interference to existing full service FM stations or FM translator and FM booster stations, Congress should eliminate the third adjacent channel protection requirement.[139] We will continue to recommend such legislation. Finally, with respect to DCS's third proposal, we believe that relaxing community of license coverage requirements for commercial FM stations and increasing the ability of radio stations to change their communities of license to any community within the same market will undermine our broadcast regulatory policy of enhancing localism. Such actions would result in the licensing of stations that technically cannot serve their communities of license, a result antithetical to the concept of localism. Furthermore, we note that we recently declined to abandon our policy against removing the sole local transmission service at a community in order to allow it to become the first local transmission service at another community.[140] We note, however, that DCS has modified this last proposal in accordance with a recent recommendation of the Diversity Committee.[141] We seek comment on this revised proposal in the *Third Further Notice* below.[142]

5. Advocacy of Tax Deferral Legislation; Promotion of Minority Ownership in All General Media Rulemaking Proceedings

72. DCS proposes that the Commission recommend to Congress that it reinstate the Commission's authority to adopt the former Tax Certificate Policy.[143] That policy, originally adopted by the Commission in 1978, allowed a seller to defer capital gains taxes on the sale of a media property to a minority-controlled firm. Commenters that specifically addressed this proposal were uniformly in favor of it.

73. The Commission recommended reinstatement of the necessary statutory authority in its recently adopted Section 257 Triennial Report to Congress.[144] We believe, therefore, that we have already satisfied this proposal and decline to commit to further action in this proceeding.

74. DCS also proposes that the Commission consider, as part of all general media rulemaking proceedings (except for individual FM or TV allotment proceedings), how the proposed rules would impact minority ownership.[145] The Commission's Office of Communications Business Opportunities currently provides outreach services to assist small businesses and new entrants into the communications industry and input on how our proposed rules impact minority ownership. We believe, therefore, that we have already satisfied this proposal and decline to commit to further action in this proceeding.

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[139] *Report to Congress on the Low Power FM Interference Testing Program*, Pub. L. No. 10-553 (rel. Feb. 19, 2004).

[140] *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14227-30 ¶¶ 28-34 (2006).

[141] DCS Supplemental Comments at 22-24.

[142] *See infra* ¶ 98.

[143] DCS Initial Comments at 28.

[144] *See Section 257 Triennial Report to Congress - Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, Report, 19 FCC Rcd 3034 (Feb. 12, 2004).

[145] DCS Initial Comments at 29.

6. Extension of the Community Reinvestment Act

75. DCS proposes that the Commission work with the Treasury Department to expand application of the Community Reinvestment Act ("CRA") credit[146] to encourage institutions to place capital in minority-focused private equity funds.[147] We decline to adopt this proposal. We note that the CRA already encourages debt financing to small broadcasters; to the extent that the MMTC proposal advocates adding a race-based dimension to the CRA, we conclude that we are constrained by judicial precedent from enacting it.[148]

7. Establish a "Fund of Funds"

76. DCS proposes that the Commission initiate discussions with the major pension funds to encourage the establishment of a special fund to place capital with minority-focused private equity funds. We decline to adopt this proposal at this time. In the absence of a congressional directive explicitly granting us the power to hold such discussions, we conclude that we lack the statutory authority to adopt it. Moreover, although we recognize that eligible entities, as defined herein, have difficulty accessing capital, we have taken action that will help mitigate that difficulty and do not believe that the additional measures suggested by DCS are appropriate Commission functions.

8. Relax Foreign Ownership Restrictions

77. DCS proposes that the Commission consider relaxing restrictions on foreign ownership to permit non-controlling foreign investment where such investment would help eliminate a barrier to access to capital for domestic, minority-owned broadcasters.[149] We decline to adopt this proposal. DCS does not explain why the Commission's concerns about foreign ownership of broadcast interests generally would not apply in this context. At a minimum, the Commission would be required to undertake a significant rulemaking proceeding to examine this issue in greater depth. We are not convinced, on the basis of the record before us, that taking the extraordinary step of relaxing our foreign ownership rules would advance our interest in promoting diversification among broadcast licensees, including women and minorities.

9. Permit AM Stations to Use FM Translators

78. DCS proposes that the Commission permit AM stations to rebroadcast their signals on FM translator stations. We note that the Commission already has released a *Notice of Proposed Rulemaking* to seek comment on such a rule change.[150] We expect to issue an order resolving this proceeding soon. Therefore, no action is necessary in this item.

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[146] 12 U.S.C. § 2901. The CRA was enacted in 1977 to prevent redlining and to encourage banks and thrifts to help meet the credit needs of all segments of their communities, including low- and moderate-income neighborhoods. It extends and clarifies the longstanding expectation that banks will serve the convenience and needs of their local communities. The CRA and its implementing regulations require federal financial institution regulators to assess the record of each bank and thrift in helping to fulfill their obligations to the community and to consider that record in evaluating applications for charters or for approval of bank mergers, acquisitions, and branch openings. http://www.occ.treas.gov/crainfo.htm

[147] DCS Initial Comments at 32.

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

[149] DCS Initial Comments at 37-39.

[150] *See Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, MB Docket No. 07-172, Notice of Proposed Rule Making, 22 FCC Rcd 15890 (Aug. 15, 2007).

10. Repeal Radio Subcaps

79. In its Supplemental Comments, DCS urges the Commission to seek comment on a proposal advanced by Multicultural Radio Broadcasting, Inc. ("Multicultural").[151] Multicultural proposes that the Commission repeal the subcaps on ownership of same-service (AM or FM) stations contained in the local radio ownership rule.[152] We note that we retain the subcaps as a component of the local radio ownership rule in our *Report and Order* in the 2006 Quadrennial Review proceeding. Therefore, we will take no action in this item.

IV. THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

A. Definition of Socially and Economically Disadvantaged Businesses

80. As stated above, we defined the class of entities benefiting from the rule and policy changes set forth in this item as "eligible entities," using the SBA definition of small businesses. We seek comment on whether we can or should expand that definition.

81. *Socially and Economically Disadvantaged Businesses.* DCS has recommended that, instead of extending the benefits only to "eligible entities," we should instead use a race-conscious definition of socially and economically disadvantaged business (SDB) to define the relevant class of companies.[153] For example, to qualify for participation in Small Business Administration's Small Disadvantaged Business program,[154] a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals.[155] Under the program, African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Pacific Americans, and Native Americans are presumed to qualify, and other individuals can qualify if they can show by a preponderance of the evidence that they are disadvantaged.[156] We invite comment on the DCS proposal to adopt a race-conscious definition of SDBs.

82. We are mindful that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[157] As a result, any race conscious measure the Commission might adopt to promote minority ownership would be subject to strict scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment.[158] The hurdle posed by strict scrutiny is quite high. In *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 21-22 (D.C. Cir. 2001), *rehearing denied*, 253 F.3d 752, and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1988), the United States Court of Appeals for the D.C. Circuit twice struck down Commission equal employment opportunity rules after concluding that they resulted in race-based classifications that were subject to strict scrutiny.

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[151] DCS Supplemental Comments at 11-12.

[152] 47 C.F.R. § 73.3555(a).

[153] *See* Reply of the Diversity and Competition Supporters in Response to the Second Notice of Proposed Rulemaking Docket No. 06-121, at 1 (Nov. 1, 2007),.

[154] 13 C.F.R. § 124.1.

[155] *See* SBA, *Small Disadvantaged Business*, http://www.sba.gov/sdb/indexaboutsdb.html (visited Jan. 30, 2007).

[156] 13 C.F.R. §§ 124.103(b-c), 124,104(a).

[157] *Adarand*, 515 U.S. 200, 236 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

[158] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); *see Adarand*, 515 U.S. at 227.

83. Race-based classifications subject to strict scrutiny may be upheld "only if they are narrowly tailored measures that further compelling governmental interests."[159] Accordingly, parties who contend that a race-conscious classification would be the best approach, or indeed even a permissible approach, to encourage ownership diversity and new entry must explain specifically, using empirical data and legal analysis, how such a classification would not just be tailored, but narrowly tailored, to advance a governmental interest that is not simply important, but compelling.

84. *Other Definitions.* Pending the potential adoption of an alternative definition, DCS proposes the adoption of race-neutral, "individualized 'full file' review, similar to that used by Michigan, California, and Texas state university admission departments following the passage of state initiatives and court decisions banning affirmative action."[160] Under this proposal, "each applicant would demonstrate (to the satisfaction of an independent, politically insulated professional entity, perhaps modeled after the Universal Service Board) that it has overcome significant social and economic disadvantages, the overcoming of which would be predictive of success in a challenging industry and of the promotion of diversity of information and perspectives and satisfaction of unmet needs in the industry."[161] DCS states that this disadvantage often, but not necessarily, would be related to race or gender discrimination or their present effects.[162] DCS offers several hypothetical applicants who might benefit from "full file" review, including an applicant injured in military service in Iraq who later completed a leadership training program; a rural applicant who put herself through college and successfully ran a previously-bankrupt AM station; and a Spanish language radio company owner who succeeded despite advertiser resistance to program language and format.[163]

85. We seek comment on the DCS proposal regarding "full file" review, and pose a number of specific questions regarding that proposal. Would the grant of broadcast licenses to applicants who have overcome social and economic disadvantages likely result in greater diversity of broadcast information and viewpoints? How should "full file review" be structured so that it is race-neutral and does not trigger strict scrutiny? Can the "full file review" framework applied and upheld in the context of university admissions be applied to the media industry in an effective manner to foster diversity of viewpoints without involving the Commission in content-based decisions that could raise First Amendment concerns? How should the Commission or an "independent, politically insulated professional entity" assess whether an applicant has overcome social and economic disadvantage and whether granting the application would increase diversity of viewpoints? How could the concept of "full file" review, which in the higher education context is used to compare candidates competing for a limited number of admissions slots, be applied in an administratively feasible manner to a situation where applicants will not be compared to each other (because mutually exclusive licenses applications are resolved through an auction) but applicants instead will be evaluated to see if they meet a specified standard? Should an applicant bear the burden of proving specifically that it would contribute to diversity of viewpoints as a result of having overcome these disadvantages? When the applicant is a company, which individuals

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[159] *Adarand*, 515 U.S. at 227.

[160] DCS Supplemental Comments at 39.

[161] *Id.* at 40-41; *see also* MMTC Letter to Chairman Martin and Commissioners Adelstein, Copps, McDowell, and Tate at 1-2 (Dec. 11, 2007) ("A full file review paradigm would be based on an applicant's success in overcoming obstacles and entry barriers, the overcoming of which would naturally yield diversity of information and viewpoints and would be predictive of success in a challenging environment.") (available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519818049).

[162] DCS Supplemental Comments at 41.

[163] *Id.*

would we evaluate to determine if the company meets the relevant standard under "full file review"? Would a determination by an independent board be advisory to the Commission? Would an affirmative determination qualify the entity as an eligible entity for all future transactions or for a specified period of time or would it have to seek a new determination for each transaction? How would "full file" review or a similar standard compare to an "eligible entity" or SDB standard in promoting viewpoint and/or ownership diversity? Should we substitute the "full file review" approach for the "eligible entity" approach until we can adopt an SDB standard or should we adopt it in lieu of an SDB standard?

86. We also invite commenters to propose any alternative definition of "eligible entity" that they believe would better advance our goals of promoting ownership diversity and new entry. With respect to any proposed definition that is race conscious, commenters should address the constitutionality of such definition.

B. Share-Time Proposals

87. DCS proposes that the Commission afford FM licensees that broadcast in HD using IBOC technology the voluntary option of assigning the right to operate an HD radio stream to an SDB.[164] As proposed by DCS, the SDB operating the HD radio stream would receive a license under the Commission's share-time rule.[165] DCS further proposes that the Commission use share-time procedures to permit the bifurcation of a single-channel, analog FM station into an "Entertainment Station" and a "Free Speech Station" Such a "Free Speech Station" would be independently owned by an SDB, have at least 20 non-nighttime hours per week of airtime, and be primarily devoted to non-entertainment programming. We seek specific comment on these proposals. In particular, we seek comment on the extent to which, if the SDB (or eligible entity) becomes a Commission licensee, these proposals may provide the non-SDB entity a way to circumvent our ownership restrictions.

C. Retention on Air of AM Expanded Band Owners' Stations if One of the Stations is Sold to an Eligible Entity

88. In 1987, the Commission began a comprehensive review of numerous technical, legal, and policy issues relating to AM broadcasting in an effort to identify and address its most pressing problems.[166] The allotment of additional spectrum (1605 – 1705 kHz)[167] for broadcasting provided the Commission with a "unique opportunity" to address these problems, most importantly the channel congestion and interference that had significantly degraded the technical quality of the service.[168] Accordingly, the Commission limited initial applications for expanded band authorizations to existing AM broadcasters in the standard band and gave the highest priority to those fulltime stations that would most reduce congestion and interference by moving their operations to one of the new channels.[169] To ensure that this process achieved its intended goals, the Commission further provided that the license for

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[164] DCS Initial Comments at 41-47.

[165] 47 C.F.R. § 73.1715.

[166] *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Notice of Inquiry, 2 FCC Rcd 5014 (1987).

[167] This spectrum, known as the AM expanded band, was allocated to the domestic AM radio service in 1979 by the International Telecommunication Union World Administrative Radio Conference.

[168] *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Notice of Proposed Rule Making, 5 FCC Rcd 4381, 4382 (1990) ("*Expanded Band NPRM*").

[169] *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273, 6317 (1991) ("*Expanded Band R&O*").

an expanded band station would issue conditioned upon the surrender of one of the paired frequencies, preferably the standard band frequency, following a five-year transition period during which dual operations would be permissible.[170] On reconsideration, the Commission reordered its priorities in light of Congress's recent amendment of the Act to add Section 331(b)[171] and gave first priority to a special class of four AM stations – those daytime-only stations licensed to serve communities with populations of more than 100,000 persons that lacked a fulltime aural service.

89. In 1997, the Commission released its final 88-station allotment plan for the expanded band and invited the selected stations to file construction permit applications.[172] A total of 54 expanded band stations were licensed through this process. Two construction permit applications and one license application remain pending. To date, 19 licensees have surrendered their lower band licenses and one licensee has surrendered its expanded band license at the end of each of these licensees's five-year dual operating authority period. In March 2006, eleven licensees and four public interest groups petitioned the Commission to waive the surrender requirement in order to allow the transfer of one of the stations to a recognized small business, or its retention by the licensee if the licensee is a small business.[173]

90. DCS argues that the technical benefits that the Commission anticipated from the surrender of lower band AM licenses are now outweighed by continued service to the listening public. They claim that "numerous" AM licensees have specifically targeted the programming on the lower band paired station to serve the needs of minorities and niche audiences. They propose that the Commission extend the dual operating period authorization[174] and the temporary exemption of the expanded band authorization for multiple ownership purposes.[175] As proposed, licensees would be permitted, prior to a specified disposition date, to assign or transfer control of one the paired AM stations to a qualifying "small business" as that term applies to radio broadcasters in the Small Business Administration's Regulations.[176] Under DCS's proposal, the consideration which a licensee could receive for one of its paired AM stations could not exceed 75 percent of the station's fair market value. Further, in the event that the licensee is itself a small business, it would be permitted to retain permanently both authorizations.

91. We seek comment on this proposal. In particular, we seek comment on how to properly balance the competing goals of improving the technical viability of the AM service and promoting ownership diversity. In the event that the Commission adopts this proposal, we also seek comment on the length of time licensees operating paired stations should be given to dispose of one station to a qualifying small business. We tentatively conclude that any licensee, which itself is not a qualifying small business and which fails to consummate the sale of one station by the disposition date, must surrender one of the two licenses by the disposition. Moreover, we tentatively conclude that in the event that a licensee fails to

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[170] *See Expanded Band NPRM* at 4392; *Expanded Band R&O* at 6320, and 47 C.F.R. § 73.3555 Note 10. *See also Letter to Jennifer Wagner, Esq.*, 16 FCC Rcd 21398 (2001).

[171] 47 U.S.C. § 331(b).

[172] *See Implementation of the AM Expanded Band Allotment Plan*, Memorandum Opinion and Order, 12 FCC Rcd 3361 (1997). *See also Mass Media Bureau Announces Revised AM Expanded Band Allotment Plan and Filing Window for Eligible Stations*, Public Notice, 12 FCC Rcd 3185 (1997).

[173] *See Request for Waiver of Rules Requiring Return of AM Licenses*, MM Docket No 87-267 (filed Mar. 27, 2006).

[174] *See* 47 C.F.R. 73.3555, Note 10.

[175] *See id.* Note 9.

[176] *See* 13 C.F.R. § 121.201 (radio station licensee treated as "small business" if it and affiliated entities have annual gross receipts under $6.5 million).

take any action by the disposition date, the lower band station shall automatically expire on that date. We seek comment on these procedures.

92. Finally, we seek comment on the proposal of DCS to reinstate the 20 licenses which were unconditionally surrendered by licensees in accordance with the terms of their authorizations. We note that subsequent licensing activity may preclude reinstatement and that certain circumstances, such as the sale of a former transmitter site and station equipment, may make resumption of operations by a formerly paired station infeasible or impossible. We seek comment on whether the Commission should accept construction permit applications from these licensees and the technical standards that the Commission should use to process these applications. We seek comment on whether the acceptance of such applications without providing an opportunity for competing applications complies with *Ashbacker* principles.[177] Lastly, we seek comment on whether a successor licensee should be permitted to seek reinstatement of a surrendered license.

D. Modifications to Form 323

93. As part of its 1998 biennial review of media ownership rules, the Commission adopted modifications to its Annual Ownership Report, FCC Form 323, to require the provision of information on the racial and gender identity of radio and television licensees.[178] The Commission reasoned that the action was needed in order to "determine accurately the current state of minority and female ownership of broadcast facilities, to determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that the Commission may adopt, and to fulfill the Commission's statutory mandate under Section 257 of the 1996 Act and Section 309(j) of the Communications Act of 1934 to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry."[179] FCC Form 323 is filed by commercial AM, FM and television stations at two-year intervals on the anniversary date of the station's renewal application filing date.[180] Partnerships composed entirely of natural persons and sole proprietorships are not required to file the FCC Form 323 on a biennial basis. In addition to gender information, the racial/ethnic origin categories include American or Alaska Native, Asian, Black or African American, Hispanic of Latino, Native Hawaiian or Other Pacific Islander.[181] The Commission periodically posts its compilation of data derived from these forms on its webpage.[182]

94. As part of our quadrennial media ownership review, several commenters and FCC study authors have expressed concern about the Commission's data collection process and have proposed revisions to the Form 323 to enhance its utility in measuring current levels of minority and female broadcast ownership. DCS has criticized the form as an inadequate basis upon which to develop effective minority ownership policies, regardless of whether such policies are race conscious.[183] DCS notes that

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[177] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). *See also Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001).

[178] *See 1998 Biennial Regulatory Review*, 13 FCC Rcd at 23096-99, ¶¶ 100-05.

[179] *See* 47 U.S.C. §§ 257, 309 (j).

[180] 47 C.F.R. § 73.3615. Noncommercial educational station licensees file FCC Form 323-E. *See* 47 CFR § 73.3615 (d).

[181] FCC Form 323, Question 9, Ownership Instructions – Section II, Note 4.

[182] Minority and female ownership data are posted at http://www.fcc.gov/ownership/data.html.

[183] *See* Reply of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking at 14-15 (Nov. 1, 2007).

the authors of several media ownership studies have indicated that the Commission's most recent research study on minority ownership is "not sufficient" to validate a race conscious initiative.[184] Other commenters state that problems with the Form 323 derive from the process the Commission uses to automate and cull the data from the forms.[185] Areas of concern include the filing of multiple forms for a single station, the practice of some filers to attach racial/gender information in a separate attachment to the form, the lack of questions regarding gender/racial classifications on the Form 323-E used by noncommercial educational stations, and filers who write "no change – info on file" as opposed to electronically validating completing the information previously submitted, including race, gender, and ethnicity data.[186]

95. We now seek initial comment on issues related to the Commission's collection of information on the racial and gender identity of radio and television licensees. We tentatively conclude that we should make changes to Form 323 to increase the accuracy of the data collected and the potential uses for the form. As previously indicated, sole proprietorships and partnerships composed entirely of natural persons have not routinely been required to complete Form 323. We solicit input from the public on whether expansion of the scope of parties required to file the biennial ownership report would enhance the race, gender, and ethnicity data collection. Further, we seek comment on whether the Commission should establish a uniform filing date for all radio and television station licensees and eliminate the current practice of permitting licensees to file on the anniversary of their renewal date. Would a single filing date pose a burden on licensees? What are the benefits to a single filing date requirement? Would the data collection be improved with such a change? Under current procedures, if the licensee or permittee is directly or indirectly controlled by another entity, or if another entity has an attributable interest in such licensee or permittee, a separate Form 323 must be submitted for such entity. Does this practice make the race, gender and ethnicity data more, or less, reliable? What other changes to Form 323 would make use of the data more reliable? Are there reasons that justify maintaining the current collection process such as streamlining, paperwork burdens, or administrative efficiencies?

96. We are concerned about the accuracy of data submitted by licensees, as this information may for the basis for Commission policy and rulemaking. Should the Commission adopt a new form to more accurately collect information from licensees on race, gender, and ethnicity, and delete these questions from the Form 323? Moreover, we are concerned about the accuracy of data submitted from licensees as this information may form the basis for Commission policy and rulemaking. We ask commenters to address whether the Commission should conduct audits to assess the accuracy of the information filed in the annual ownership report. Would the data collection be enhanced if we imposed an audit process? If so, what type of audit should be conducted? Should the Commission periodically audit a random sample of filers? How often should the audit be conducted? What penalties should be imposed for licensees that file inaccurate information on Form 323?

E. Structural Rule Waivers for Creating Incubator Programs

97. As noted above, DCS has modified its proposal advocating the grant of a structural rule waiver for parties that create and maintain an incubator program for SDBs. DCS narrowly tailors

[184] *Id.* at 16 (*citing* Arie Beresteanu and Paul B. Ellickson, "Minority and Female Ownership in Media Enterprises (Jun. 2007) ("The data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis")).

[185] *See, e.g.,* Consumers Union Comments at 275-293. Commenters criticize Media Ownership Study #2 for missing "well over half" of all female and minority-owned broadcast stations. *See* Ownership Structure and Robustness of Media, Kiran Duwadi, Scott Roberts, Andrew Wise and C. Anthony Bush, FCC (Sep. 2007).

[186] *Id.*

application of the proposal to address the concerns, expressed by Consumers Union and others, that it could undermine our local broadcast ownership limits. Specifically, DCS now proposes a "Trial Incubation Plan" that would operate for two years, at which point the Commission would analyze its effects before renewing or expanding it. The Trial Incubation Plan would apply only to the local radio ownership rule in large markets and permit the incubating party to acquire only one additional station beyond the applicable local cap, including any same-service subcap. That additional station must be in the same service (AM or FM) and in the same market, or a market of approximately the same size, as the newly SDB-controlled station. Furthermore, DCS proposes that the two transactions be contingent, such that the SDB transaction would close prior to or simultaneously with the incubating party's transaction. We seek comment on this revised proposal.

F. Opening FM Spectrum for New Entrants

98. As noted above, DCS has modified its proposal advocating that FM stations be permitted to change their community of license to any community located in the same radio market. In accordance with a recently adopted recommendation of the Diversity Committee, DCS proposes that the Commission authorize stations to change their community of license to any community within the same market, provided that "if the community of license being vacated (the "Original Community") has no other full power AM or FM or LPFM station licensed to it and which originates local programming for at least 15% of its airtime (a "Local Service LPFM"), the licensee vacating the Original Community must underwrite the cost of licensing, construction and one full year of operation of a new Local Service LPFM to be licensed to the Original Community." We seek comment on this proposal.

G. Must-Carry for Class A Television Stations

99. In its Supplemental Comments, DCS urges the Commission to take action in accordance with a proposal advanced by the Community Broadcasters Association ("CBA").[187] CBA proposes that the Commission "actively support[] cable must-carry legislation for Class A stations."[188] We agree that cable carriage of Class A television stations could promote both programming diversity and localism, given that all such stations are required to originate local content. We seek comment on whether we have authority under the Act to adopt rules requiring such carriage.

H. Reallocation of TV Channels 5 and 6 for FM Service

100. In its Supplemental Comments, DCS urges the Commission to give a "hard look" to a proposal advanced by Mullaney Engineering, Inc. ("Mullaney").[189] Mullaney proposes that the Commission reallocate TV Channels 5 and 6 for FM broadcasting, thereby creating a "staggering expansion of the existing FM band."[190] We agree with DCS that this proposal could yield tremendous opportunities for new entrants, and we seek comment on it.

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[187] DCS Supplemental Comments at 10-11.

[188] Reply of Community Broadcasters Association at 2 (Nov. 1, 2007).

[189] DCS Supplemental Comments at 11.

[190] *See* Petition for Reconsideration and/or Comment of Mullaney Engineering, Inc., MM Docket No. 87-268 (Oct. 26, 2007).

I. Proposals of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition

101. In its Supplemental Comments, DCS endorses several proposals advocated by NABOB and Rainbow/PUSH.[191] These proposals were advanced in the course of the 2002 Biennial Review proceeding, and we believe that the record with respect to them should be refreshed. Specifically, NABOB and Rainbow/PUSH propose that the Commission: (1) examine assignment and transfer applications to discern the potential impact of the proposed transaction on minority ownership; (2) decline to grant temporary waivers of the local ownership rules to parties proposing a transaction that would create station combinations exceeding the ownership caps; (3) treat local marketing agreements as attributable interests; and (4) allow minorities to own station combinations equal to the largest combination in a market to counterbalance the economic impact of grandfathered holdings. We seek comment on these proposals. In particular we ask parties to address our authority to enact them, the extent to which they would apply, and whether they contradict any of the proposals we adopt in this item.

V. CONCLUSION

102. The measures we adopt today, as well as the proposals on which we seek further comment, are intended to promote diversity of ownership of media outlets in order to promote diversity and competition, longstanding and important Commission goals, as well as to enhance innovation in broadcasting. We adopt a number of measures, advocated by a variety of commenters, that should help small businesses, including those owned by women and minorities, with access to financing and availability of spectrum, which have been identified as critical problem areas for new entrants into broadcasting, including women and minorities. We invite comment on a number of other measures including a measure to enhance participation by new entrants into digital broadcasting as well as measures to improve our data gathering in this important area. We also invite comment on whether to expand the class of entities benefiting from our proposals and new measures. We ask commenters to buttress their comments with economic and other evidence so that any further action can be based on a rigorous and thorough record.

VI. PROCEDURAL MATTERS

A. Filing Requirements

103. *Ex Parte Rules.* The *Third Further Notice of Proposed Rulemaking* in this proceeding will be treated as "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[192] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[193] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

104. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,[194] interested parties may file comments and reply comments on or before the dates

[191] *See* DCS Supplemental Comments at 12-13; Comments of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition (Jan. 2, 2003).

[192] *See* 47 C.F.R. § 1.1206(b), as revised.

[193] *See id.* § 1.1206(b)(2).

[194] 47 C.F.R. §§ 1.415, 1.419.

indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies.[195]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.
  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service First-Class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

105. *People with Disabilities.* Contact the FCC to request materials in accessible formats (Braille, large print, electronic files, audio format, etc.) by e-mail at FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-1400 (voice), (202) 418-7365 (TTY).

106. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bill.cline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via

[195] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

their website at http://www.bcpiweb.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-1400 (voice), (202) 418-7365 (TTY).

107. *Information*. For additional information on this proceeding, contact Mania Baghdadi at (202) 418-7200. Press inquiries should be directed to Mary Diamond at (202) 418-2388.

B. Initial and Final Regulatory Flexibility Analysis

108. *Initial Regulatory Flexibility Analysis ("IRFA")*. The Regulatory Flexibility Act of 1980, as amended ("RFA"),[196] requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[197] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[198] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[199] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[200] As required by the RFA,[201] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in the *Third Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the filing deadlines on the first page of this document.

109. *Final Regulatory Flexibility Analysis ("FRFA")*. As required by the RFA,[202] the Commission has prepared an FRFA relating to the Report and Order. The FRFA is set forth in Appendix C.

C. Paperwork Reduction Act Analysis

110. *Initial Paperwork Reduction Act Analysis*. The Third Further Notice of Proposed Rulemaking has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[203] and contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget

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[196] The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[197] 5 U.S.C. § 605(b).

[198] *Id.* § 601(6).

[199] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.* § 601(3).

[200] 15 U.S.C. § 632.

[201] *See* 5 U.S.C. § 603.

[202] *See* 5 U.S.C. § 604.

[203] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

(OMB) to comment on the proposed information collection requirements contained in this Notice, as required by the PRA.

111. Written comments on the PRA proposed information collection requirements must be submitted by the public, the OMB, and other interested parties on or before 60 days after publication in the *Federal Register*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,[204] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

112. Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at Nicholas_A._Fraser@omb.eop.gov or via fax at (202) 395-5167 and to Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC or via Internet at Cathy.Williams@fcc.gov or PRA@fcc.gov.

113. *Further Information.* For additional information concerning the PRA proposed information collection requirements contained in the Third Further Notice of Proposed Rulemaking, contact Cathy Williams at (202) 418-2918, or via the Internet at PRA@fcc.gov.

114. *Final Paperwork Reduction Act Analysis.* This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new and/or modified information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

D. Congressional Review Act

115. The Commission will send a copy of this *Report and Order and Third Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

VII. ORDERING CLAUSES

116. Accordingly, **IT IS ORDERED**, that pursuant to the authority contained in sections 1, 2(a), 4(i), 257, 303(r), and 307-310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303(r), and 307-310, this *Report and Order* **IS ADOPTED**.

117. **IT IS FURTHER ORDERED**, that pursuant to the authority contained in sections 1, 2(a), 4(i), 257, 303(r), and 307-310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303(r), and 307-310, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A.

[204] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); see 44 U.S.C. § 3506(c)(4).

118. **IT IS FURTHER ORDERED**, that pursuant to 5 U.S.C. § 553(d)(3) and 47 C.F.R. § 1.427(b), the rule amendments adopted herein contain information collection requirements subject to the PRA and **WILL BECOME EFFECTIVE** 30 days after the Commission publishes a notice in the Federal Register announcing approval by the Office of Management and Budget.[205]

119. **IT IS FURTHER ORDERED**, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

120. **IT IS FURTHER ORDERED**, that the Commission **SHALL SEND** a copy of this Report and Order and Third Further Notice of Proposed Rulemaking in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

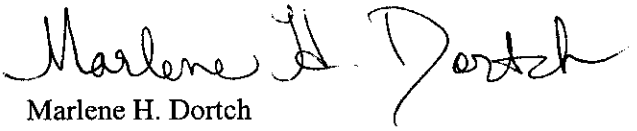
121. **IT IS FURTHER ORDERED**, that pursuant to the authority contained in Sections 1, 2(a), 4(i, j), 257, 303(r), 307-10, and 614-15 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i, j), 257, 303(r), 307-10, 534-35, this *Third Further Notice of Proposed Rule Making* **IS ADOPTED**.

122. **IT IS FURTHER ORDERED**, that pursuant to the authority contained in sections 1, 2(a), 4(i, j), 257, 303(r), 307-10, 336, and 614-15 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i, j), 257, 303(r), 307-310, 336, 534-35, **NOTICE IS HEREBY GIVEN** of the proposals described in this *Third Further Notice of Proposed Rule Making*.

123. **IT IS FURTHER ORDERED**, that the Petition for Rulemaking of Entravision Holdings, LLC, RM-9567, **IS GRANTED IN PART**.

124. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Third Further Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

[205] The Commission will publish a document in the Federal Register announcing the effective date of the amendments to Sections 73.3555, Note 2(i) and 73.3598(a) and new Section 73.2090.

APPENDIX A

Rule Changes

47 CFR Part 73 is amended as follows:

PART 73 – RADIO BROADCAST SERVICES

1. Section 73.2090 is added to read as follows:

§ 73.2090 Ban on discrimination in broadcast transactions.

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).

2. Section 73.3555, Note 2(i) is amended to read as follows:

§ 73.3555, Note 2(i)

(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:

(1) **Where the entity in which the interest is held is not an eligible entity,** 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 asset value, defined as the aggregate of all equity plus all debt, of that media outlet, **or where the entity in which the interest is held is an eligible entity, the combined equity and debt of the interest holder in the eligible entity is less than 50 percent or 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;** 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 or cross-ownership rule 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.

For purposes of paragraph (i)(1) of this note, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 C.F.R. § 121-20, at the time the transaction is approved by the FCC, and holds (i) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet; or (ii)

15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (iii) more than 50 percent of the voting power of the corporation that will own the media outlet if such corporation is a publicly traded company.

3. Section 73.3598 is amended by revising paragraph (a) to read as follows:

§ 73.3598 Period of construction.

(a) **Except as provided in the last two sentences of this paragraph,** each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. **Except as provided in the last two sentences of this paragraph,** each original construction permit for the construction of a new LPFM station shall specify a period of eighteen months from the date of issuance of the construction permit within which construction shall be completed and application for license filed. A LPFM permittee unable to complete construction within the time frame specified in the original construction permit may apply for an eighteen month extension upon a showing of good cause. The LPFM permittee must file for an extension on or before the expiration of the construction deadline specified in the original construction permit. **An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 C.F.R. § 121-20, at the time the transaction is approved by the FCC, and holds (i) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit; or (ii) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (iii) more than 50 percent of the voting power of the corporation that will hold the construction permit if such corporation is a publicly traded company.**

4. Section 73.5008 is amended by revising paragraph (c) to read as follows:

(c) An attributable interest in a winning bidder or in a medium of mass communications shall be determined in accordance with Section 73.3555 and Note 2. In addition, the attributable mass media interests, if any, held by an individual or entity with an equity and/or debt interest(s) in a winning bidder shall be attributed to that winning bidder for purposes of determining its eligibility for the new entrant bidding credit, if the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder, **or where the winning bidder is an eligible entity, the combined equity and debt of the interest holder in the winning bidder is less than 50 percent or the total debt of the interest holder in the winning bidder does not exceed 80 percent of the asset value of the winning bidder and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the winning bidder or any related entity. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its**

industry grouping, as set forth in 13 C.F.R. § 121-20, at the time the transaction is approved by the FCC, and holds (i) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet; or (ii) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (iii) more than 50 percent of the voting power of the corporation that will own the media outlet if such corporation is a publicly traded company.

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Third Further Notice of Proposed Rule Making* ("*Notice*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. The *Notice* invites comment on several ways to increase participation in the broadcasting industry by new entrants and small businesses, especially minority- and women-owned businesses, with the goal of promoting innovation, diversity of ownership and viewpoints, spectrum efficiency, and competition in media markets. The *Notice* first invites comment on how to define the class of eligible entities that will be entitled to benefit from the Commission's proposals.

3. The *Notice* then invites comment on a range of proposals to stimulate ownership diversity, including permitting share-time arrangements between FM licensees and SDBs; extension of the dual operating period authorization and temporary exemption of expanded band authorization in the AM radio context; and reinstatement of 20 AM licenses that were voluntarily surrendered. In addition, the Commission seeks comment on proposed revisions to FCC Form 323 to enhance the ability of the Commission to collect information on the racial and gender identity of radio and television licensees.

4. The *Notice* further requests comment on a proposal to grant structural rule waivers for parties that create and maintain incubator programs for SDBs; a proposal that the FCC permit FM licensees to change their station community of license to any community located in the same radio market under certain conditions; and seeks input on whether the Commission has authority to require cable operators to carry Class A television stations and whether the Commission should reallocate TV Channels 5 and 6 for FM broadcasting. Finally, the Commission requests refreshed comments on certain proposals advanced by NABOB and Rainbow/PUSH Coalition during the 2002 Biennial Review of the Commission's media ownership rules.

B. Legal Basis

5. This *Notice* is adopted pursuant to sections 1, 2(a), 3, 4(i, j), 257, 301, 303(r), 307-10, and 614-15 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153, 154(i, j), 257, 301, 303(r), 307-10, 534-35.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA defines the

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] 5 U.S.C. § 603(b)(3).

term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

7. **Television Broadcasting.** In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[8] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of December 7, 2007, about 825 (66 percent) of the 1,250 commercial television stations in the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations[9] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the attribution rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

8. An element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

9. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[10] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[11] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of December 7, 2007, about 10,500 (95 percent) of 11,050 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a

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[5] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

[6] *Id.*

[7] 15 U.S.C. § 632.

[8] 2007 NAICS Code 515120. This category description states: "This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public". U.S. Census Bureau 2007 NAICS Definitions, Television Broadcasting.

[9] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[10] *See* 2007 NAICS code 515112.

[11] *Id.*

business entity qualifies as small under the above definition, business control affiliations[12] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

10. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

11. **Class A TV, LPTV, and TV translator stations.** The rules and policies adopted herein may also apply to licensees of Class A TV stations, low power television ("LPTV") stations, and TV translator stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than $13.0 million in annual receipts.[13] Currently, there are approximately 567 licensed Class A stations, 2,227 licensed LPTV stations, and 4,518 licensed TV translators.[14] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA's definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than $13.0 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

12. **FM Translator Stations and Low Power FM Stations.** The proposed rules and policies could affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as to potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than $6.5 million in annual receipts.[15] Currently, there are approximately 5540 licensed FM translator and 262 booster stations and 820 licensed LPFM stations.[16] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition.

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[12] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[13] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

[14] *See* News Release, "Broadcast Station Totals as of December 21, 2006," (Jan. 26, 2007), *available at* http://www.fcc.gov/mb/.

[15] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[16] *See News Release*, "Broadcast Station Totals as of December 31, 2006" (rel. Jan. 26, 2007) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc).

13. **Cable and Other Subscription Programming.** The Census Bureau recently updated the NAICS so that these firms are included in the Wired Telecommunications Carriers category[17] which is described as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[18] The SBA has updated the small business size standards to accord with the revised NAICS. The size standard for Wired Telecommunications Carriers is all firms having an average of 1,500 or fewer employees. The Census Bureau has not collected information on the size distribution of firms in the revised classification of Wired Telecommunications Carriers. Accordingly we will apply the new size standard to Census Bureau data for 2002 regarding the size distribution of Cable and Other Program Distribution.[19] There were a total of 1,191 firms in this category that operated for the entire year.[20] Of this total, 1,178 firms had fewer than 1,000 employees.[21] Thus, under this size standard, the majority of firms can be considered small.

14. **Cable System Operators.** The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[22] The Commission has determined that an operator serving fewer than 653,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[23] Industry data indicate that, of 994 cable operators nationwide, all but thirteen are small under this size standard.[24] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[25] and therefore we are unable to estimate

[17] 13 C.F.R. § 121.201 (2007), NAICS code 517110

[18] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[19] 13 C.F.R. § 121.201 (2002), NAICS code 517510.

[20] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 5, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[21] *Id.*

[22] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[23] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (CSB Jan. 24, 2001).

[24] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2007*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of Mar. 30, 2006); Warren Communications News, *Television & Cable Factbook 2007*, "Ownership of Cable Systems in the United States," pages D-1737 to D-1786.

[25] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

more accurately the number of cable system operators that would qualify as small under this size standard.

15. **Open Video Services.** Open Video Service ("OVS") systems provide subscription services.[26] In 2007, the SBA created a small business size standard for Cable and Other Subscription Programming.[27] The Census Bureau has not collected information on the size distribution of firms in the new standard. Accordingly we will apply the new size standard to Census Bureau data for 2002 regarding the size distribution of Cable and Other Program Distribution.[28] This standard provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has certified a large number of OVS operators, and some of these are currently providing service.[29] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that it does not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS. Given this fact, the Commission concludes that those entities might qualify as small businesses, and therefore may be affected by the rules and policies adopted herein.

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

16. Depending on the rules adopted as a result of this *Notice*, the Report and Order (R&O) ultimately adopted in this proceeding may contain new information collections for eligible entities and/or modified ones for incumbent broadcasters. Any changes in recording or recordkeeping would result from any changes in the Commission's forms necessary to implement any rules adopted to promote new entry of small businesses and eligible entities. As noted above, we invite small entities to comment on any such recordkeeping issues in response to the *Notice*.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that might minimize any significant economic impact on small entities. Such alternatives may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[30]

18. As noted, we are directed under law to describe any such alternatives we consider, including alternatives not explicitly listed above.[31] The *Notice* describes and seeks comment on several possible ways to ease entry into the broadcasting business by small entities that have traditionally faced significant difficulties in entering broadcasting. The *Notice* seeks comment on how the proposals herein will achieve that goal. The Commission especially encourages small entities to comment on the proposals in the *Notice* in this proceeding. The Commission welcomes comment on how to minimize any burdens

[26] *See* 47 U.S.C. § 573.

[27] 13 C.F.R. § 12.1201, NAICS code 517210.

[28] 13 C.F.R. § 121.201 (2002), NAICS code 517510.

[29] *See* http://www.fcc.gov/mb/ovs/csovsarc.html (last visited in January 2008).

[30] 5 U.S.C. § 603(c).

[31] 5 U.S.C. § 603(b).

on small cable system operators that might result from eligible entities being entitled to carriage on such systems under the must carry statute and rules.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) in MB Docket No. 02-277.[2] The Commission sought written public comment on the proposals in the *NPRM* including comment on the IRFA. The Commission also prepared a Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) and a Second Supplemental Initial Regulatory Flexibility Analysis (Second Supplemental IRFA) of the possible significant economic impact on small entities of the proposals in the *Further Notice of Proposed Rulemaking* (*Further Notice*)[3] and the *Second Further Notice of Proposed Rulemaking* (*Second Further Notice*),[4] respectively. The Commission sought written public comment on the *Further Notice*, including comment on the Supplemental IRFA, and written public comment on the *Second Further Notice*, including comment on the Second Supplemental IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[5]

A. Need for, and Objectives of, the *Report and Order* (*Order*)

2. The *Order* takes 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. The *Order* sets forth the Commission's objectives, defines the entities that will benefit initially from the Commission's actions, and adopts a number of measures modifying certain Commission rules and policies to encourage ownership diversity and new entry in broadcasting.

B. Legal Basis

3. This *Order* is adopted pursuant to Sections 1, 2(a), 4(i), 257, 303, and 307-310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303, and 307-310.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA and the Supplemental IRFA

4. The Commission received no comments in direct response to the IRFA, the Supplemental IRFA, or the Second Supplemental IRFA. However, the Commission received comments that discuss issues of interest to small entities. These comments were taken into account during the Commission's decision-making process to adopt certain rule modifications to promote broadcast ownership among new

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Broadcast Stations in Local Markets, Definition of Radio Markets,* 17 FCC Rcd 18503, 18558 App. A (2002).

[3] *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).

[4] *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, 22 FCC Rcd 14215 (2007).

[5] *See* 5 U.S.C. § 604.

entrants and small businesses, including minority- and women-owned businesses. These rule modifications are summarized in the section of this FRFA discussing the steps taken to minimize a significant impact on small entities, and the significant alternatives considered.

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

5. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[6] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[9]

6. **Television Broadcasting.** In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[10] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of December 7, 2007, about 825 (66 percent) of the 1,250 commercial television stations in the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations[11] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

7. An element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

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[6] 5 U.S.C. § 603(b)(3).

[7] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

[8] *Id.*

[9] 15 U.S.C. § 632.

[10] 2007 NAICS Code 515120. This category description states: "This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public." U.S. Census Bureau 2007 NAICS Definitions, Television Broadcasting.

[11] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).