as PSAs aired at 3:00 AM. This programming need not be specifically tailored to aspects of these generic needs that are specific to the community of license. For example, a station licensed to Three Mile Island, Pennsylvania has no obligation to broadcast any programming on the subject of nuclear safety in Three Mile Island, nuclear safety generally, or even environmental protection generally. Indeed, there is no requirement that the station even broadcast the words "Three Mile Island" on the air, except in station IDs. Residents of Three Mile Island would probably be unaware that their community even has "its own" radio allotment. The station owner might never visit Three Mile Island, since the obligation to actually learn what the leaders and residents of the community actually regard are important needs was also deregulated in 1981. Further, the residents of Harrisburg, to whom the station's programming is actually aimed, would be no more aware of the problems and needs of their neighbors in Three Mile Island than they would have been if the station licensed to Three Mile Island had never existed at all.

LPFMs, or with modest-sized but full service commercial FM stations whose coverage areas are tailored to the location-specific needs of particular rural communities. For example, in our Comments, we proposed two new classes of FM stations to serve small communities: Class A1, 1500 watts at 100 meters, and Class A2 (1000 watts at 50 meters).198/ Unlike a full Class C FM focused on a distant very large city, a station whose coverage area only includes the local population would have to prosper or fail based on its responsiveness to local needs. Further, it would be inexpensive to build and operate -- a plus for new entrants and local ownership.199/

Adoption of this proposal would harmonize the station allotment rules with the new Arbitron definitions, and it would also have at least six distinct and substantial advantages:

First, the new urban moved-in stations would introduce new competition, diversity and program variety to the large urban markets most in need of more stations. Obviously, large cities have far fewer stations per unit of population than smaller ones,200/ but they also have far more demographic and language diversity than smaller cities.201/ New stations would enhance the likelihood that radio stations will serve these emerging demographic and language groups that have the greatest needs for radio service.

Second, the more efficient use of the spectrum would substantially increase the economic value of the radio industry, and particularly the value of the radio stations that could relocate closer to the people they actually serve. By allowing more stations to reach their economic highest valued uses, this proposal would attract new investment to the industry. Companies like

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198/ These stations would efficiently serve many small communities. With low towers, these stations would be inexpensive to construct, and with low powers, they would be inexpensive to operate. They would not waste electricity and spectrum space masquerading as rural full Class C facilities, programming music aimed at residents of central cities while actually offering little of specific interest to the rural residents whose residences they unavoidably blanket.

199/ See Initial Comments, pp. 135-136.

200/ For example, there are 28 commercial radio stations licensed to New York City, whose 2000 population was 8,008,278; thus, there are 286,001 people per station in New York City. There are five commercial radio stations licensed to Binghamton, whose 2000 population was 47,380; thus, there are 9,476 people per station in Binghamton. Similarly, in the New York City radio market (ARB #1) in 2002, there were 18,003,000 people and 76 full power commercial stations, or 236,882 people per station; and in the Binghamton radio market (ARB #179) in 2002, there were 248,500 people and 17 full power commercial stations, or 14,618 people per station. Sources: U.S. Census 2000, Table DP-2 (Profile of Selected Social Characteristics) ("Census 2000 DP-2"); BIAfn Radio Market Report (First Edition, Spring, 2003).

201/ Again for example, New York City's population of persons six years of age and older includes 3,554,805 (47.6% of the total) whose primary language is not English and who speak English "less than very well." Binghamton's population of persons six years of age and older includes 2,344 (5.3% of the total) whose primary language is not English and who speak English "less than very well." Source: Census 2000 DP-2, supra.