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

In the Matter of	)	
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294
	)	
2006 Quadrennial 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. 06-121
	)	
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
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
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
	)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies	)	MB Docket No. 04-228

REPORT AND ORDER
AND THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 2007 **Released: March 5, 2008**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Martin, Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein concurring in part, dissenting in part, and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. In this Report and Order and Third Further Notice of Proposed Rule Making ("*Report and Order and Third Further Notice*"), we take several steps to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses, which historically have not been well-represented in the broadcasting industry. After setting forth our objectives, we define the entities that will benefit initially from our actions and adopt a number of measures modifying certain of our rules and policies to encourage ownership diversity and new entry in broadcasting. We also seek comment on several additional proposals.

II. BACKGROUND

2. "[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[1] Today, we seek to further this important policy goal by expanding opportunities for new entrants and small businesses, including minority- and women-owned businesses, to own broadcasting outlets. By broadening participation in the broadcast industry, we seek to strengthen the diverse and robust marketplace of ideas that is essential to our democracy.[2] As the Supreme Court has recognized, "Safeguarding the public's right to receive a diversity of views and information over the airwaves is ... an integral component of the FCC's mission."[3] Beyond fostering viewpoint diversity, we also believe that taking steps to facilitate the entry of new participants into the broadcasting industry may promote innovation in the field. "[T]he most potent sources of innovation often arise not from incumbents but from new entrants."[4] We believe that this may be particularly true with respect to small businesses, including those owned by minorities and women. "[E]xpanding the pool of potential competitors in media markets" to include such businesses "should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets."[5]

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[1] *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663-64 (1994) (*"Turner I"*) (quoting *Midwest Video*, 406 U.S. 649, 668 n.27) (plurality opinion) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

[2] *See 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,* Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13627, ¶ 19 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part, Prometheus Radio Project. v. FCC*, 373 F.3d 372 (2004) ("*Prometheus*"), *stay modified on rehearing,* No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied,* 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1117); *see also 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006) ("*Further Notice*"); *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Second Further Notice of Proposed Rule Making, MB Docket No. 06-121 *et al.*, 22 FCC Rcd 14215 (2007) ("*Second Further Notice*").

[3] *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990), *overruled in part on other grounds in Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995)("*Adarand*").

[4] *2002 Biennial Review Order*, 18 FCC Rcd at 13632, ¶ 40.

[5] *Id.* at 13637, ¶ 51.

3. Commenters likewise agree that increasing diversity in broadcast ownership is beneficial.[6] The Diversity and Competition Supporters ("DCS"), a coalition of national organizations created to advance the cause of minority ownership, argue that "curing the acute minority under-representation in broadcast ownership would do much to promote competition and diversity of viewpoints."[7] Consumers Union/Consumer Federation of America/Free Press (collectively "Consumers Union") support increasing diversity (and localism) in ownership because doing so would produce "more diverse speech, more choices for listeners, and more owners who are responsive to their local communities and serve the public interest."[8] Clear Channel Communications, Inc. ("Clear Channel") also urges the Commission to seek to increase such ownership.[9]

4. Not only have a variety of commenters urged us to adopt measures to promote new entry and diverse ownership, including increased ownership by women and minorities, but, over the years, they have also, in a variety of proceedings and contexts, advanced proposals as to how these goals can be achieved. Indeed, as indicated in Appendix A of the *Second Further Notice*, DCS advanced many proposals considered or adopted in this *Report and Order and Third Further Notice* in the 2002 Biennial Review proceeding. The Commission specifically sought comment on these proposals in the *Further Notice* and the *Second Further Notice* in the 2006 Quadrennial Review proceeding.[10] In response, DCS advanced additional and/or revised proposals, as did other commenters. Accordingly, we consolidate this docket with the media ownership proceeding, in which these proposals were filed, and resolve the issues involved in the *Second Further Notice*.

5. We believe that it is important to act now to achieve these objectives, and we hope that, in fact, the actions we take in this item will facilitate ownership diversity and new entry in the broadcasting industry.

III. REPORT AND ORDER

A. Definition of Eligible Entities

6. To define the group intended to receive the benefits of the measures adopted herein, we will use the term "eligible entity" as it is defined in the Commission's *2002 Biennial Review Order*. In that proceeding, the Commission adopted an exception to the prohibition on the transfer of grandfathered station combinations that violated new local media ownership rules. The Commission ruled that licensees would be allowed to transfer control of or assign a grandfathered combination to "eligible entities," which were defined as any entity that would qualify as a small business consistent with Small Business Administration ("SBA") standards for its industry grouping, based on revenue.[11] At present, the SBA

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[6] *See, e.g.*, Comments of the National Association of Broadcasters at 2 (Oct. 1, 2007)(reiterating general support for policies that create industry incentives to increase minority and female ownership and participation in the broadcast industry) ("NAB Comments").

[7] Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking (Oct. 2, 2007), at 2 ("DCS Initial Comments").

[8] Comments of Consumers Union, Consumer Federation of America and Free Press at 4 (Oct. 2, 2007) ("Consumers Union Comments").

[9] *See* Comments of Clear Channel Communications, Inc. on Second Further Notice of Proposed Rulemaking (Oct. 1, 2007) ("Clear Channel Comments").

[10] *See supra* Note 2.

[11] *2002 Biennial Review Order*, 18 FCC Rcd at 13810-12, ¶¶ 488-89. We include both commercial and noncommercial entities within the scope of the term "eligible entity" to the extent that they otherwise meet the criteria.

(continued....)

defines as a small business a television broadcasting station that has no more than $13 million in annual receipts and a radio broadcasting entity that has no more than $6.5 million in annual receipts.[12] To determine qualifications as a small business, the SBA considers the revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations.[13] In addition, in order to ensure that ultimate control rests in an eligible entity that satisfies the revenue criteria, the entity must satisfy one of several control tests. The eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.[14]

7. We conclude that use of this definition of "eligible entity" will advance our objectives of promoting diversity of ownership in the broadcast industry by making it easier for small businesses and new entrants – that otherwise might find it difficult or impossible to compete – to acquire a license and attract the capital necessary to compete in the marketplace with larger and better financed companies. In addition, by facilitating entry into the broadcast industry by new entrants, we are hopeful that these measures will result in a wider array of programming services, including some that are responsive to local needs and interests and audiences that are currently underserved. We anticipate that small businesses will be more likely than large corporations to have ties to the communities that they seek to serve, and thus be more attuned to local needs and interests.

8. We disagree with DCS's contention in its supplemental comments that adoption of this small business classification "would actually be regressive and serve to *diminish* minority ownership."[15] DCS bases this contention on data compiled by Free Press, which purport to show that minority owned commercial radio stations are less well represented among SBA-defined small businesses (5.88 percent) than they are in the industry as a whole (7.78 percent).[16] According to the Free Press data, there are 812 minority owned commercial radio stations, 225 of which are owned by seven mid-sized minority controlled companies that would not qualify as an "eligible entity," yielding 587 minority owned

(Continued from previous page)
The U.S. Court of Appeals for the Third Circuit, which reviewed the *2002 Biennial Review Order,* upheld the transfer policy that included the "eligible entity" exception. It also rejected arguments that the transfer restriction violated Section 202(h) of the Telecommunications Act of 1996, constituted arbitrary and capricious decision-making, and violated the Fifth Amendment of the Constitution. The court stated that the Commission successfully demonstrated that the transfer restriction is "in the public interest" as required under § 202(h). *Prometheus,* 373 F.3d at 426-28.

[12] *See* 13 C.F.R. § 121.201 (North American Industry Classification System (NAICS) code categories). The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the TV industry is listed in NAICS code 515120.

[13] 13 C.F.R. §§ 121.103, 121.105.

[14] *2002 Biennial Review Order,* 18 FCC Rcd at 13811, ¶ 489.

[15] Supplemental Ex Parte Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking at 2 (Nov. 20, 2007) (emphasis in original) ("DCS Supplemental Comments").

[16] *Id.* at 38.

commercial radio stations among small businesses.[17] In calculating the overall number of commercial radio stations owned by SBA-defined small businesses, DCS and Free Press cite to the Supplemental Regulatory Flexibility Analysis that accompanied the *Further Notice* in the 2006 Quadrennial Review proceeding, which states that about 95 percent of commercial radio stations have revenues under the applicable limit.[18] They err, however, in assuming for purposes of their calculations that, because 95 percent of radio *stations* have revenues under the SBA limit, 95 percent of radio station *owners* also have such revenues.[19] As a result, their analysis is fundamentally flawed. In fact, the Supplemental Regulatory Flexibility Analysis specifically cautions that "in assessing whether a business entity qualifies as small . . . business control affiliations must be included."[20] Analyzing BIA figures as of December 1, 2007, we find that 4,532 of the 11,475 commercial radio stations are owned by entities with annual revenues clearly in excess of $6.5 million. Thus, 6,943 radio stations (or about 61 percent) are owned by small businesses. Indeed, due to lack of revenue data for privately-held companies, even this 61 percent figure likely overestimates small business control. Using Free Press data, we find that at least 8.5 percent, not 5.88 percent, of commercial radio stations owned by SBA-defined small businesses are minority owned.[21] Furthermore, it is impossible to estimate how many minority owned new entrants may form to take advantage of the proposals we adopt herein, thereby increasing, potentially dramatically, the percentage of minority owned small businesses. Accordingly, we believe that concerns that our definition of eligible entities will be regressive are unfounded.

9. We recognize that some commenters have urged us to take action to increase the ownership of broadcast stations by minorities and women specifically.[22] In the *Third Further Notice* below, we seek comment on whether we should adopt an alternative definition of "eligible entity" that would specifically identify these groups. In the meantime, we have decided to employ a race- and gender-neutral definition in the rules we adopt today so as to avoid constitutional difficulties that might create impediments to the timely implementation of the steps we take today to diversify broadcast ownership. As described below, we believe that the measures we adopt today will be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including those owned by women and minorities.

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[17] *Id.* at 38, n.82. DCS states that these companies are Access.1 Communications, Radio One, Bustos Media Holdings, Border Media Partners, Inner City Broadcasting Corporation, Spanish Broadcasting System, and Multicultural Radio Broadcasting.

[18] *Further Notice* at App. B, Supplemental Regulatory Flexibility Analysis ("According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of June 6, 2005, about 10,425 (95 percent) of 11,000 commercial radio stations in the United States have revenues of $6 million or less").

[19] DCS Supplemental Comments at 38-39, n.82 ("Since about 95% of all commercial radio stations are owned by SBA-defined small businesses...there are about 9,981 small business owned radio stations, and of those, 587 (812 minus 225) are minority owned, representing 5.88% of the SBA-defined small business-owned stations").

[20] *Further Notice* at App. B, Supplemental Regulatory Flexibility Analysis.

[21] We arrive at our calculation by considering the 587 minority owned stations among small businesses as a percentage of the roughly 6,943 stations owned by small businesses in total.

[22] *See, e.g.*, DCS Initial Comments at 8, n.34 (stating that "socially disadvantaged businesses" (SDBs) are a "subset of small businesses" and asserting that limiting the class of eligible small businesses to SDBs would be "desirable because it would be less dilute in its impact on minorities by omitting, for example, the children of millionaires who, as new entrants, can qualify as small businesses although they have never been disadvantaged").

B. Actions to Expand Opportunities for Eligible Entities

1. Revision of Rules Regarding Construction Permit Deadlines

10. We revise Section 73.3598 of the Commission's Rules (the "Rules") to afford eligible entities that acquire an expiring construction permit additional time to build out the facility. Specifically, we allow eligible entities the time remaining on the original construction permit or 18 months, whichever is greater. This revision is intended to foster diversity of ownership by providing eligible entities with additional market entry opportunities.

11. *Background.* Section 73.3598 requires that each construction permit for the construction of a new TV, AM, FM, International Broadcast, low power TV, TV translator, TV booster, FM translator or FM booster station must specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and an application for license filed.[23] Construction permits for new LPFM stations allow permittees 18 months to complete construction and file a license application.[24] In its decision adopting the three-year construction period for broadcast stations, the Commission provided for automatic forfeiture of a permit if station construction has not been completed and an application for a license has not been filed by the end of that period; adopted a formal system by which the construction period would be "tolled" in the event that: (a) an "act of God" interfered with construction efforts, or (b) a permit itself was the subject of administrative or judicial review; and eliminated the restriction on payment allowable for the sale of an unbuilt construction permit.[25] The Commission also noted that there may be rare and exceptional circumstances other than those delineated

[23] 47 C.F.R. § 73.3598(a).

[24] *See Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000). The *Report and Order* established an 18-month construction period for all LPFM facilities, stating that deadlines would be strictly enforced. However, as a temporary measure, the Commission subsequently adopted an interim waiver policy to allow permittees with soon-to-expire permits to request additional time to construct their facilities. Under that policy, the Media Bureau has the authority to consider and grant requests for an additional 18 months to construct facilities, upon a showing that the permittee reasonably can be expected to complete construction within the extended period. *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763, 6775, ¶ 27 (2005). The Commission recently adopted a *Third Report and Order* that amended the Commission's rules to allow all permittees, including current ones whose construction permits have yet to expire, the opportunity to seek an 18-month extension to complete construction of their facilities upon a showing of good cause. *Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 07-204, ¶ 40 (rel. Dec. 11, 2007).

[25] *See 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Policies and Rule Regarding Minority and Female Ownership of Mass Media Facilities,* Report and Order ("*1998 Biennial Regulatory Review*"), 13 FCC Rcd 23056 (1998), *on reconsideration, Streamlining of Mass Media Applications*, Memorandum Opinion and Order ("*Streamlining*"), 14 FCC Rcd 17525 (1999). Prior to the revision of Section 73.3598, the construction period for radio stations was 18 months, and the construction period for television stations was 24 months. A permittee could request additional time if it failed to complete construction by the qualified date by filing FCC Form 307. Additional time would be authorized if the permittee demonstrated one of the following three conditions: (1) construction is complete and testing is underway looking toward the prompt filing of a license application; (2) substantial progress has been made, *i.e.*, equipment is on order or on hand, site acquired, site cleared, and construction proceeding to completion; or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems), but the permittee has taken all possible steps to resolve the problem expeditiously and proceed with construction. A permittee making a satisfactory showing under these criteria would be afforded up to an additional six months to complete construction. Furthermore, the rules afforded permittees an additional six months to construct from the grant of a modification application and an additional one year to construct from consummation of an assignment or transfer. *Streamlining*, 14 FCC Rcd at 17532, ¶ 20.

in its rules or decisions adopting the rules that would warrant the tolling of construction time, *i.e.*, other circumstances beyond the control of the permittee such that it would be entitled to tolling of the construction time under Section 319(b) of the Communications Act of 1934, as amended (the "Act"). In these very limited circumstances, the Commission noted that it would entertain requests for waiver of its strict tolling provisions.[26]

12. As part of a general effort to streamline its rules, the Commission also eliminated the practice of providing extra time to construct after a permit has been modified or assigned or transferred.[27] Thus, under these Rules, any construction permit for which construction has not been completed and for which an application for license has not been filed, is automatically forfeited upon expiration without any further affirmative cancellation by the Commission.[28]

13. These modifications were intended to accomplish a variety of goals, including reducing applicant and licensee burdens, increasing the efficiency of application processing, preserving the public's ability to participate fully in the broadcast licensing process, expediting service to the public, and preventing the warehousing of spectrum.[29] In revising the Rules, the Commission noted its intention to establish an incentive for all potential applicants to plan construction carefully even prior to applying for a permit and, once the permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors.[30] The Commission noted its experience that, despite financial and site availability certification requirements, applicants had, in some instances, filed for permits without taking preliminary steps to ensure that they could begin – much less complete – construction once an authorization was received.[31] Such tactics, the Commission noted, deprive the public of the prompt initiation of additional broadcast service and represent an abuse of the Commission's processes.[32] Therefore, the Commission adopted the revisions to minimize instances when those who do not have the intent or foresight to ensure the prompt initiation and conclusion of construction "tie up" the spectrum indefinitely.[33] In so doing, however, the Commission also noted that Section 319 of the Act and its rules governing construction permits were intended to strike a balance between our fundamental interests in expediting new service to the public and preventing the warehousing of scarce spectrum, and our recognition that permit holders sometimes encounter unforeseen obstacles that may prevent the rapid construction of broadcast facilities.[34]

14. DCS urges the Commission to allow holders of expiring construction permits to sell them to SDBs, rather than have their expired permits forfeited to the Commission for auction.[35] DCS proposes

[26] *Streamlining*, 14 FCC Rcd at 17541, ¶ 42.

[27] *Id.* at 17533, ¶ 21.

[28] *1998 Biennial Regulatory Review*, 13 FCC Rcd at 23091, ¶ 89. *See* 47 C.F.R. § 73.3598(e). While Section 319(b) of the Communications Act provides for the automatic forfeiture of an expired construction permit unless the Commission authorizes additional time or the delay was caused by circumstances outside the permittee's control, the Commission's practice, before the rule was changed, had been to take an affirmative step cancelling a construction permit before it was forfeited. *1998 Biennial Regulatory Review*, 13 FCC Rcd at 23087-88, 23091 n.149, ¶¶ 78, 89.

[29] *1998 Biennial Regulatory Review*, 13 FCC Rcd at 23090, 23093, ¶¶ 83, 90.

[30] *Streamlining*, 14 FCC Rcd at 17539, ¶ 36.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *1998 Biennial Regulatory Review*, 13 FCC Rcd at 23093, ¶ 90.

[35] DCS Initial Comments at 9-11.

allowing the sale of soon-to-expire construction permits to SDBs for four reasons: (1) to promote diversity; (2) to give the permittees a "well-deserved rescue;"[36] (3) to enhance the likelihood that the public would receive service on an expedited basis; and (4) to relieve the Commission of the time and expense of putting the allotment out for bids again.[37] The FCC Advisory Committee on Diversity for Communications in the Digital Age (the "Diversity Committee") has endorsed DCS's idea and recommends that Section 73.3598 be revised to permit sales of expiring construction permits to SDBs that pledge to build out the permit within the time remaining in the original construction permit or within 18 months, whichever is greater.[38] According to the Diversity Committee, by allowing the sale of the construction permit on the open market, the Commission would increase the likelihood of expediting service to the community more quickly and with more administrative efficiency than by auctioning those allotments.[39]

15. *Discussion.* To enhance and promote ownership by small businesses, including those owned by minorities and women, we revise Section 73.3598 of the Rules to permit the sale of expiring construction permits to eligible entities, as defined herein,[40] that pledge to build out the permit within the time remaining in the original construction permit or within 18 months, whichever is greater. We believe that this revision will advance diversity of ownership, as broadcasters that otherwise would forfeit their construction permits would be motivated to sell them to eligible entities as an alternative. Moreover, we believe that it will serve as an appropriate accommodation of the capital constraints and other financial issues that small businesses often confront.

16. We remain cognizant of our general goal of advancing broadcast service to the public in a timely manner, and we seek to assure that applicants continue to build their facilities in a timely manner. We believe, however, that this revision achieves an appropriate balance between the goals of ownership diversity and timeliness of service. Permittees are unlikely to fail to construct facilities in a timely manner simply because they know that they can sell an expiring permit to an eligible entity, especially

[36] According to DCS, a permittee that honestly tried but failed to build out its permit is hardly a profiteer or a trafficker. DCS argues that it is often inequitable to leave such a permittee with nothing after it invested heavily, in good faith, in obtaining the permit and beginning construction. DCS Initial Comments at 11.

[37] In addition, Entravision Holdings, LLC ("Entravision") filed a petition to the Commission to amend Section 73.3598 of the Commission's Rules to permit qualified broadcasters having significant minority group participation or proposing to meet the broadcasting needs of minority group populations "to obtain a construction permit that would otherwise be declared forfeited and, as a result thereof, receive additional time in which to complete construction." In the Matter of Amendment of Section 73.3598 of the Commission's Rules, RM-9567, filed Mar. 10, 1999, by Entravision and Paul A. Zevnik ("Entravision Petition"). The Entravision Petition was put out for public notice, RM-9567, DA 99-648 (rel. Apr. 8, 1999), and comments were received. We incorporate the Entravision Petition and comments thereto into this proceeding. Our decision here addresses Entravision's petition by granting, in part, its request to amend 47 C.F.R. § 73.3598 to give eligible entities, as defined herein, an opportunity to obtain a construction permit that would otherwise be forfeited and to receive additional time in which to complete construction.

[38] Diversity Committee Financial Issues Subcommittee Incentive-Based Recommendations (Jun. 14, 2004). *See* http://www.fcc.gov/DiversityFAC/.

[39] *Id.* at 8-9.

[40] As noted above, for purposes of this Order, we define "eligible entity" as any entity that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue. *See supra* ¶ 6. In the *Third Further Notice* below, we seek comment on whether we should adopt an alternative definition of "eligible entity." *See infra* ¶¶ 80-86.

given the financial loss they would almost certainly take when compared to sale of a fully-constructed and operating facility. Moreover, we believe that service to the public would be expedited by providing eligible entities up to 18 months additional time to complete construction of an expiring permit, rather than allowing the permit to expire and auctioning the allotment a second time.

2. Modification of Attribution Rule

17. We revise Note 2(i) to Section 73.3555 of our Rules,[41] which sets forth the Commission's equity/debt plus ("EDP") attribution standard, to facilitate investment in eligible entities and thereby promote diversity of ownership in broadcast facilities. We sought comment on this matter in the *Second Further Notice*,[42] and, in response, DCS submitted a proposal recommended by the MMTC EDP Task Force.[43] We adopt the Task Force's proposal, with modifications, and expect that this action will spur more investments in eligible entities that are seeking to enter the broadcast market for the first time.

18. *Background*. The Commission's broadcast attribution rules define which financial or other interests in or relationships with a licensee are counted in applying the broadcast ownership rules. The rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[44] At the same time, the attribution rules are designed to "permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry."[45] With regard to corporate entities, the broadcast attribution rules generally attribute voting stock interests of five percent or more.[46] Minority stock interests in a corporation with a single-majority shareholder, non-voting stock interests, warrants, debt, properly

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[41] 47 C.F.R. § 73.3555, Note 2(i).

[42] *Second Further Notice*, 22 FCC Rcd at 14229, App. A, proposal #8.

[43] DCS Initial Comments at 17-19. MMTC's EDP Task Force included the following members: Richard Bodorff, Steven Lerman, Jane Mago, Vincent Pepper, Eve Reed, Julian Shepard, Gregg Skall, Jerianne Timmerman, and S. Jenell Trigg, Esqs. *Id.* at 17, n.62.

[44] *Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross Interest Policy*, Report and Order, 14 FCC Rcd 12559, 12560 ¶ 1 (1999) ("*1999 Broadcast Attribution Order*"), *recon. granted in part, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1116-17, ¶¶ 40-44 ("*Broadcast Attribution Reconsideration Order*"), *stayed in part*, 16 FCC Rcd 22310 (2001).

[45] *See 1999 Broadcast Attribution Order*, 14 FCC Rcd at 12562-63, ¶ 5.

[46] 47 C.F.R. § 73.3555, Note 2(a). Generally, interests in partnerships and limited liability companies are attributable regardless of the amount or percentage of equity held. Limited partnership and LLC interests are not attributable, however, if the entity's governing agreement insulates the limited partner or LLC member from material involvement in the management or operations of the entity's media activities of the partnership and the entity so certifies to the Commission. 47 C.F.R. §73.3555, Note 2(f)(1); *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12613, 12619, ¶ 124, n.265 (outlining insulation criteria). However, for specified "passive" institutional investors only voting stock interests of 20 percent or greater are attributable. 47 C.F.R. §§ 73.3555, Note 2(b), 76.501, Note 2(b). Passive investors are investment companies, as defined by 15 U.S.C. § 80a-3 (mutual funds), insurance companies, and banks holding stock through their trust departments in trust accounts. *Id.*

insulated limited partnership and LLC interests, and unexercised options are not attributable, unless the EDP rule is triggered.[47]

19. The EDP rule is designed to resolve concerns that multiple non-attributable interests could be combined to allow the holders to exert significant influence over licensees such that these interests should be counted in applying the multiple ownership rules. Under the EDP rule, where an investor is either (1) a major program supplier (providing programming constituting over 15 percent of a broadcast station's total weekly broadcast programming hours); or (2) a same-market media entity subject to the broadcast multiple ownership rules, its interest in a licensee or other media entity will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33 percent of the total assets (equity plus debt) of the licensee or media entity.[48] In other words, attribution results where the financial interest exceeds 33 percent *and* there is a triggering relationship, *i.e.*, either the investor is a major program supplier or a same-market media entity subject to the broadcast multiple ownership rules. The EDP rule limits the single majority shareholder attribution exemption, as well as the exemptions from attribution applicable to non-voting stock, debt, and properly insulated interests in limited partnerships and LLCs.[49] The EDP rule applies to all of the broadcast ownership rules.

20. The Commission adopted the EDP rule as the result of its broad review of its broadcast attribution rules, begun in 1995.[50] It began that review for a number of reasons, including: (1) changes in the broadcasting industry and in the multiple ownership rules since its last revision of the attribution rules in the mid 1980s and its consequent desire to ensure that the attribution rules remained appropriate in identifying interests that should be counted for purposes of applying the multiple ownership rules; (2) concerns raised that certain non-attributable investments, while permissible under then-current rules, might permit a degree of influence that warrants their attribution; and (3) concerns that individually permissible cooperative arrangements between broadcasters were being combined so as to result in influence in multiple stations that the rules had intended to prohibit.[51] The Commission adopted the EDP rule to address those concerns.

21. As the Commission noted "[t]he function of our attribution rules is not to limit investment, but to identify influential interests over the core operations of a licensee that should be counted in applying the multiple ownership rules."[52] The Commission intended that the EDP rule would operate "in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad."[53]

22. Over the years, parties have expressed concern that the EDP rule may be deterring potential investment in broadcast entities owned by small businesses, including minority- and women-owned businesses, and investments in new entrants. For example, in its comments in the 2002 biennial review proceeding, DCS contended that the EDP rule has the "unintended consequence" of discouraging broadcasters from investing in any SDB at a level that would exceed the 33 percent EDP threshold anywhere in the country, regardless of whether the potential investor is currently a same-market media

[47] 47 C.F.R. § 73.3555, Notes 2(e), (f), (h), & (i).

[48] 47 C.F.R. § 73.3555, Notes 2(a) & (i).

[49] *See 1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579, ¶ 36.

[50] *Id.*

[51] *Id.* at 12561, ¶ 2.

[52] *Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1100, ¶ 6.

[53] *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12573, ¶ 27.

entity or a major program supplier to the SDB.[54] DCS stated that broadcasters consider small, potentially attributable interests disadvantageous because such non-strategic interests could become attributable upon a sizable merger or acquisition that would result in the financial interest holder's satisfying the second prong and having its otherwise nonattributable interest become attributable.[55] In comments to the *Second Further Notice*, DCS states that its experience has shown that the EDP rule has had the unintended effect of too severely restricting small business financing, especially in the form of seller financing that so often is vital to new entrants' ability to close a transaction.[56]

23. Indeed, commenters have proposed a variety of revisions to the EDP rule, based on their concerns that minority-owned or smaller entities were having difficulty obtaining financing. In the 2002 biennial review proceeding, DCS proposed that the Commission exempt from attribution "otherwise nonattributable EDP interests in SDBs where: (1) the EDP interest holder merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP interest in an SDB, (2) the unrelated transaction occurs at least a year after the EDP relationship was formed, (3) the unrelated transaction would otherwise cause the EDP interest holder's interest in the SDB to become attributable, and (4) the EDP interest holder and the SDB proffer an affirmative showing that the EDP interest holder does not exercise undue influence over the SDB."[57]

24. In the Section 257 proceeding,[58] NAB also proposed revisions to the EDP attribution rule, arguing that the rule discourages investment in new entrants, including businesses owned by minorities or women. It stated that the rule discourages spinoffs to new entrants because merging group owners are reluctant, or unable, to transfer stations to minorities, women, or other new entrants in the local market because these potential owners are more likely to need investments from the merging parties.[59] Therefore, it urged the Commission to repeal the EDP rule, or, alternatively, to narrow the rule by

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[54] Initial Comments of Diversity and Competition Supporters at 110-12 (Jan. 2, 2003) ("DCS 2002 Biennial Review Comments").

[55] *Id.*

[56] DCS Initial Comments at 17.

[57] DCS 2002 Biennial Review Comments at 112. In 1999, when the Commission adopted the EDP rule, MMTC similarly argued on reconsideration that the Commission should exempt from attribution any existing interest in an SDB that would trigger the EDP rule if the interest holder acquired another media entity in the same market at a later date. *See* Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, MM Docket Nos. 94-150, 92-51, 87-154 (Oct. 18, 1999). MMTC also sought to exempt from the attribution rules any interest otherwise attributable under the EDP rule that would allow an SDB to acquire or build out an unbuilt permit. *Id.* MMTC requested that the Commission vest the interest holder with the right to the processing of any other of the interest holder's applications regardless of the duopoly or cross-ownership rules. MMTC argued that the vested right would provide the larger broadcaster investing in the SDB with "the secure knowledge that its public spiritedness in making an especially risky investment in an SDB will be rewarded with a guaranteed opportunity to acquire a full complement of local properties." *Id.* at 4. The Commission deferred consideration of MMTC's request to create exemptions for SDBs because it was hesitant to adopt any preferences based on minority status since the Supreme Court's decision in *Adarand Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1109-10, ¶ 24. In addition, in response to NAB's request on reconsideration, the Commission "found no reason to believe that the EDP rule would unduly curb investment in smaller, minority stations." *Id.* at 1102, ¶ 9.

[58] *Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies*, Public Notice, MB Docket No. 04-228, 19 FCC Rcd 10491 (MB Jun. 15, 2004).

[59] Comments of the NAB (Oct. 12, 2004), at 3-5.

applying it only to investors that are also major program suppliers, or by not attributing investments comprised solely of debt.[60]

25. In 2004, the Diversity Committee recommended that the Commission allow entities to invest in SDBs without triggering the EDP rule in order to enable SDBs to buy a station, retain an existing one, or to build out a construction permit.[61] Under its proposal, a firm would be able to own more than 33 percent of the SDB, or provide more than 15percent of the weekly programming without ownership attribution. This proposal would allow entities to increase their investments in new entrants without implicating the multiple ownership rules and, according to the Diversity Committee, potentially resolving impediments to financing new entrants and small businesses. Further, the Diversity Committee recommended that the Commission exempt an entity from attribution that invests in an SDB at levels that do not trigger the EDP rule, but subsequently acquires other broadcast interests in the market, which otherwise would trigger the EDP rule. It argued that this would encourage investments by removing any risk of future attribution of currently nonattributable interests.[62]

26. In response to the *Further Notice* in this proceeding, DCS and several other parties proposed revisions to the EDP rule to promote investment. American Women in Radio and Television, Inc. proposed that the Commission eliminate the EDP rule for the limited purpose of allowing large broadcasters to invest in small businesses owned by women and minorities, but cautions that stringent guidelines are needed to prevent ownership fraud.[63] NAB suggested eliminating or revising the EDP rule to improve access to capital and provide benefits to small businesses, new entrants, and existing broadcasters.[64] Nexstar Broadcasting, Inc. proposed relaxing the EDP rule for otherwise non-attributable interest holders of small business entities and/or creating incentives for larger broadcasters to "incubate" small business broadcast owners.[65]

27. In early 2007, MMTC convened an EDP Task Force to revise the EDP Rule to permit broadcasters to provide financing to a small business without materially conflicting with the purpose of the EDP Rule.[66] As a result of its deliberations, the Task Force recommended the following revisions to Section 73.3555, Note 2(i) of the Rules and DCS submitted the proposal in its comments in response to the *Second Further Notice*:

> (i) Notwithstanding paragraphs (e) and (f) of this NOTE, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:
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> (1) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total

[60] *Id.* at 5. NAB also made similar arguments concerning the EDP rule on reconsideration of the *Attribution Report and Order. See Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1103, 1109, ¶¶ 10, 23. The Commission rejected these arguments and denied NAB's petition for reconsideration.

[61] http://www.fcc.gov/DiversityFAC/040614/recommend/IncentiveBasedRegulationsRecommend.doc.

[62] *Id.*

[63] Comments of American Women in Radio and Television, Inc at 9-10 (Oct. 23, 2006),; *see also* Comments of American Women in Radio and Television at 8 (Oct. 12, 2004).

[64] Comments of the NAB at 125 (Oct. 23, 2006).

[65] Comments of Nexstar Broadcasting, Inc. at 20 (Oct. 23, 2006).

[66] DCS Initial Comments at 17.

asset value, defined as the aggregate of all equity plus all debt, of that media outlet provided, however, that the equity and debt may exceed 33 percent in either of the following circumstances to enable a small business, as defined under the U.S. Small Business Administration's small business size standards set forth in 13 C.F.R. §121.201, to acquire a broadcast station: (i) The combined equity and debt of the interest holder described in section (2) below must be less than 50 percent, or (ii) Where there is no equity, the debt may not exceed 80 percent of the asset value of the station being acquired, provided that the lender does not hold an equity interest in the licensee or any related person, does not hold an option or other right to acquire an equity interest in the future and has not received a promise of such a right, unless such combined interest has been granted subject to an appropriate waiver as provided at Section 1.3 of the Commission's Rules; and (2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph (i); or (ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple ownership rule or cross-media limit that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.[67]

28. In response to the *Second Further Notice*, numerous parties supported modifying the EDP rule. NAB contends that the EDP rule has the "unintended consequence" of discouraging broadcasters from investing in SDBs.[68] In support of EDP Task Force proposal, DCS states that if adopted, it would authorize much more substantial levels of seller paper and other broadcaster financing of small businesses without adding any material risk of abuse. It also argues that it is among the easiest and most important steps the Commission could take to expand access to capital for minority and women broadcasters.[69] ION Media Networks supports modification because it would enhance opportunities for minority-owned businesses to obtain capital for acquisitions.[70] Financial Services Companies supports modification because it agrees that such action would restore seller paper, which new entrants need in order to show financers that a seller has confidence in a buyer.[71] No commenters opposed the EDP modification proposals.

29. *Discussion.* In 2000, when the Commission deferred action on requests raised on reconsideration that it carve out exemptions to the EDP rule, there was insubstantial evidence in the record that the rule would deprive entities of financing necessary to enter the broadcast market.[72] Though the Commission had attempted to tailor the new rule to avoid unduly limiting investment, it did not have sufficient experience with the actual operation of the new rule in the media marketplace to determine at that time whether or not the EDP rule as tailored actually resulted in the unintended consequence of

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[67] *Id.* at 17-18.

[68] NAB Comments at 6.

[69] DCS Initial Comments at 17.

[70] Reply of ION Media Networks at 4-5 (Nov. 1, 2007).

[71] Reply of Financial Services Companies in Response to the Second Further Notice of Proposed Rulemaking at 2 (Nov. 1, 2007).

[72] *See Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1103, ¶¶ 9, 23.

unduly limiting investment in small businesses. Therefore, the Commission rejected proposals to waive or limit the EDP attribution rule to enhance investment in small businesses or minority-owned stations.[73]

30. The EDP rule has now been in effect for more than eight years. During this time period, a large and varied number of commenters have evidenced the financing problems that small businesses, including those owned by women and minorities, have faced. They have repeatedly alleged that relaxing the EDP rule may foster investments in small businesses by larger broadcasters and, therefore, may make it easier for eligible entities to obtain financing. As the Commission stated when it adopted the rule, the function of our attribution rules, including the EDP rule, is to identify influential interests to be taken into account for purposes of compliance with the multiple ownership rules. It is not the purpose of the attribution rules to limit investments, or to limit investment opportunities available to otherwise qualified broadcast licensee candidates. Thus, in adopting the EDP attribution rule, we tried to balance the purpose of the rule with our goal of not unduly limiting investment. We believe that relaxing the rule as specified herein would be appropriate based on our eight years of experience with the operation of the rule.

31. Specifically, we will allow the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold set forth in Note 2(i) to Section 73.3555 of our Rules without triggering attribution where such investment would enable an eligible entity to acquire a broadcast station provided: (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity.[74] These higher investment limits in eligible entities also apply for purposes of determining eligibility for the new entrant bidding credit in broadcast auctions, as the standards for determining attribution in a winning bidder parallel the attribution standards in Section 73.3555, Note 2, which we are revising in this proceeding.[75]

32. There is ample support from the Task Force participants and from parties in the record to adopt this revision, none of which opposed it. We believe that these higher levels of investment are appropriate and will facilitate the financing of eligible entities without materially undermining our attribution rules. With respect to a combined equity and debt interest, we note that the new threshold still does not permit a controlling interest. With respect to investments restricted to debt, we note that, although the revised permissible level is substantially higher than that allowed under the current rule, the debt must be nonconvertible and cannot be coupled with any equity interest, option, or promise to acquire an equity interest in the future. Thus, the holder of the debt would have limited ability to influence the eligible entity. Under such circumstances, attribution is not warranted, especially given the significant interest in facilitating investment in such entities. Moreover, because we are applying the exemption to

[73] *Id.*

[74] We are not adopting the Task Force's waiver language. There is no evidence in the record that it is necessary to specifically provide for such waivers in addition to the other circumstances in which waivers of the multiple ownership rules may be sought in order to advance the goals of this proceeding. Further, to the extent that the Task Force seeks to make clear that already existing combinations, permitted because of an outstanding waiver, should not be disturbed, that does not need to be specified in the rule.

[75] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, Memorandum Opinion and Order, 14 FCC Rcd 12541, 12543 ¶ 5 (1999) (finding it appropriate to attribute the mass media interests of investors holding more than a 33% equity and/or debt interest in a broadcast auction bidder claiming new entrant status); *see also* 47 C.F.R. § 73.5008(c).

eligible entities, rather than SDBs as MMTC previously proposed, we also conclude that there are no constitutional concerns with adopting this proposal.

33. We decline to adopt NAB's proposals. First, we find that repeal of the EDP rule in its entirety is unnecessary to achieve our goals. We believe that the EDP rule, in general, continues to resolve concerns that certain interest that otherwise would be non-attributable but for the EDP rule, could be combined to allow the holders to exert significant influence over licensees. In addition, NAB has not submitted any evidence in the record to suggest that limiting the exemption to major program suppliers would further our goals of balancing our concerns about capturing interests that could allow the holders to exert significant influence over licensees, while at the same time avoiding unduly limiting investment in eligible entities. We have considered and modified NAB's suggestion of not attributing investments comprised solely of debt in our adoption of the MMTC Task Force proposal, which would allow an entity to hold 80 percent of the debt without having its interest attributed under the EDP rule. Finally, we find that the Task Force's proposal, as opposed to other proposals discussed herein, provides for minimal changes to our existing rule while at the same to specifically targeting the concerns raised – removing potential deterrence for eligible entities to obtain financing to purchase broadcast stations.

34. In conclusion, we are modifying the EDP rule today in response to concerns that it may be hindering investment in eligible entities. We find sufficient evidence in the record to show that difficulty in accessing capital investment currently is inhibiting diversity of ownership of broadcast stations and new entry. Moreover, we think it is reasonable to conclude that modification of the EDP rule could alleviate or, at the least minimize this problem. We believe that this modification will further our goal of improving access to capital in order to foster diversity of ownership, new entry, and, ultimately, the provision of new programming and other services to the public. We find sufficient evidence in the record warrants a change in our policy. We also believe that the changes we are making today will retain regulatory certainty for entities in planning their financial transactions, an important goal of the attribution rules, which are designed as bright line tests. Finally, we believe that the public interest weighs in favor of allowing existing broadcasters to acquire a minority equity ownership interest in an eligible entity in order to provide the opportunity for such a new entrant to enter the broadcasting market.

3. Distress Sale Policy

35. *Background.* The Commission's distress sale policy permits "a licensee whose license has been designated for revocation hearing, or whose renewal application has been designated for hearing on basic qualifications issues, to assign its license prior to commencement of the hearing to a minority controlled entity" at a price that is substantially below its fair market value.[76] Under this policy, a licensee facing the possible loss of its license can sell the station in a "distress sale." The licensee faces a substantial financial penalty as a result of the "distress" sale but recoups a portion of the value of its station and avoids the revocation or renewal hearing. The Commission saves the time and expense of conducting a revocation or renewal hearing and subsequent appeals. Most important, the station is placed expeditiously in the hands of a qualified operator that might otherwise have few opportunities to acquire a station and the public does not lose service from a local broadcast station. Although the U.S. Supreme Court initially affirmed the constitutionality of the distress sale policy,[77] it later overruled that decision "[to] the extent that" the former case was inconsistent with the principle that racial classifications imposed by the federal government are subject to strict scrutiny, and thus may be upheld as constitutional

[76] *Martin W. Hoffman*, Memorandum Order and Opinion, 15 FCC Rcd 22086, ¶ 3 (2000). *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 851 (1982); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 983 (1978).

[77] *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 600-01 (1990).

"only if they are narrowly tailored measures to further compelling governmental interests."[78] *Adarand* threw the constitutionality of our distress sale policy into considerable doubt and highlights the need to strengthen its constitutional foundation.[79]

36. The Financial Issues Subcommittee of the Diversity Committee has proposed that the Commission "reaffirm the viability and routine applicability of" the Commission's distress sale policy.[80] The Subcommittee also suggested that, in the operation of the policy, the Commission "assess each distress sale purchaser's ability to promote diversity, such as by requiring a showing of the *bona fides* of the purchaser's company, its commitment to promoting diversity and providing service for a substantial length of time, and its plans to serve the needs of the public and to correct any deficiencies in station operations caused by the distress sale seller."[81]

37. DCS maintains that the distress sale policy should be "redesigned as a race-neutral policy that is likely to benefit minority broadcasters."[82] They state that "under the Diversity Committee's formulation, a potential buyer, of any race, could demonstrate that its proposed service to the community would address needs unmet by existing media" and that "[s]ervice to minority audiences could be an unmet need."[83] In this way, they suggest that the policy can be "redesigned as a race-neutral policy that is likely to benefit minority broadcasters."[84]

38. *Discussion.* We agree with DCS that it would be beneficial to put the distress sale policy on a sound constitutional footing by making it race-neutral. We are reluctant, however, to require entities that are eligible to purchase stations under the policy to demonstrate that their proposed service to the community would address needs unmet by existing media. First, this would require the Commission to sit in judgment of what "needs" are unmet by existing media, and also whether the programming service proposed by the prospective buyer would fulfill those needs. The Commission historically has been reluctant to become involved in making programming judgments of this kind due to First Amendment sensitivities. In addition, to the extent that "needs" were defined in part through the use of racial classifications, such a revised policy would not eliminate the constitutional concerns referenced above. Furthermore, if we were to award a license based on programming commitments, we would have to adopt measures to ensure that the buyer lives up to its commitments so that the perceived benefits of the transaction actually materialize.[85] This would further entangle the Commission in assessing the programming of its licensees and would be administratively burdensome as well. For these reasons, we decline to adopt this proposal.

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[78] *See Adarand,* 515 U.S. 200, 227 (1995).

[79] *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 21-22 (D.C. Cir.), *reh'g denied*, 253 F.3d 752 (D.C. Cir. 2001); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1988) (striking down Commission equal employment opportunity rules that resulted in racial classifications and were thus subject to strict scrutiny under *Adarand*).

[80] Report and Recommendations of the Financial Issues Subcomm. of the Advisory Comm. for Diversity in the Digital Age at 18-19 (Jun. 14, 2004).

[81] *Id.*

[82] DCS Initial Comments at 36.

[83] *Id.*

[84] *Id.*

[85] *See Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

39. Instead, we have decided to place the distress sale policy on a sound constitutional and administrative footing by allowing a licensee whose license has been designated for a revocation hearing or whose renewal application has been designated for a hearing on basic qualifications issues to sell its station prior to the commencement of the hearing to an "eligible entity," as defined above. Like the other measures we adopt today, we believe that this will promote diversity of ownership in the broadcast industry by making it easier for small businesses and new entrants, including minority owned businesses, to purchase stations. This, in turn, may result in a greater diversity of program services, including services that are responsive to local needs and interests and the interests of underserved audiences. Similar to our new rule facilitating the transfer of expiring construction permits to eligible entities, the modified distress sale policy can expedite new service or facilitate the continuation of existing service to the public by avoiding lengthy revocation or renewal hearings and subsequent appeals, and it also conserves substantial private and Commission resources that would otherwise be devoted to such proceedings. Thus, we view this modified policy as a "win-win" for diversity of ownership, for the swift delivery of new services to the public, and for the conservation of public and private resources.

4. Ban on Discrimination in Broadcast Transactions

40. We adopt a rule that bars discrimination on the basis of race or gender and related protected categories in broadcast transactions.[86] DCS, the Commission's Diversity Committee, and Consumers Union all advocate that the Commission take action in this area.[87] Specifically, this rule will state that:

> No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations (as defined in this part).

41. We conclude that adoption of a nondiscrimination rule with respect to sales is consistent with our Section 257 statutory mandate,[88] and will advance the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services.[89] We also conclude that this rule will advance the Commission's public-interest mandate to foster viewpoint diversity by promoting

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[86] *See* 47 U.S.C. § 151; *see also* 47 C.F.R. § 73.2080(a); *cf* 42 U.S.C. § 2000e.

[87] DCS Initial Comments at 5-7 & nn. 22-32; Advisory Committee on Diversity, *Transactional Transparency Recommendations*, at 4 (May 14, 2004); Consumers Union Comments at 30.

[88] 47 U.S.C. § 257 (directing the Commission to identify and eliminate, through regulatory action, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications and information services, in order to promote the policies and purposes of the Act favoring diversity of media voices, vigorous economic competition, technological advancement, and the promotion of the public interest, convenience and necessity).

[89] 47 U.S.C. § 309(j)(4)(D) directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provisions of spectrum-based services. This provision's reference to tax certificates and other procedures could arguably be interpreted as authorizing measures beyond those related to the competitive bidding process in order to promote opportunity for minorities and women to participate in the provision of spectrum-based services.

the dissemination of licenses to a wide variety of applicants.[90] Moreover, we agree with DCS that "discrimination simply has no place" in the broadcast industry.[91]

42. Sellers will be required to certify compliance with this rule against discrimination by checking a box on Form 314 or 315 applications. Consequently, this new rule will both remind sellers of these prohibitions and require them to certify to the government that they have not been violated. We therefore amend Form 314 and 315 accordingly.

5. "Zero Tolerance" Policy for Ownership Fraud

43. We adopt DCS's proposed "zero tolerance" policy for ownership fraud, as outlined below. We also reaffirm our principle that applicants' representations to the Commission must be complete and correct.[92]

44. DCS asserts that ownership fraud occurs when real-parties-in-interest structure transactions so that the principals of the putative applicant entity have no real voice in practice, and that such fraud may be relatively common.[93] Consumers Union also "strongly supports" these concerns.[94]

45. The Commission agrees that ownership fraud could impede both the Commission's efforts to assess or increase media ownership diversity. Rules granting preferences to qualified applicants encourage applicants to qualify for the preference. Inevitably, some potential applicants will try to claim the preference by creating an appearance of qualification that does not accord with reality. Because the risk of such fraud arises whenever some applicants can obtain a preference, we agree that the Commission should adopt measures to deter such fraud. We conclude that adopting this "zero tolerance" policy will help deter and detect ownership fraud. [95]

[90] This mandate has been recognized repeatedly by the courts. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 409 (1969).

[91] DCS Initial Comments at 7.

[92] 47 C.F.R. § 1.65.

[93] DCS Initial Comments at 19-20 & nn.67-69 (citing allegations made in eight cases arising between 2004 and 2007, but arguing that limited enforcement resources ensured that more such cases went undetected). The Commission, however, can adopt measures to deter ownership fraud without ruling on DCS's claim that ownership fraud may be widespread. Rules granting preferences to qualified classes of applicants are meant to encourage potential applicants to qualify for the preference. Inevitably, some potential applicants will try to claim the preference by creating an appearance of qualification that does not accord with reality. Because the risk of such fraud arises whenever some applicants can obtain a preference, the Commission can adopt measures to deter such fraud without assessing its current prevalence.

[94] Consumers Union Comments at 30.

[95] In 2000, the Commission adopted aspects of a proposed "zero tolerance" policy for employment discrimination. *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Dockets 98-204 et al.*, Report and Order, 15 FCC Rcd 2329, 2362, ¶ 72 (2000), *rev'd in part on other grounds, MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (adopting a "zero-tolerance policy" for employment discrimination including proposals to (1) consider non-final allegations of discrimination if they were well-supported by a large number of individuals against one broadcast station or cable unit or shocking to the conscience or particularly egregious; (2) potentially consider as evidence of discrimination evidence showing that "a broadcaster or cable entity engages in a pattern of deliberate and systematic violations of the EEO program requirements" that deny women and minorities access to job opportunities."). But the Commission agrees that this zero-tolerance policy should differ slightly from those used in the context of employment discrimination.

46. Moreover, because the Commission relies upon applicants' representations to assess minority and female ownership, inaccurate or misleading submissions not only violate the Commission's rules, they also hinder evaluation of its efforts to promote viewpoint and ownership diversity. Consequently, a "zero tolerance" policy for ownership fraud will facilitate both law enforcement and information-gathering efforts. DCS also argues that we should adopt a policy of random auditing in order to ensure that ownership fraud is not occurring.[96] We do not believe that such a practice is either necessary or advisable. The FCC has the authority to audit applications to ensure compliance with all Commission rules, including our ownership rules. Nevertheless, it is not possible for the FCC to determine now how these auditing resources should be most efficiently allocated in the future when the issues that will be before the Commission are, as of yet, unknown and unknowable.

47. We also agree that the Commission should resolve ownership-fraud complaints expeditiously. Consequently, we agree with DCS that the Commission should "fast track" ownership-fraud claims and seek to resolve them within 90 days.

48. In addition, we agree that the Commission should, when permissible, provide confidentiality to whistleblowers who disclose potential ownership fraud. But we believe that we lack the legal authority to adopt DCS's proposal to help whistleblowers secure alternative employment. Moreover, even if we had such authority, DCS has not shown that it should be exercised. Such efforts could create conflicts of interest or the appearance of impropriety if the Commission were to assist whistleblowers seeking employment within industries regulated by the Commission.[97] Consequently, we adopt a "zero tolerance" policy as a general statement of policy guiding the enforcement of our media ownership disclosure and reporting rules.

6. Non-Discrimination Provisions in Advertising Sales Contracts

49. The Commission also adopts DCS's proposal to require broadcasters renewing their licenses to certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination, as outlined below.[98] Reports that some advertising contracts contain "no urban/no Spanish dictates" that are intended to minimize the proportion of African American or Hispanic customers patronizing an advertiser's venue—or that presume that African Americans or Hispanics cannot be persuaded to buy an advertiser's product or service—indicate potential violations of U.S. nondiscrimination laws.[99] For over 20 years, the Commission has been aware of the insidious practices of certain advertisers, rep firms and advertising agencies of imposing written or unwritten "no urban/no Spanish" dictates.[100] Discriminatory practices have no place in broadcasting.

[96] DCS Initial Comments at 19-20.

[97] The Commission recognizes that the Freedom of Information Act and other federal laws may require the Commission to disclose otherwise confidential data under appropriate circumstances. Nevertheless, the Commission agrees that it should preserve the confidentiality of whistleblowers when federal law permits it to do so.

[98] DCS Initial Comments at 26-27 & nn. 93-96; *see also* Consumers Union Comments at 30.

[99] *See* DCS Initial Comments at 26, n.94.

[100] Kofi Ofori in "When Being Number One Is Not Enough: The Impact of Advertising Practices On Minority-Owned And Minority-Formatted Broadcast Stations," Civil Rights Forum on Communications Policy (1999). This study, which was sponsored by the Commission, examined discriminatory advertising practices and their impact on minority owned and minority formatted broadcasters, and found that radio stations that are successful in attracting large minority audiences still do not attract the dollars their ratings should earn.

50. We reject DCS's suggestion that reports about "no urban/no Spanish dictates" require the Commission to dictate the specific language that advertising contracts can or should contain. Reports indicating that some advertising contracts have contained potentially impermissible provisions do not permit the Commission to dictate the language of those contracts. Indeed, serious First Amendment concerns could arise were the Commission to do so. Consequently, we conclude that it is appropriate for the Commission to require broadcasters renewing their licenses to certify that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses. As such, we will amend Form 303-S to require broadcasters to make such a certification.

7. Longitudinal Research on Minority and Women Ownership Trends

51. DCS and Consumers Union argue that the Commission should conduct annual longitudinal studies of minority and female ownership.[101] The Commission agrees with these concerns. For the reasons noted below, we will commence such research once we have resolved the data-gathering issues raised in the accompanying *Third Further Notice*.

52. We agree that longitudinal studies could help the Commission track ownership trends over time. We also agree that such studies could help scholars and other interested parties assess the impact of rule changes on minority and female ownership. We agree that this, in turn, could help provide real-time feedback on the impact of the Commission's rules and policies on the access to capital, on the availability of spectrum and opportunity to minority and female-owned entities, and the ability of such entities to serve the public. We also agree that conducting such studies annually would help it build a more robust database that could better illuminate the optimal intervals for conducting future studies.

53. Consequently, although we disagree with assertions that the Commission "has absolutely no idea" about the current state of female and minority broadcast ownership, we do recognize that our current data-collection efforts could be improved. Accordingly, we propose to modify our existing reporting instrument concerning broadcast ownership, Form 323, by augmenting the information it collects, as set forth in the *Third Further Notice*.[102] Once we have collected improved information, we will conduct longitudinal studies as suggested by the commenters.[103]

8. Local and Regional Bank Participation in SBA Guaranteed Loan Programs

54. The Commission also adopts the proposal from DCS, the Diversity Committee and NAB to increase Commission efforts to encourage local and regional banks to participate in SBA-guaranteed

[101] *See id.* at 30-31 & nn. 110-115; Consumers Union Comments at 31 (Oct. 1, 2007).

[102] These concerns do not require the Commission to defer action on all of the DCS proposals. For example, both Consumers Union and the Consumer Federation of America agree that some of the proposals can be justified based upon the imperfect data in the record. *Compare* Consumers Union Comments at 29-32 (urging the Commission to adopt certain MMTC proposals), *with id.* at 4 (urging the Commission "to proceed with caution, and first establish the portfolio of research that is needed to adequately make these important public policy decisions" that relate to increasing ownership diversity"). Indeed, most commenters did not dispute the utility of better ownership data, but they still supported "proposals that promote diversity of ownership in the broadcast industry." NAB Comments at 9. The National Association of Black-Owned Broadcasters, Inc. and The Rainbow/PUSH Coalition, Inc. also support the adoption of "proposals to increase minority ownership *in this proceeding*." Comments of The National Association of Black-Owned Broadcasters, Inc. and The Rainbow/PUSH Coalition, Inc. at 3 (Oct. 1, 2007) (emphasis added). Therefore, the Commission has adopted herein proposals aimed at increasing diversity in media ownership even though their utility must be assessed based upon the record provided by the Commission's existing ownership data.

[103] We seek comment in the *Third Further Notice* as to how often these studies should be conducted.

loan programs to facilitate broadcast and telecommunications-related transactions.[104] Through its Office of Communications Business Opportunities, the Commission will work closely with the SBA to educate and encourage more local and regional banks (which have not been heavily involved in broadcast and telecommunications lending) to make loans through the SBA's 7(a) or 504 programs.

55. Such efforts could be useful because these types of transactions raise unique valuation and logistical issues. By increasing outreach to local and regional banks and to the SBA, the Commission can better assist both local banks and SBA programs to facilitate such transactions. Moreover, we believe that this effort will provide potential lenders with special expertise regarding transactions that require lending based—not on hard assets—but on cash flow and assets that primarily include a revocable Commission license. Absent such efforts, uncertainty about asset valuation could cause local and regional banks to refuse to facilitate otherwise viable transactions. Such outcomes could frustrate Commission efforts to promote ownership and viewpoint diversity.

9. Duopoly Priority for Companies that Finance or Incubate an Eligible Entity

56. The Commission adopts DCS's and the Diversity Committee's proposal that any entity financing or incubating an eligible entity[105] should be given a priority if it files for a duopoly simultaneously with non-eligible entities in a market that can only support one additional duopoly, as outlined below.[106] DCS and the Diversity Committee argue that "when the local television ownership rules permit only one additional duopoly in a market, a 'race to the courthouse' could determine which duopoly application is processed first."[107] We agree that one way to cure this problem is to create an incentive plan under which a company financing or incubating an eligible entity would be guaranteed a priority if it files for a duopoly simultaneously with other entities in a market that can support only one additional duopoly. This vested priority in a duopolization queue would reward the large broadcaster that had incubated or financed an eligible entity if it filed simultaneously for a duopoly with a non-incubating entity. Moreover, such a priority in the duopolization queue could have substantial value and therefore provide the added benefit of an incentive for eligible entity financing. The Commission agrees that in this situation, a general statement of policy that grants priority to entities funding or incubating eligible entities would promote ownership diversity.

10. Extension of Divestiture Deadlines in Certain Mergers

57. We adopt DCS's proposal to consider requests to extend divestiture deadlines in mergers in which applicants have actively solicited bids for divested properties from eligible entities.[108] This proposal was also supported by the Commission's Diversity Committee.

58. The Commission has encouraged companies undertaking major transactions to assist small businesses, including those owned by minority and female entrepreneurs interested in purchasing divested

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[104] DCS Initial Comments at 33-34 & nn.119-121; Advisory Committee on Diversity, *Financial Issues Recommendations* at 16 (Jun. 14, 2004); NAB Comments at 8; *see also* Consumers Union Comments at 31.

[105] The proposal contemplates a benefit in exchange for financing or incubating an SDB. However, as noted above, for purposes of this Order we define "eligible entity" as any entity that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue. *See supra* ¶ 6. In the *Third Further Notice* below, we seek comment on whether we should adopt an alternative definition of "eligible entity." *See infra* ¶¶ 80-86.

[106] DCS Initial Comments at 36-37 & nn.128-129; Advisory Committee on Diversity, *Financial Issues Recommendations* at 17-18 (Jun. 14, 2004).

[107] DCS Initial Comments at 36.

[108] *Id.* at 39-40 & nn. 134-36.

properties. But such efforts may take time, and such entities may need additional time to secure funding to complete potential transactions.[109] Consequently, while rigidly enforced divestiture deadlines might be intended to increase minority ownership and viewpoint diversity, they could sometimes have the perverse effect of disadvantaging potential minority owners.

59. Because divestiture deadlines are intended to prevent undue concentration of media ownership, requests to extend these deadlines in order to facilitate acquisition of divested properties by small businesses could promote both diversity in media ownership and the objective that divestiture seeks to achieve. Consequently, the Commission will adopt a policy of considering requests to extend divestiture deadlines when applicants have actively solicited bids for divested properties from eligible entities.

60. The Commission also adopts DCS's proposal that entities availing themselves of an extension must either sell a given property to an eligible entity within the extended deadline or have the property placed in an irrevocable trust for sale by an independent trustee to an eligible entity. This would prevent potential abuse of the extensions and ensure that they will actually result in sales to eligible entities.

11. Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities

61. We adopt DCS's proposal that the Commission permit the assignment or transfer of grandfathered radio station combinations intact to *any* buyer, not just an eligible entity as currently permitted,[110] provided that such a buyer files an application to assign the excess stations to an eligible entity, or to an irrevocable divestiture trust for purposes of ultimate assignment to an eligible entity, within 12 months after consummation of the purchase of the grandfathered cluster.[111] This proposal is the subject of a *Petition for Rulemaking* filed by MMTC on July 12, 2007. The Commission sought comment on it in a Public Notice dated August 6, 2007.[112] Commenters encouraged the Commission to adopt the proposal, including a coalition of 48 parties, comprised of 21 radio broadcast companies, five financial institutions and capital providers, 16 media brokerages, and six public interest and civil rights organizations.[113] DCS contends that this proposal would promote small business investment in broadcasting by providing additional time and flexibility to raise the capital necessary to purchase the

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[109] *Letter to Henry Rivera, Chairman of the Advisory Committee on Diversity for Communications in the Digital Age, from Kevin J. Martin, Chairman of the Federal Communications Commission* (Sept. 27, 2007). Chairman Martin has encouraged the creation of "educational conferences to be conducted by the communications industry whenever a significant ownership-related transaction is proposed to the Commission. These conferences would serve to encourage and facilitate communications companies that engage in transactions and license transfers to include small businesses, minorities and women entrepreneurs, and other designated entities during negotiations on assets and properties identified for divestiture."

[110] In the *2002 Biennial Review Order*, the Commission permitted the sale of grandfathered station combinations to "eligible entities," which were defined as entities that would qualify as a small business consistent with SBA standards for its industry grouping. *2002 Biennial Review Order*, 18 FCC Rcd at 13811, ¶ 489. This proposal is similar to another that advocates modifying the class of entities that may acquire a grandfathered combination, which is addressed below. *See infra*, ¶ 65.

[111] DCS Initial Comments at 40-41.

[112] *See* Petition for Rulemaking of the Minority Media and Telecommunications Council to Facilitate the Entry of Small Businesses into Local Radio Markets, RM-11338 (Jul. 12, 2007).

[113] *See* Reply of 48 Parties (Oct. 5, 2007).

excess stations. We agree. In order to ensure that this proposal will not undermine our local radio ownership rule, we will require non-eligible entities seeking to acquire a grandfathered radio station group to file the divestiture trust agreement with its initial application to allow the Commission to evaluate the proposed trust at the outset.[114]

12. "Access to Capital" Conference

62. The Commission adopts DCS's and the Diversity Committee's proposal to convene an access-to-capital conference.[115] This proposal was also strongly supported by NAB, which identified access to capital as "the largest roadblock to a more diverse broadcast industry."[116] Moreover, we agree with commenters that eligible entities and new entrants ought to have an opportunity to build a dialogue with their new fellow broadcasters.[117]

63. With the counsel of its Diversity Committee, the Commission will attempt to organize such a conference and will tentatively schedule it to be held during the first half of 2008 in New York City. As recommended by the Diversity Committee, this conference will focus on the investment banking and private equity communities, and the opportunities for small businesses, new entrants, and designated entities to acquire access to financing and thereby facilitate entry to ownership in the communications sector. Moreover, the Commission will seek to facilitate the creation of educational conferences whenever a significant ownership transaction is proposed to the Commission.[118]

13. Guidebook on Diversity

64. The Commission adopts the proposal to create a guidebook on diversity that would focus on activities that companies can make to promote diversity in ownership and contracting.[119] DCS argues that voluntary industry efforts to promote diversity would be more successful if the Commission were to "provide the industry with the necessary tools, including solid, comprehensive information on what diversity initiatives are most likely to have an impact and how companies can most effectively implement those initiatives."[120] The Commission agrees, and will thus create *Increasing Diversity in the Media and Telecom Industries*, a guidebook based tentatively upon the title and structure proposed by the Diversity Committee.[121]

C. Other Proposals

1. Transfer of Grandfathered Station Combinations to SDBs

65. DCS proposes that the Commission permit the licensee of a grandfathered station combination to sell the cluster intact to an SDB.[122] No commenter other than DCS specifically addressed

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[114] *See* MMTC *ex parte* comment (Nov. 19, 2007).

[115] DCS Initial Comments at 51-52 & n.175; Advisory Committee on Diversity, *Interim Report of the Access to Capital Subcommittee of the Diversity Committee,* (Sep. 27, 2007).

[116] NAB Comments at 8; *see also* DCS Initial Comments at 51-52.

[117] DCS Initial Comments at 52-53.

[118] *Id.*

[119] *Id.* at 52-53 & n. 176.

[120] *Id.* at 52.

[121] Advisory Committee on Diversity, *Preparation of a Guidebook on Diversity,* (Sep. 27, 2007).

[122] DCS Initial Comments at 7-9.

this proposal. We decline to adopt it. In the *2002 Biennial Review Order*, the Commission permitted the sale of grandfathered station combinations to "eligible entities," which were defined as entities that would qualify as a small business consistent with SBA standards for its industry grouping.[123] As noted above, we adopt the same definition for the class of entities that benefit initially from the actions we take in this *Report and Order*. Should we adopt a definition of SDB at the conclusion of the proceeding initiated by the *Third Further Notice* below, by operation of the existing rule such SDBs would be permitted to acquire grandfathered combinations.

2. Structural Rule Waiver for Selling a Station to an SDB; Staged Implementation of Deregulation

66. DCS proposes that the Commission adopt a "structural" waiver of its broadcast ownership rules for applicants selling a station to an SDB. Under this proposal, an applicant selling a station to an SDB would be permitted to complete a transaction that otherwise would be barred by an ownership rule.[124] DCS links this proposal to another, which urges the Commission, should it decide to relax its broadcast ownership rules, to implement such deregulation in stages, measuring its impact and adopting "mid-course corrections" as needed.[125] It suggests that the confluence of these two proposals would have the effect of permitting an applicant selling a station to an SDB to have its transaction evaluated under more liberal ownership rules that would take effect later in the staged deregulation process.[126] Consumers Union comments that the structural rule waiver proposal, while "well intentioned . . . would be a disaster for both the cause of increasing female and minority ownership [and] the Commission goals of localism and viewpoint diversity."[127] It further comments that any rule waiver granted in exchange for selling a station to an SDB should be granted on a case-by-case basis, not as the result of the proposed "bright-line" policy.[128]

67. We decline to adopt these proposals. We agree with Consumers Union that the short-term benefit of the waiver proposal – an immediate increase in the number of stations owned by SDBs – is likely to be offset by the public interest harms resulting from the approval of station combinations that exceed our ownership rules. Moreover, as we have no current plans to implement the type of deregulation envisioned by DCS, we find the proposals to be premature.

3. Structural Rule Waivers for Creating Incubator Programs

68. DCS proposes that the Commission waive its broadcast ownership rules to allow an applicant to acquire stations in a market beyond the permissible limit if it establishes and implements an "incubator" program designed to promote ownership by disadvantaged businesses.[129] We decline to adopt this proposal. While we appreciate the value that incentives-based programs such as this can have, we are concerned that companies participating in such a program will expend only the barest minimum in financial and other support required to qualify for the waiver. Moreover, we are concerned that, by allowing the incubating party to acquire stations in excess of local ownership caps, the proposal would create a significant potential for undermining our broadcast ownership restrictions. Therefore, we are not

[123] *2002 Biennial Review Order*, 18 FCC Rcd at 13811, ¶ 489.

[124] DCS Initial Comments at 9.

[125] *Id.* at 24-26.

[126] *Id.* at 9.

[127] Consumers Union Comments at 32.

[128] *Id.* at 34.

[129] DCS Initial Comments at 9.

convinced that the potential benefits associated with this proposal outweigh the potential harms.[130] We note, however, that DCS has modified this proposal to narrow its application.[131] We seek comment on this modified proposal in the *Third Further Notice* below.[132]

4. Opening FM Spectrum for New Entrants

69. DCS proposes that the Commission take three steps to open FM spectrum for new entrants. First, DCS proposes that we relax the current limit on the filing of contingent applications set forth in Section 73.3517(e) of the Rules, which provides that the Commission will accept up to four contingent applications filed by FM licensees or permittees for minor modification of facilities. Second, DCS proposes that we repeal the third adjacent channel requirements found in Section 73.215(a) of the Rules, or recommend to Congress that we be allowed to do so. Finally, DCS proposes that we relax our FM service and allotment rules and policies in two respects: (1) replace the community of license coverage requirement for commercial FM stations, set forth in Section 73.315(a) of the Rules,[133] with the less stringent coverage requirement for noncommercial FM stations, set forth in Section 73.515 of the Rules;[134] and (2) authorize stations to change their community of license to any community located within the same market, as defined by Section 73.3555(a) of the Rules.[135]

70. DCS urges the adoption of these proposals to facilitate efforts of minority-owned stations, which it states are disproportionately licensed to suburban areas, to relocate closer to the urban audiences they seek to serve.[136] Consumers Union filed comments generally supporting the proposal to eliminate third adjacent channel protection requirements.[137]

71. We decline to adopt these proposals. In amending Section 73.3517 of the Rules to permit the filing of contingent applications, the Commission concluded that a limit of four struck the proper balance between the desire of broadcasters for additional flexibility in proposing coordinated changes and the limited staff resources that are available to review the substantially more complex facilities change applications that the revised rule permits.[138] DCS has not presented evidence sufficient to persuade us to upset this balance. With respect to DCS's second proposal, we note that the third adjacent channel requirements are statutory. The Commission issued a report to Congress in 2004, based on the FCC-commissioned Mitre Study, advising that, because LPFM stations do not pose a significant risk of causing

[130] DCS implicitly recognizes the difficulty in ensuring the public receives a fair trade for the harms that would be caused by granting waivers to further concentrate the media market when it notes that "[t]he key to the effectiveness and integrity of an incubation program is that it would include concrete, definitive, and verifiable commitments of 'sufficient magnitude and permanence' to justify a waiver." *Id.* at 14 (citations omitted).

[131] DCS Supplemental Comments at 4-8.

[132] *See infra* ¶ 97.

[133] 47 C.F.R. § 73.315(a). Commercial FM stations are deemed to "substantially comply" with the community of license coverage requirements if at least 80% of the area or population of the community of license is located within the 70 dBu contour. *See* John R. Hughes, 50 Fed. Reg. 5679 (1985).

[134] 47 C.F.R. § 73.515 (requiring noncommercial FM stations to place a 60 dBu contour over at least 50% of the area or population of its community of license).

[135] DCS Initial Comments at 22-24.

[136] *Id.* at 24.

[137] Consumers Union Comments at 30.

[138] *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, First Report and Order, 14 FCC Rcd, 5272, 5282, ¶ 14 (1999).