DOCKET FILE COPY ORIGINAL

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

MAILED
MAY - 7 2009
FCC Mail Room

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 FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: April 8, 2009 **Released: May 5, 2009**

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: Acting Chairman Copps and Commissioners Adelstein and McDowell issuing separate statements.

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION 1
II. BACKGROUND 4
III. DISCUSSION 12
IV. FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING 27
V. PROCEDURAL MATTERS 31
A. Filing Requirements 31
B. Initial and Final Regulatory Flexibility Analysis 41

C. Paperwork Reduction Act Analysis 43
D. Congressional Review Act 48
VI. ORDERING CLAUSES 49
APPENDIX A - Rule Changes
APPENDIX B - Initial Regulatory Flexibility Analysis
APPENDIX C - Final Regulatory Flexibility Analysis

I. INTRODUCTION

1. The Commission has long sought to promote broadcast station ownership by minorities and women in order to foster diversity in broadcasting.[1] Although some of the Commission's initiatives— such as the now-repealed minority tax certificate program— have had beneficial effects, the overall level of minority and female ownership in the broadcast industry remains dismal.[2] Unfortunately, the Commission currently does not possess reliable data on the precise status of minority and female ownership— data that we will need to establish and maintain effective policies over time and that the courts will insist upon if the Commission chooses to pursue more race- or gender-based approaches.

2. Starting in 1998, the Commission required broadcast licensees to report race, ethnic origin, and gender data on Form 323 in order to (1) allow the Commission to determine accurately the current state of minority and female ownership of broadcast facilities, (2) determine the need for measures designed to promote ownership by minorities and women, (3) chart the success of any such measures that we may adopt, and (4) fulfill our statutory mandate under Section 257 of the Telecommunications Act of 1996 ("1996 Telecom Act") and Section 309(j) of the Communications Act of 1934 ("the Act") to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry.[3] Unfortunately, those goals have never been realized, in significant part due to

[1] *See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (articulating policies to increase the level of broadcast facility ownership by minorities, including the comparative hearing minority preference, distress sale, and tax certificate policies); *Amendment of Section 73.3555 (formerly sections 73.35, 73.240 and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74, 97 (1985); *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 FCC Rcd 2788 (1995); *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 12 FCC Rcd 22363, 22399-401 (1997); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 13 FCC Rcd 15920, 15994-95 (1998); *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 (2003); *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*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 (2008).

[2] For example, one set of studies found that while minorities comprise 34% of the U.S. population, they own only 3.15% of full power commercial television stations and 7.7% of full power commercial radio stations, and, similarly, while women comprise 51% of the U.S. population, they own only 5.87% of full power commercial television stations and 6% of full power commercial radio stations. *See* S. Derek Turner and Mark Cooper, "Out of the Picture 2007: Minority & Female TV Station Ownership in the United States," (Oct. 2007) available at http://www.freepress.net/files/otp2007.pdf (visited Apr. 7, 2009); S. Derek Turner and Mark Cooper, "Off the Dial: Female and Minority Radio Station Ownership in the United States," (June 2007) available at http://www.stopbigmedia.com/files/off_the_dial.pdf (visited Apr. 7, 2009) ("Free Press Studies"). The authors define ownership for purposes of these studies as holding more than 50% voting interest. Free Press Studies at 11.

[3] *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, 13 FCC Rcd 23056, 23095 (1998) ("*1998 Biennial Regulatory Review Order*").

flaws in Form 323 data.[4] Indeed, a number of parties and researchers, governmental and private, have asked us to improve our data collection regarding minority and female ownership, and, in the *Diversity Order*, we proposed to do so.[5]

3. In this Report and Order, we adopt significant improvements to our Form 323 data collection in order to obtain an accurate, reliable, and comprehensive assessment of minority and female broadcast ownership in the United States. We believe that this data will serve as both a spur to action and a fundamental building block for future action. To accomplish our goal of improving the data collection, we adopt changes to our reporting requirements on the FCC Form 323, "Ownership Report for Commercial Broadcast Stations," which is currently filed by certain full power commercial AM, FM, and television broadcast stations.[6] We are broadening the reporting requirements to include commercial broadcast licensees that are sole proprietorships and partnerships comprised of natural persons and are requiring low power television stations ("LPTV") licensees, including Class A stations, to file biennially.[7] We also are requiring certain nonattributable interests to be reported. In addition, we are adopting a *Fourth Further Notice of Proposed Rulemaking* to seek comment on whether to modify FCC Form 323-E, "Ownership Report for Noncommercial Broadcast Stations," which is filed by non-commercial educational ("NCE") radio and television broadcast stations, to obtain gender and minority ownership data, and to identify more accurately ownership of NCE stations. Currently, low power FM ("LPFM") licensees, which are all noncommercial entities, are not required to file 323-E Ownership Reports. We also are seeking comment on whether to impose a biennial filing requirement on LPFM licensees to collect gender, race, and ethnicity ownership data.

II. BACKGROUND

4. The Commission requires full power broadcast stations to periodically file Form 323 and 323-E Ownership Reports to identify their organizational and ownership structures. Form 323 also requires stations to provide information on owners' race, ethnicity, and gender. Currently, full power commercial broadcast licensees are required to file Form 323: (1) when filing the station's license renewal application; (2) following the consummation of an assignment or transfer of control of the station license; (3) within 30 days after the grant of a construction permit for a new commercial radio or television station; and (4) at two-year intervals on the anniversary date of the station's renewal application filing date.[8] The biennial reporting requirement does not apply, however, where the licensee is a sole proprietor or a partnership that is composed entirely of natural persons.[9] In lieu of filing a new report, a

[4] *See infra*, ¶¶ 7-10.

[5] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, *et al.*, 23 FCC Rcd 5922, 5942 ¶¶ 51-52 (2008) ("*Diversity Order*" and "*Third Further Notice*").

[6] Accordingly, we are revising 47 C.F.R. § 73.3615(a). See Appendix A, attached hereto.

[7] We are revising 47 C.F.R. § 73.6026 and adding 47 C.F.R. § 74.797 to implement these changes. See Appendix A, attached hereto.

[8] 47 C.F.R. § 73.3615. *See also*, FCC Form 323, General Instructions. The permittee also is required to update its initial report or to certify the continuing accuracy and completeness of that report when the permittee applies for a station license for that new station.

[9] 47 C.F.R. § 73.3615(a). Prior to 1984, licensees other than widely held corporations were required to file ownership reports within 30 days of a change in their ownership information, while widely held corporations were required to file annually. In 1984, the rules were changed so that all licensees were required to file annually, except for sole proprietorships and 50/50 partnerships. The Commission made clear that it was balancing the burdens of the filing requirement with the need to monitor ownership compliance frequently enough so that (continued....)

licensee with a current and unamended report may certify that it has reviewed its current report and that it is accurate.[10] The Commission does not require LPTV stations, including Class A stations, to file Form 323,[11] nor does it require LPFM stations to file Form 323-E.[12]

5. If a full power commercial licensee or permittee is directly or indirectly controlled by another entity or if another entity holds an attributable interest in such licensee or permittee, a separate Form 323 is required to be submitted for such entity. To determine which interests are reportable on Form 323, the Commission uses its broadcast attribution rules, including the multiplier, which applies when an interest in a licensee is held indirectly by any party through one or more intervening entities in a vertical ownership chain.[13] Form 323 defines the term "respondent" as either the licensee or permittee or an entity controlling or holding an attributable interest in the licensee or permittee. Each respondent, other than a natural person, is required to list its officers, directors, stockholders, and other entities with attributable interests, its non-insulated partners, and/or its members.[14]

6. In 1998, the Commission began collecting data on minority and female broadcast ownership to fulfill the Commission's statutory mandate under Section 257 of 1996 Telecom Act and Section 309(j)

(Continued from previous page)

noncompliance would not persist and become established. *Attribution of Ownership Interests*, 97 FCC 2d 997, 1032 ¶ 74 (1984), *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986). In 1985, the Commission narrowed the scope of the exemption granted to 50/50 partnerships from the annual filing requirement to those partnerships that consisted entirely of natural persons. Other 50/50 partnerships were required to file annually. *Attribution Reconsideration Order*, 58 RR 2d at ¶ 62. The Commission stated that it sought to assure that it learns of changes to attributable interests in the partners in situations where assignment or transfer applications are not required. *Id.* It stated that, for example, annual reports would provide information on changes in the officers or directors of a corporate partner. *Id.* However, the Commission also broadened the exemption to include other partnerships of natural persons, not just 50/50 partnerships. *Id.* at ¶ 63. The Commission stated that it could safely eliminate the annual reporting requirement for such entities because its rules require prior approval of any assignment or transfer of a partnership interest. *Id.* Thus, the Commission could determine ownership of these entities by tracking those applications. In 1998, the Commission replaced the annual filing requirement with a biennial filing requirement. The Commission stated that this relaxation of the ownership reporting requirement would ease the paperwork burden on licensees without impairing the public's ability to ascertain the ownership of broadcast stations. However, the Commission declined to relax the reporting requirement further, particularly given consolidation and the frequency of ownership changes. The Commission also formalized the practice of requiring an ownership report within 30 days of consummation of an approved assignment or transfer by amending the rule accordingly. *1998 Biennial Regulatory Review Order*, 13 FCC Rcd at 23094 ¶ 94.

[10] 47 C.F.R. § 73.3615(a).

[11] Low power televisions stations are subject to Part 74 of the Commission's rules, which does not contain any requirements to file ownership reports. Class A stations, as defined in 47 C.F.R. § 73.6001, also are not currently required to file ownership reports. *See* 47 C.F.R. § 73.6026.

[12] *See* 47 C.F.R. § 73.801.

[13] Form 323 Instructions, Section II. The attribution rules are contained in the Notes to 47 C.F.R. § 73.3555. Under the multiplier rule, Note 2(c), to determine the interest of a party that holds an ownership interest in a licensee where the interest is held indirectly through intervening corporations, one must successively multiply the ownership percentage of each entity in the ownership chain except for any interest that exceeds 50%, which is not multiplied. The resulting figure is used to determine whether the interest meets or exceeds the attribution threshold. For additional information on the Commission's attribution rules, see *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559 (1999) ("*1999 Attribution Order*"), *recon. granted in part*, 16 FCC Rcd 1097 (2001) ("*Attribution Reconsideration Order*").

[14] Form 323, Instructions for Section II(1).

of the Act to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry.[15] The Commission revised Form 323 to require filers to identify the gender and race or ethnicity of individuals with attributable interests in the licensee.[16] The Commission concluded that the information was needed 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, and to chart the success of any such measures that the Commission may adopt."[17]

7. It has beeome apparent, however, that the current collection methodology is inadequate and ineomplete and cannot accurately be used to determine the state of minority and female broadcast ownership. In the *2006 Quadrennial Review* proceeding, study authors who attempted to use Form 323 minority and female ownership data for their analyses of broadcast ownership issues express concerns about the usefulness of the data. The authors state that the gender and racial information collected on Form 323 cannot be relied on as a basis for credible analysis of issues relating to ownership of broadcast outlets by women and minorities.[18] The researchers contend that the data are incomplete, inaccurate, duplicative, and subject to significant measurement error.[19] Specific problems cited include ownership percentages exceeding 100%, inconsistent racial classifications from year to year, missing and inaccurate information, and missing filings.[20] The authors also note that because the biennial filing deadlines are tied to the station's renewal application filing date, it is impossible to obtain a snapshot of broadcast ownership at any one particular moment in time to use as a benchmark or for analytical purposes. The authors also identified the exemptions for certain stations as problematic because the resulting database is incomplete.[21] The authors recommend that the Commission collect race and gender data on a regular basis not only from commercial broadcasters that are currently exempt from the biennial reporting

[15] *1998 Biennial Regulatory Review Order*, 13 FCC Rcd at 23095 ¶ 96; *see also* 47 U.S.C. §§ 257, 309 (j).

[16] *1998 Biennial Regulatory Review Order*, 13 FCC Rcd at 23094 ¶ 94. The Commission stated that it would determine at a later date whether to add the gender, race, and ethnicity question to the FCC Form 323-E required of noncommercial stations. *Id.* at 23098 ¶ 103.

[17] *Id.* at 23095 ¶ 96.

[18] *See, e.g.*, C. Anthony Bush, "Minority and Women Broadcast Ownership Data," attached as Appendix A to Kiran Duwadi, Scott Roberts, and Andrew Wise, "Ownership Structure and Robustness of Media" ("Media Ownership Study # 2"), available at http://www.fcc.gov/ownership/studies.html (visited Apr. 7, 2009), at App. A at 9; Carolyn M. Byerly, "Questioning Media Access: Analysis of FCC Women and Minority Ownership Data," (Sept. 2006), attached as Appendix A to United Church of Christ, Inc, et al ("UCC") comments submitted in MB Docket No. 06-121, at App. A at 3-9 ("Byerly").

[19] Arie Beresteanu and Paul B. Ellickson, "Minority and Female Ownership in Media Enterprises" (June 2007), available at http://www.fcc.gov/ownership/studies.html (visited Apr. 7, 2009) ("Media Ownership Study # 7) at 11-12, 20-22. The authors recommend that the FCC improve its collection of data regarding gender and racial ownership information to ensure full, consistent, and accurate reporting of ownership status and its composition. *Id.* at 20. Byerly recommends that the Commission revise its internal administrative procedures to ensure timely submissions and accurate database input. Byerly at 4-5.

[20] S. Derek Turner and Mark Cooper, "Out of the Picture: The Lack of Racial and Gender Diversity in TV Station Ownership," (2005) attached as Study 11 to Consumers Union, et al. comments submitted in MB Docket No. 06-121, at 217-19 ("Turner and Cooper").

[21] Media Ownership Study # 2 at App. A at 13, 18-19. Bush also criticizes the data because it does not include gender and racial information from licensees that are sole proprietorships and certain partnerships. *Id.*, App. A at 13.

requirement, but also from non-commercial licensees.[22]

8. Additionally, critics assert that the format in which the data are collected and made available to the public poses obstacles to analysis of the data. Specifically, researchers object to the use of attachments for submitting ownership data because the attachments cannot be electronically searched in the database or cross-referenced with other forms.[23] Researchers also state that the filing of multiple forms by separate entities for a single station creates additional difficulties for performing analysis.[24]

9. *GAO Study*. In March 2008, the United States Government Accountability Office ("GAO") released a report that reviews (1) the number and ownership characteristics of various media outlets; (2) the extent to which broadcast outlets are owned by minorities and women; (3) the effect of economic, legal, regulatory, and technological factors on the number and ownership characteristics of media outlets; and (4) expert opinions on modifying certain media ownership laws and regulations.[25] The GAO report recommends that the FCC identify processes and procedures to improve the reliability of its data on gender, race, and ethnicity so that it can more effectively monitor and report on the status of female and minority broadcast ownership.

10. Specifically, the GAO identifies three weaknesses of the data: (1) exemptions from the biennial filing requirement for certain types of broadcast stations, (2) inadequate data quality procedures, and (3) problems with data storage and retrieval.[26] First, the GAO concludes that because individuals, partnerships of natural persons, low power stations, and noncommercial broadcast stations are exempt from filing Form 323 biennially, it is not possible to identify the full universe of broadcast stations owned by minorities and women.[27] As for data quality procedures, the GAO criticizes the Commission for not verifying or periodically reviewing the gender, race, and ethnicity data submitted on Form 323.[28] The GAO finds that reporting of ownership data on attachments is problematic because the data are not entered into the database, which renders the database unreliable and unusable for electronic queries. The GAO also criticizes the Commission for retaining outdated ownership forms in its database, even when a form has been updated.[29] The GAO commends the Commission for taking several measures to address these concerns, noting, for instance, that the Commission now allows owners to modify information on a

[22] Byerly recommends that the Commission collect gender and racial information on all commercial and non-commercial radio, television, FM translator, and low power television and radio stations. Byerly at 4-5.

[23] Turner and Cooper at 218-19. *See also*, Allen S. Hammond, "The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006," (Media Ownership Study # 8), available at http://www.fcc.gov/ownership/studies.html (visited Apr. 7, 2009). Hammond notes that verification of ownership is extremely difficult when stations are licensed to holding companies or wholly owned subsidiaries of large corporations. *Id.* at 9.

[24] Turner and Cooper discovered as many as 20 Form 323s (one for each holding entity) for a single station, with the actual owners listed on only one of the filed forms. Turner and Cooper at 218.

[25] "Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess," Report to the Chairman of the Subcommittee on Telecommunications and the Internet, Energy and Commerce Committee, House of Representatives, GAO-08-383 (Mar. 2008) ("GAO Report").

[26] GAO Report at 4.

[27] *Id.* at 22.

[28] *Id.*

[29] *Id.*

previously submitted Form 323, instead of requiring modifications to be submitted on a new form, and it precludes electronic submissions of incomplete forms. However, the GAO faults the Commission for continuing to allow respondents to file ownership information on attachments to Form 323, for not having any regular review process, and for not imposing consequences for misfiling that would encourage accurate, complete, and timely submission of Form 323.[30]

11. On March 5, 2008, the Commission released the *Diversity Order* 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.[31] The Commission adopted a number of new rules and policies intended to encourage ownership diversity and new entry in broadcasting. The Commission discussed the benefits of conducting "longitudinal studies" of minority and female ownership in order to track ownership trends over time and agreed to begin research once the Commission improved the data collection process and gathered the necessary data.[32] The Commission concluded that such studies could help parties to assess the impact of changes in our media ownership rules on minority and female ownership and provide real-time feedback on the impact of the Commission's rules and policies on licensing, access to capital, availability of spectrum, and opportunities for minority and female ownership. The Commission stated that it would modify Form 323 Ownership Report to improve the quality and usefulness of the data and sought comment on specific proposals. Below, we discuss the proposals on which the Commission sought comment and describe the steps we are taking to address concerns about our collection of data on minority and female ownership of broadcast stations.

III. DISCUSSION

12. The promotion of diversity of ownership of broadcast stations, including ownership by minorities and women, is a long-standing policy goal of the Commission, and is consistent with our mandate under 309(j) of the Act.[33] To achieve this goal, we must gain a better understanding of the current state of minority and female ownership. We agree with commenters, study authors, and the GAO that the data we have collected in the past using Form 323 are not sufficiently reliable and comprehensive to form the basis for effectively assessing ownership diversity and whether additional measures to promote it are necessary. Because comprehensive data on minority and female ownership of broadcast licensees are not available from other government and commercial sources, the quality and comprehensiveness of the Commission's database materially affects the Commission's and the public's

[30] *Id.* at 22-23.

[31] *Diversity Order*, 23 FCC Rcd at 5924 ¶ 1. Previously, in *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, (3d Cir. 2003), the court had instructed the Commission to consider on remand proposals to advance minority ownership in its rulemaking process. *Id.* at 421 n.59.

[32] *Diversity Order*, 23 FCC Rcd at 5942 ¶¶ 51-52. A "longitudinal study" involves repeated observations of the same reporting unit over periods of time. The Diversity and Competition Supporters ("DCS") proposed such studies in response to the *Second* and *Third Further Notices* in this proceeding. *See 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 Rulemaking, 22 FCC Rcd 14215 (2007). In the *Diversity Order* and the *Third Further Notice*, the Commission committed to improving minority and female ownership information sufficiently so that such studies of ownership could be undertaken. In this Order, we adopt measures to improve our collection of data about minority and female ownership so that these data can serve as the basis for observing trends in minority and female ownership and for studies on minority and female ownership, whether these are longitudinal studies or other kinds of studies, that will, in turn, serve as an accurate and solid basis for measures to promote diversity in the broadcast industry.

[33] *See 1998 Biennial Regulatory Review Order*, 13 FCC Rcd at 23095 ¶ 96.

ability to achieve these goals. As discussed below, in this Order, we adopt changes to ownership reporting requirements to increase the accuracy and comprehensiveness of the data collected and to address the other flaws in collection of minority and female ownership information discussed in the GAO report and in this proceeding. Specifically, (1) we enlarge the class of licensees required to file ownership reports biennially to include LPTV stations, including Class A stations, as well as commercial broadcast stations licensed to sole proprietors and partnerships composed of natural persons; (2) for purposes of defining the class of interests that are reportable, we will not apply two attribution exemptions — the single majority shareholder exemption and the exemption for interests held in eligible entities that would be attributable but for the higher Equity/Debt Plus ("EDP") thresholds adopted in the *Diversity Order*; (3) we set a uniform biennial filing date in place of the filing date tied to stations' renewal anniversaries; and (4) we set an initial filing date of no later than November 1, 2009. Further, to effectuate these changes, as discussed more fully below, in this Order, we delegate authority to staff to (1) revise the FCC Form 323 according to the parameters adopted in this Order; (2) revise the electronic interface so that the ownership data is incorporated into the database, is searchable, and can be aggregated and cross-referenced; (3) build additional checks into Form 323 to perform verification and review functions and to preclude the filing of incomplete or inaccurate data; and (4) conduct audits on a random basis to ensure accuracy of Form 323 Reports. We believe that the changes we are adopting today adequately address commenters' and the GAO's criticisms and will allow us to undertake studies that reliably analyze minority and female ownership.

13. *Use of FCC Form 323*. In the *Third Further Notice*, the Commission sought comment on whether to create a new form to collect data on minority and female ownership or to modify the existing Form 323.[34] The Commission tentatively concluded that it should modify the existing Form 323 and not create a new form for this purpose.[35] The commenters agree with that tentative conclusion.[36] We continue to believe that use of Form 323 is the most efficient and least burdensome method of collecting minority and female broadcast ownership data.[37] Broadcasters are familiar with the form and how to complete it. We see no reason to adopt another form when we can make changes to the existing form with which broadcasters are familiar to accomplish the same goals. Accordingly, we will continue to use Form 323 to collect data on minority and female ownership and will retain the existing biennial reporting interval for the form.[38] As discussed below, however, we will modify the ownership reporting

[34] *Third Further Notice*, 23 FCC Rcd at 5955 ¶¶ 95-96.

[35] *Id.* at 5955 ¶ 95.

[36] DCS Comments at 18-19; UCC Comments at 9-11; NAB Comments at 10-11; Entravision Reply Comments at 3.

[37] DCS suggests that the Commission revise the Form 323 to gather anecdotal evidence regarding the impact of the Commission's rules or market conditions on their ability to secure access to capital, spectrum, and opportunity. DCS Comments at 18-19. While it would be useful to have information on these topics, we are not broadening the Form 323 to include them. The purpose of our action today is to revise the Form 323, generally, in order to gather more accurate broadcast ownership information, and, specifically, to collect empirical data that is amenable to statistical analysis of the extent to which minorities and women participate in the ownership of broadcast outlets. To the extent that anecdotal evidence will be helpful in formulating and justifying additional measures to promote diversity, the Commission can undertake such studies in a different context.

[38] In the *Diversity Order*, the Commission agreed with some commenters that annual studies would be useful, but it did not commit to undertaking studies annually, instead leaving open the issue of optimal intervals for conducting future studies. 23 FCC Rcd at 5942 ¶ 52 & n.103. Our decision to collect minority and female ownership information biennially instead of annually represents a balance between the goal of quickly building a robust database, on the one hand, and the need to minimize burdens on respondents and to provide the Commission with a sufficient data collection interval to examine the data and ascertain its quality, on the other.

requirement in several key respects to address the criticisms of our data collection efforts and thus improve the accuracy, reliability, and usefulness of the information we obtain. Commission staff is directed to modify the existing FCC Form 323 consistent with the discussion herein.[39]

14. *Enlarging the Class of Stations Required to File Biennially.* As discussed above, currently the Commission requires only commercial, full power AM, FM, and television stations to file Form 323 biennially. The GAO and the *Quadrennial Review* study authors believe the Commission should expand the universe of stations required to submit data. UCC also supports expanding the scope of the filing requirement.[40] The National Association of Broadcasters ("NAB") and American Women in Radio and TV ("AWRT") disagree with requiring sole proprietors to file biennially because, they argue, any change in the identity of a licensed individual would be captured by a request for an assignment or transfer of control of the license, which would require the licensee to file a revised Ownership Report.[41] AWRT recommends that, to ensure that the Commission has accurate information on all licensees, the Commission require a one-time filing for licensees who are currently exempt from the biennial reporting requirement but continue to exempt these licensees from the biennial requirement.[42]

15. We conclude that the most effective way to obtain comprehensive, up-to-date ownership data is to require all commercial broadcast licensees to file the revised 323 Form biennially.[43] Accordingly, we will require all full power commercial broadcast stations and all low power television stations, including Class A stations, to file FCC Form 323 every two years. Although LPTV and Class A stations are not subject to the Commission's Part 73 ownership rules, and therefore have not heretofore been subject to Form 323 filing requirement, we conclude that collecting minority and female ownership data for these stations is essential if we are not to overlook a substantial reservoir of minority and female owners of broadcast facilities, and we believe the benefits of collecting this information outweigh any additional filing burdens imposed on these stations. Proponents of LPTV and Class A stations have long advised us that these stations provide significant opportunities for minorities and females to enter into the broadcasting business by owning and operating stations and to serve underserved audiences, including minorities.[44] Because we are modifying the form to include additional requests for information and establishing a uniform filing date, we will require all licensees and respondents to file a complete Form

[39] Information as to minority and female ownership is currently elicited in response to Question 9 of Section II of the Form 323. We delegate to staff the authority to modify the format, structure, content, and placement of questions designed to elicit empirical information as to minority and female ownership within the boundaries of the policies adopted in this Order. In designing the appropriate questions to elicit the information, staff should balance the goals of increasing data quality and comprehensiveness with that of minimizing burdens on respondents wherever possible.

[40] UCC Comments at 9-11; *see also* AWRT Comments at 4-6.

[41] NAB Comments at 8-9; AWRT Comments at 4-6.

[42] AWRT Comments at 4-6.

[43] In the *Fourth Further Notice*, also adopted today, we seek comment on whether to include gender and racial/ethnic information on Form 323-E. Various parties, including the *Quadrennial Study* authors and the GAO have asked us to gather information on noncommercial broadcast stations. *See Third Further Notice*, 23 FCC Rcd at 5955 ¶ 94.

[44] *See, e.g.*, MMTC Oct. 6, 2008 Ex Parte (MB Docket No. 07-294) at I ("Class A stations offer the best opportunity for minorities, women and small business to participate and compete in the television industry, which is increasingly consolidated with few opportunities for minority broadcasters . . . Approximately 15% of Class A stations are minority-owned and many of these stations provide multilingual and multicultural service unavailable from full power stations.").

323 on or before the initial filing date established in this Order. This will allow the first snapshot to be complete and provide a baseline of comparison for later filings every two years.

16. We also will eliminate the exemption from the biennial reporting requirement that currently applies to sole proprietorships and partnerships of natural persons that are licensees of commercial broadcast stations. Exempting sole proprietors and partnerships composed of natural persons from the biennial filing requirement precludes us from obtaining a complete snapshot of female and minority ownership. Excluding sole proprietors and partnerships of natural persons from Form 323 filing requirements – business structures that small and new entrant owners, including minorities and women, would likely use– would similarly overlook a potentially significant group of minority and female owners. Further, such an exemption prevents us from obtaining information resulting from ownership changes that do not require prior FCC approval.[45] Any additional filing burdens imposed by this action are counterbalanced by the need to ensure the completeness and accuracy of our data collection efforts. The Commission staff is directed to revise Form 323 as indicated above.

17. *Reportable Interests*. Currently, Form 323 requires respondents to provide information, including gender, race, and ethnicity, for all entities with attributable interests in any station that is subject to the reporting requirement.[46] Therefore, Form 323 does not collect information as to holders of nonattributable interests, including information as to whether they are minorities or females. While the Commission considers only attributable interest holders in determining whether licensees are in compliance with our media ownership rules, the balance struck in defining what interests should be counted for purposes of implementing our ownership rules may not be appropriate for collecting data on interests held by minorities and women.[47] We believe that in order to measure the extent of minority and female ownership of broadcast outlets and assess the need for and effectiveness of any policies designed to promote minority and female ownership, it is important to obtain information on holders of certain nonattributable interests as well as on holders of attributable interests. Our attribution rules seek to identify financial interests in licensees that convey the potential and incentive to exert significant

[45] As noted above, in 1985, the Commission exempted partnerships composed of natural persons from a then-annual filing requirement based on its view that it could obtain adequate information as to ownership of such entities in assignment and transfer applications. In the instant Order, the Commission extends the biennial filing requirement to partnerships composed of natural persons and sole proprietors. We do so based not on a revision of our earlier decision that such a step is not needed to monitor compliance with the ownership rules effectively, but rather, solely based on our narrower decision that collecting data on such entities is necessary for minority and female ownership data to be comprehensive enough to be useful. Our decision to collect the data as of a uniform date means that relying on transfer or assignment applications to collect minority and female ownership data as to these entities will not suffice.

[46] FCC Form 323, Question 9.

[47] Our action here expanding the categories of interest holders for whom minority and female ownership information must be reported beyond holders of attributable interests to include holders of certain nonattributable interests is limited only to gathering information on minority and female ownership and in no way impacts our larger decision as to what interests should be attributed for purposes of measuring compliance with the Commission's multiple ownership rules. We note that we consider certain aspects of the attribution rules in a separate proceeding. *See Cable Horizontal And Vertical Ownership Limits, Implementation of Section 11 of the Cable Television Consumer Protection And Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 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*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2176 ¶ 92, *et seq.* (2008) ("*2008 Cable Ownership Further Notice*").

influence over core licensee functions, and thus should be counted under the multiple ownership rules.[48] At the same time, however, the Commission has sought to target the attribution rules precisely so as to avoid impeding capital flow to broadcasters. As the Commission stated in its *1999 Attribution Order*, "we must tailor the attribution rules 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."[49] However, in the instant case, the concern about impeding capital flow does not apply, and, in fact, our goal is to collect information so that we can accurately assess and effectively promote diversity of ownership in the broadcast industry. We can be more inclusive in collecting this information without causing an adverse effect on capital investment. We recognize that we must balance the goal of collecting more comprehensive and more accurate data with the goal of minimizing burdens on respondents. Broadcasters are familiar with and accustomed to keeping records in accordance with the Commission's existing attribution rules, which provide useful, fairly bright-line criteria to determine which interests must be reported and which interests do not need not be reported. However, there are certain areas in which the comprehensiveness of our minority and female ownership data collection efforts will be materially advanced by deviating from the attribution rules, and we believe we can do so without unreasonably burdening respondents. Specifically, we believe it is important to collect information from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption[50] and from holders of interests that would be attributable but for the higher Equity/Debt Plus ("EDP") thresholds adopted in the *Diversity Order* for purposes of determining attribution of certain interests in eligible entities.[51] Accordingly, Commission staff is directed to modify Form 323 so that the class of interests that are reportable and the entities that are required to file Form 323 will include entities subject to these two attribution exemptions.

18. The single majority shareholder exemption exempts from attribution minority shareholdings in a corporation with a single majority shareholder, based on the view that in a corporation in which a single entity holds more than 50% of the voting power, minority shareholders cannot exercise significant

[48] Core licensee functions include control over programming, personnel, and finances. *1999 Attribution Order*, 14 FCC Rcd at 12560 ¶ 1.

[49] *See* note 5, *supra*.

[50] The single majority shareholder exemption provides that a minority shareholder's voting interests will not be attributed where a single shareholder owns more than 50 percent of the outstanding voting stock. *See* former 47 C.F.R. § 73.3555 Note 2(b). Accordingly, shareholders holding voting stock interests of 5 percent or more in corporations with a single majority shareholder are required to be reported.

[51] Accordingly, the EDP threshold of 33% will be applied for reporting purposes, for all entities, even eligible entities. Under the Commission's equity/debt plus ("EDP") standard, an interest is held attributable under the Commission's rules if, aggregating both equity and debt, the interest exceeds 33 percent of the total asset value (all equity plus all debt) of a broadcast station licensee, cable television system, daily newspaper or other media outlet subject to the Commission's broadcast multiple ownership or cross-ownership rules– and the interest holder also (1) holds an attributable interest in another media outlet in the same market that is subject to the multiple or cross-ownership rules, or (2) supplies over 15 percent of the total weekly broadcast programming hours of the station in which the interest is held. The *Diversity Order* adopted a mechanism to allow an interest holder to exceed the 33 percent threshold without triggering attribution if the investment would enable an "eligible entity" (as that term is defined in the *Diversity Order*) to acquire a broadcast station provided that (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. In order to obtain a broader scope of ownership data, we will require entities holding interests in licensees that would otherwise be deemed non-attributable by virtue of the "eligible entity" exemption to be reported.

influence. This attribution exemption has been the subject of considerable debate over the years, and there is a pending rulemaking proceeding seeking comment on whether the exemption should be retained or eliminated.[52] For purposes of assessing levels of minority ownership and for the reasons stated above,[53] we believe that we should err on the side of comprehensiveness based on criticisms of the current collection scheme. The minority interests that are exempt from attribution under the single majority shareholder exemption can be quite substantial – nearly 50%. Including these interest holders would make the data set more complete and help determine whether nonattributable interests could be a source of attributable minority and female owners in the future. Thus, collection of this information will be useful in assessing whether we need to take additional measures to increase minority ownership and in justifying any measures that we decide to take.

19. Similarly, we believe it is important to collect information from holders of interests that would be attributable but for the higher attribution thresholds embodied in the recently adopted relaxed EDP rule applicable to certain investments in eligible entities. In order to increase investment opportunities for eligible entities to acquire broadcast stations, the *Diversity Order* raised the Equity/Debt Plus attribution threshold to 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 the attribution 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 other criteria are met.[54] The Commission did not premise its relaxation of the EDP attribution rule on a finding that such an interest holder is unable to exert significant influence in the licensee but rather on a policy decision that relaxing the EDP rule is necessary to facilitate access to capital by eligible entities, including minority- and female-owned businesses. The Commission already has determined that interests that exceed the 33 percent EDP threshold confer on the interest holder an ability to influence a licensee's operations. Information on such interest holders would be directly relevant to any assessment of the extent to which ownership by women and minorities is likely to affect programming and viewpoint diversity. Thus, including these interests is necessary to ensure that our information collection is sufficiently comprehensive.[55]

20. *Database Functionality*. The GAO report and the *Quadrennial Review* study authors have criticized the difficulty of aggregating and summarizing the data submitted on Form 323. Specifically, the GAO Report criticizes the Commission's procedures that allow respondents to provide attachments with their electronic filing that may include minority and female ownership data. Because the data are not entered into the database, the data cannot be retrieved and evaluated by electronic query. Moreover, the

[52] *See 2008 Cable Ownership Further Notice*, 23 FCC Rcd at 2182-84 ¶ 108-12. The Commission eliminated the exemption in 2001, based on elimination of the exemption in the cable context and on a holding that minority shareholders in such corporations could exert significant influence such that their interests should be attributed. *Attribution Reconsideration Order*, 16 FCC Rcd at 1116-17 ¶ 43. The Commission subsequently reinstated the exemption after the court remanded the Commission's decision to eliminate the exemption in the cable context. *Time Warner Entertainment Co. L.P. v. FCC*, 240 F.3d 1126, 1143-44 (D.C. Cir. 2001); *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*, Order, 16 FCC Rcd 22310 (2001) (reinstating the exemption pursuant to the court's remand). The exemption currently is in effect.

[53] *See supra*, ¶ 17.

[54] *Diversity Order*, 23 FCC Rcd at 5936 ¶ 31.

[55] 47 C.F.R. § 73.3555, Notes 2(a) & (i); *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579-80 ¶¶ 36-39.

GAO Report criticizes the Commission's current data storage and retrieval system because it retains the ownership information from outdated forms, even if new forms have been filed. We agree that the current procedures for submitting the data on Form 323 should be changed. It is crucial that the data be submitted in a useful manner so the data are electronically searchable and can easily be sorted and aggregated. None of the commenters oppose procedural modifications to collect usable data for performing studies.[56] Therefore, Commission staff is directed to modify Form 323 so that ownership data is incorporated into the database, is searchable, and can be aggregated and cross-referenced electronically.

21. In the *Third Further Notice*, we noted that currently if a licensee 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 each such entity. We sought comment on whether this practice makes gender and minority data more or less reliable.[57] While NAB did not comment on data reliability, it did propose that the Commission revise the reporting requirement so that a single form could be filed for all of the entities ultimately controlled by the same parent company or a single form for each licensee. NAB suggests that its proposal would make it easier to identify minority and female owners and reduce the burdens on Commission licensees.[58] In addition, we note that at least one *Quadrennial Review* study author notes that actual owners of stations are not necessarily listed on all Form 323s.[59] At this time, we are not modifying the current requirement that licensees, parent entities, all attributable entities, as well as the nonattributable entities identified above, file separate forms. First, we are not convinced that requiring licensees to obtain and report all ownership data for parent corporations and attributable entities on a single form would be less burdensome than the current practice. Licensees may find it burdensome to collect ownership information as to certain entities that hold interests in the licensee indirectly through a vertical ownership chain. Moreover, there are measures in place to ensure that researchers can aggregate and cross-reference the data submitted on separate forms for a broadcast station. For instance, all Form 323s currently require filers to list facility ID numbers and call signs. However, to further improve the ability of researchers and other users of the data to cross-reference information and construct complete ownership structures, we will require each attributable entity above the licensee in the ownership chain to list on Form 323, the FCC Registration Number (FRN) of the entity in which it holds an attributable interest. In other words, each filing entity must identify by FRN the entity below it in the chain.[60] We direct staff to revise Form 323 accordingly. While we believe these measures will resolve concerns regarding the usefulness of the data, we delegate authority to the staff to revisit this issue if additional modifications of the form are determined to be necessary.

22. *Uniform Reporting Date*. The Commission sought comment on whether to establish a uniform filing date for all respondents.[61] Currently, filing and reporting requirements are tied to stations' renewal cycles, and new data are continually incorporated into the database as it is filed, mixing new data and old data. Our experience with the data has made it apparent that the current use of rolling filing dates has impeded the ability to perform time-related comparisons using our database. None of the commenters

[56] *See* AWRT Comments at 5-6; AWRT Reply Comments at 2-3; UCC Comments at 9-11; NAB Reply at 11.

[57] *Third Further Notice*, 23 FCC Rcd at 5955 ¶ 95.

[58] NAB Comments at 9.

[59] *See supra* n.24.

[60] For example, Licensee A is wholly owned by Corp. B, and Corp. B is wholly owned by Corp. C. Corp. C is required to include on its Form 323, Corp. B's FRN. Corp. B is required to include on its Form 323 the Licensee's FRN.

[61] *Third Further Notice*, 23 FCC Rcd at 5955 ¶ 95.

opposes a uniform filing date. To make the data easier to work with, to address the problems created by the staggered ownership report filing deadlines currently in effect, and to facilitate studies of ownership, we are establishing a uniform filing date and a uniform date on which respondents must biennially identify ownership information as it exists on that date. Therefore, no later than November 1, 2009, and every two years thereafter, all commercial, full power broadcast licensees, LPTV, and Class A licensees, and entities with attributable interests in those licensees are required to file the revised Form 323. The reported ownership information must be current as of October 1 of the year in which the filing is being made. Therefore, for the first filing, all ownership information must be current as of October 1, 2009. The provision of ownership information on a uniform filing date every two years, instead of on a rolling or ad hoc basis, will facilitate comparisons among stations and rigorous analysis.

23. *Data Quality Procedures.* Much of the criticism of the current data focuses on the lack of an internal process to verify or review submitted data. In addition, the GAO strongly recommends that the Commission adopt internal administrative processes to verify and review the submitted data. The Commission has already taken steps to address many of these concerns. We have improved the computer interface process, thereby allowing owners to modify information on a previously submitted Form 323. We also have put in place edit checks that preclude owners from skipping questions, including questions on the owner's gender, race, and ethnicity. To address additional quality control issues, Commission staff is directed to build additional checks into Form 323 to perform verification and review functions and to preclude the filing of incomplete or inaccurate data. In addition, as discussed above, staff is directed to modify the form to ensure that all ownership data will be filed in a format that can be electronically searched, aggregated, and cross-referenced. We believe that the improvements we are making as a result of our decisions today will resolve the identified flaws with the current form and with our internal processes.

24. *Audits.* In the *Third Further Notice*, we sought comment on whether we should conduct audits to assess the accuracy of the information filed in the annual ownership report.[62] In addition, DCS requests that the Commission conduct audits on a rolling basis to assess the accuracy of the information filed and assess forfeiture penalties for violations.[63] As another measure to improve the quality of the ownership data, the Commission directs the Media Bureau to conduct audits on a random basis to ensure the accuracy of the Ownership Reports. We authorize the Bureau to make revisions to Form 323, its instructions, and the electronic database, as necessary in order to conduct random audits.

25. Finally, the Commission sought comment on the penalties to be imposed for licensees that file inaccurate information.[64] The GAO Report recommends that the Commission adopt additional penalties for entities that fail to file the form or that file inaccurate information. NAB opposes the adoption of such penalties to ensure accurate ownership information, and argues that the Commission already has procedures for penalizing those that fail to file accurate reports.[65] We conclude that current policies and rules are adequate to assure the accuracy of the information reported and that additional penalties are unnecessary. The truthfulness, accuracy, and completeness of information submitted on a Form 323 must be certified by the individual permittee or licensee, a general partner in the licensee or permittee partnership, or an appropriate officer in the licensee or permittee corporation or association.[66]

[62] *Third Further Notice*, 23 FCC Rcd at 5955 ¶ 96.

[63] DCS Comments at 19.

[64] *Third Further Notice*, 23 FCC Rcd at 5955 ¶ 96.

[65] NAB Comments at 10-11.

[66] Form 323, Section III, Certification Instructions.

Licensees are required to exercise reasonable due diligence before certifying to the accuracy of any information that is submitted to the Commission. This holds true for the accuracy of statements submitted on Form 323.

26. Further, we believe that our current enforcement procedures are sufficient to ensure that licensees comply with our rules and procedures. Willful false statements are punishable by (1) fine and/or imprisonment under 18 U.S.C. § 1001, and/or (2) revocation of any station license or construction permit (47 C.F.R. § 312(a)(1)), and/or (3) forfeiture (47 U.S.C. § 503).[67] As NAB explains, "[h]onest representations before the Commission go directly to a licensee's character qualifications, and false statements have the potential to subject the licensee to investigations, forfeitures, criminal fines, imprisonment, and license revocation."[68] We believe that the same enforcement mechanisms currently in place to enforce compliance with all filing requirements under our rules are adequate to enforce this filing requirement.

IV. FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

27. *Noncommercial Entities.* The FCC Form 323-E Ownership Report is filed by NCE licensees of AM, FM and TV broadcast stations. Currently, Form 323-E does not ask gender, race, or ethnicity data questions. We seek comment on whether to include this information on the form. We tentatively conclude that obtaining gender, race, and ethnicity information would further our goal to design policies to advance diversity in the broadcast industry. We believe that data from the entire universe of NCE stations are necessary to provide a comprehensive picture of broadcast ownership, including ownership by women and minorities in the broadcast industry. *Quadrennial Review* researchers and the GAO support modifying our filing requirements to collect ownership data for NCE stations.

28. We recognize, however, that there are a number of data collection issues that could thwart our efforts to obtain minority and gender data due to the complex ownership structure of some NCE licensees. Many NCE broadcast licensees are non-profit, non-stock entities, or governmental organizations that are controlled by governing boards or trustees composed of members who do not have a financial stake in the licensee organization. Their structure and organization raise difficult issues as to how to define ownership in the NCE context.[69]

---

[67] *Id.*

[68] NAB Comments at 11-12. *See Pass Word, Inc.*, 76 FCC 2d 465, *aff'd*, 49 RR 2d 1013 (finding that misrepresentation can lead to revocation of license or character disqualification and dismissal of pending applications); *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002), recon. denied, 17 FCC Rcd 8554 (2002).

[69] In 1989, the FCC issued a Notice of Inquiry seeking comment on establishing guidelines for identifying when transfers of control have occurred due to changes in the governing boards of certain types of non-stock entity licensees. *Transfer of Control of Certain Licensed Non-Stock Entities,* Notice of Inquiry, 4 FCC Rcd 3403 (1989) ("*1989 Non-Stock Entity NOI*"). The Commission received comments from a number of non-stock entity licensees as part of the *1989 Non-Stock Entity NOI.* The commenters agreed generally that fundamental differences exist between traditional stock corporations and non-stock entities so that the Commission's attribution rules applicable to commercial stations, concepts of control and transfer of control, and other rules may not necessarily be appropriate. Some commenters suggested that the makeup of a non-stock entity's governing board is secondary in importance to its organizational document (*e.g.*, a state university charter, an enabling statute, official by-laws, etc.) because the organizational documents establish a continuity of purpose that transcends the identity of the individuals designated to serve on the governing board. We also note that a significant number of non-stock entity NCE licensees are directly or indirectly affiliated with state or local government entities. For example, some NCE broadcast licensees are operated by state university systems or local school districts. In some cases, the licensee operates as a statewide public broadcast network established by statute and funded in whole or in part by taxpayer dollars. In those cases, the membership of a governmental entity licensee's governing board may be determined (continued....)

29. We seek comment on how to define ownership, including minority and/or female ownership, in the NCE context. We recognize that organizational documents are important in defining an NCE entity's strueture and mission, including whether it serves underserved audiences. However, these documents would not provide the same kind of empirical evidence that ownership statistics provide in the commercial context. Would looking at the composition of the board of directors or other governing entity of an NCE station be adequate for this purpose? Would that information meaningfully expand our information on minority and female ownership? In addition, we seek comment on any potential reporting and recordkeeping burdens on NCE entities. Would the difficulties in defining ownership in this context compromise the integrity of the data? Are there ways to minimize burdens on NCEs from this proposed reporting requirement? Assuming we decide to seek information as to minority and female "ownership" of NCE licensees, we also seek comment on whether to adopt the same or similar modifications to Form 323-E that are adopted in the accompanying Order for Form 323. For instance, we seek comment on whether to establish a uniform biennial filing date and a uniform date as of which filers must identify ownership interests. We also seek comment as to how to assure data quality, including whether the measures discussed in the accompanying Order (improving the computer interface process, building in additional checks for Form 323-E to perform verification and review functions, and ensuring that all data filed is in a format that can be electronically searched, aggregated, and cross-referenced) are appropriate and sufficient.

30. LPFM licensees and permittees are currently exempt from filing Form 323-E.[70] As of December 31, 2008, there are 859 LPFM licensees, all of which are NCE entities. We seek comment on whether to require LPFM licensees to file Form 323-E, as we propose to revise it, to collect minority and gender information for LPFM licensees, or to continue to exempt LPFM licensees from the 323-E filing requirements. We seek comment on whether the exclusion of any NCE ownership information, such as LPFM licensees, would diminish the usefulness of our new data. We also invite comment as to whether it would be burdensome for LPFM licensees to report this information and, if so, how burdensome. If we decide to collect this data from LPFM licensees, we seek comment on whether LPFM licensees should be required to file Form 323-E or another shorter form that only seeks minority and gender ownership information.

V. PROCEDURAL MATTERS

A. Filing Requirements

31. *Ex Parte Rules.* The *Fourth 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.[71] *Ex parte* presentations are permissible if disclosed in accordance

(Continued from previous page)
by political appointment by elected officials or by direct democratic election to the governing board at the state or local level.

[70] *See* 47 C.F.R. § 73.801. In January 2000, the Commission adopted rules to establish LPFM service. *Creation of Low Power Radio Service*, MM Docket No. 99-25, Report and Order, 15 FCC Rcd 2205 (2000). LPFM stations are authorized for noncommercial educational broadcasting only (no commercial operation) and operate with an effective radiated power (ERP) of 100 watts (0.1 kilowatts) or less, with maximum facilities of 100 watts ERP at 30 meters (100 feet) antenna height above average terrain (HAAT). The approximate service range of a 100 watt LPFM station is 5.6 kilometers (3.5 miles radius). LPFM stations are not protected from interference that may be received from other classes of FM stations. LPFM stations are available to noncommercial educational entities and public safety and transportation organizations, but are not available to individuals or for commercial operations. Current broadcast licensees with interests in other media (broadcast or newspapers) are not eligible to obtain LPFM stations.

[71] 47 C.F.R. § 1.1206(b).

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.[72] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.

32. *Comments and Reply Comments*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments and reply comments on or before the dates 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.[73]

33. 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.

34. 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.

35. 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.

36. 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.

37. U.S. Postal Service First-Class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

38. *People with Disabilities*: 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 & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

39. *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

[72] 47 C.F.R. § 1.1206(b)(2).

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

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) 418-0432 (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 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) 418-0432 (TTY).

40. *Information.* For additional information on this proceeding, contact Mania Baghdadi at (202) 418-7200. Press inquiries should be directed to David Fiske at (202) 418-0513.

B. Initial and Final Regulatory Flexibility Analysis

41. *Initial Regulatory Flexibility Analysis ("IRFA").* The Regulatory Flexibility Act of 1980, as amended ("RFA"),[74] requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[75] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[76] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[77] 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).[78] As required by the RFA,[79] 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 *Fourth 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.

42. *Final Regulatory Flexibility Analysis ("FRFA").* As required by the RFA,[80] the Commission has prepared an FRFA relating to the Report and Order. The FRFA is set forth in Appendix C.

---

[74] 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).

[75] 5 U.S.C. § 605(b).

[76] 5 U.S.C. § 601(6).

[77] 5 U.S.C. § 601(3) (incorporates by reference the definition of "small business concern" in the Small Business Act, 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 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." 5 U.S.C. § 601(3).

[78] 15 U.S.C. § 632.

[79] *See* 5 U.S.C. § 603.

[80] *See* 5 U.S.C. § 604.

C. Paperwork Reduction Act Analysis

43. *Initial Paperwork Reduction Act Analysis.* The Further Notice of Proposed Rulemaking has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[81] 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 (OMB) to comment on the proposed information collection requirements contained in this Notice, as required by the PRA.

44. 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 of the Notice 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,[82] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

45. 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.

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

47. *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

48. The Commission will send a copy of this *Report and Order and Fourth 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).

---

[81] 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.).

[82] 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).

VI. ORDERING CLAUSES

49. Accordingly, **IT IS ORDERED**, that pursuant to the authority contained in sections 1, 2(a), 4(i), 257, 303(r), and 307, 309, and 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* and *Fourth Further Notice of Proposed Rulemaking* **IS ADOPTED**.

50. **IT IS FURTHER ORDERED**, that the rule amendments attached hereto as Appendix A, and the revised filing procedures and changes to FCC Form 323 adopted in the *Report and Order* will become effective upon publication of a notice in the Federal Register announcing approval by the Office of Management and Budget.

51. **IT IS FURTHER ORDERED**, that the Media Bureau is hereby delegated authority to make all necessary changes to Form 323, its rules, and its electronic database system to implement the changes adopted in this *Order*.

52. **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.

53. **IT IS FURTHER ORDERED**, that the Commission **SHALL SEND** a copy of this *Report and Order* and *Fourth 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).

54. **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 *Fourth Further Notice of Proposed Rulemaking*.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Rule Changes

PART 73 – RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336 and 339.

2. Amend § 73.3615 by revising paragraph (a) introductory text to read as follows:

§ 73.3615 Ownership reports.

(a) The Ownership Report FCC Form 323 must be electronically filed no later than November 1, 2009, and every two years thereafter by (1) each licensee of a commercial AM, FM, or TV broadcast station ("Licensee") and (2) each entity that holds an interest in the licensee that (i) is attributable for purposes of determining compliance with the Commission's multiple ownership rules (see Notes 1-3 to 47 C.F.R. § 73.3555) or (ii) would be attributable but for the single majority shareholder exemption (see former Note 2(b) of 47 C.F.R. § 73.3555 and Order, 16 FCC Rcd 22310 (2001)) or the higher threshold for attribution of certain interests in eligible entities under the Equity Debt Plus attribution standard (see Note 2(i) to 47 C.F.R. § 73.3555) ("Respondent"). A Licensee or Respondent with a current and unamended Report on file at the Commission, which was filed on or by the November 1, 2009 initial filing date or thereafter, may electronically certify that it has reviewed its current Report and that it is accurate, in lieu of filing a new Report. Ownership Reports shall provide the following information as of October 1 of the year in which the report is filed:

* * * * *

3. Amend § 73.6026 by adding the following entry to the end of the list as follows:

§ 73.6026 Broadcast regulations applicable to Class A television stations.

* * * * *

§ 73.3615(a) & (g) Ownership reports.

PART 74 – EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

4. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336 and 339.

5. Add § 74.797 to read as follows:

§ 74.797 Biennial Ownership Reports.

The Ownership Report FCC Form 323 must be electronically filed no later than November 1, 2009, and every two years thereafter by each licensee of a low power television station or Respondent (as defined in § 73.3615(a) of the Commission's rules). Beginning with the 2011 filing, a licensee or Respondent with a current and unamended Report on file at the Commission may certify electronically that it has reviewed its

current Report and that it is accurate, in lieu of filing a new Report. Ownership Reports shall provide information as of October 1 of the year in which the report is filed. For information on filing requirements, filers should refer to § 73.3615(a).

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 economic impact on small entities by the policies and rules proposed in this Fourth Further Notice of Proposed Rulemaking ("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 proposed revisions to FCC Form 323-E, which would for the first time collect information on minority and female ownership of noncommercial radio and television licensees. The objective of the information collection is to obtain comprehensive ownership data to further the Commission's goal to design policies to advance diversity in the broadcast industry. In addition, the *Notice* proposes to require Low Power FM licensees, which are noncommercial broadcast licensees, to file Form 323-E on a biennial basis and to file information as to their minority and female ownership.

B. Legal Basis

3. 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

4. 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 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

[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).

[5] 5 U.S.C. § 601(6).

[6] 5 U.S.C. § 601(3) incorporates 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 such term which are appropriate to the activities of the agency and publishes the definition(s) in the Federal Register." 5 U.S.C. § 601(3).

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]

5. **Television Broadcasting.** The rules and policies proposed herein apply to licensees of noncommercial television stations, as well as to potential licensees of noncommercial television stations. 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 $14 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 February 19, 2009 there are about 392 noncommercial television stations. We do not have revenue data or revenue estimates for these stations. These stations rely primarily on grants and contributions for their operations, so we will assume that all of these entities qualify as small businesses. In assessing whether a business entity qualifies as small under the above definition, business control affiliations[9] must be included. We are unable to include or aggregate revenues from affiliated companies or entities so our assumption may overstate the number of small entities that might be affected by the proposal to require these entities to file Form 323-E.

6. 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 noncommercial television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the proposed information collection 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 this criterion in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

7. **Radio Broadcasting.** The rules and policies proposed herein apply to licensees of noncommercial radio stations, as well as to potential licensees of noncommercial radio stations. The Small Business Administration defines a radio broadcasting entity that has $7 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 Pro Radio Analyzer Database as of February 19, 2009 there are about 3,141 noncommercial radio stations. We do not have revenue data or revenue estimates for these stations. These stations rely primarily on grants and contributions for their operations, so we will assume that all of these entities qualify as small businesses. In assessing whether a business entity qualifies as

[7] 15 U.S.C. § 632.

[8] 2008 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 2008 NAICS Definitions, Television Broadcasting, available at http://www.census.gov/econ/census02/data/industry/E15120.htm.

[9] "[Businesses] are affiliates of each other when one [business] 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* 13 C.F.R. §121.201, 2008 NAICS code 515112.

[11] U.S. Census Bureau 2008 NAICS Code 515112, *available at*http://www.census.gov/econ/census02/data/industry/E515112.htm.

small under the above definition, business control affiliations[12] must be included. We are unable to include or aggregate revenues from affiliated companies or entities so our assumption may overstate the number of small entities that might be affected by the proposal to require these entities to file Form 323-E.

8. 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 this criterion in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

9. **Low Power FM Stations**. The proposed information collection could affect licensees of low power FM (LPFM) stations, as well as to potential licensees in this radio service. 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 $7 million in annual receipts.[13] As of December 31, 2008, there are approximately 859 licensed LPFM stations.[14] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition.

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

10. The Notice seeks comment on whether to revise Form 323-E, the ownership report for noncommercial educational broadcast licensees, to include minority and gender information. Therefore, the rules might contain modified information collections for noncommercial broadcast licensees. We anticipate that changes in recording or recordkeeping requirements for noncommercial broadcast entities would result from the changes in the Commission's Form 323-E necessary to implement the proposal to collect gender, race or ethnicity data. In addition, we anticipate that changes in recording or recordkeeping requirements for LPFM licensees would result from new 323-E filing requirements. The Notice also seeks comment on whether to require low power FM (LPFM) licensees to file, on a biennial basis, Ownership Report, Form 323-E. Therefore, the rules might contain modified information collections for LPFM licensees

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

11. 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 and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of

[12] "[Businesses] are affiliates of each other when one [business] 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 515112.

[14] *See News Release*, "Broadcast Station Totals as of December 31, 2008" (rel. Feb. 27, 2009), *available at* http://www.fcc.gov/Daily-Releases/Daily.Business/2009/db0227/DOC-288910A1.pdf.

the rule, or any part thereof, for small entities.[15]

12. As noted, we are directed under law to describe any such alternatives we consider, including alternatives not explicitly listed above.[16] The *Notice* seeks comment on the tentative conclusion that obtaining gender and racial/ethnic information from all noncommercial stations would further our goal to design policies to advance diversity in the broadcast industry. In the alternative, the Commission could defer until a later time collection of such information. The *Notice* also seeks comment on whether the proposed data collection would impose a significant reporting, recordkeeping, or other compliance burden on noncommercial entities, especially smaller noncommercial entities, and whether there are alternative ways to minimize burdens on NCEs from this proposed reporting requirement. In particular, the *Notice* recognizes that organizational documents are important in defining a noncommercial entity's structure and mission, including whether it serves underserved audiences. However, the *Notice* notes that these documents would not provide the same kind of empirical evidence that ownership statistics provide in the commercial context. Therefore, the *Notice* asks whether looking at the composition of the board of directors or in the alternative, some other governing entity of a noncommercial station would be adequate for this purpose and whether the information would meaningfully expand our information on minority and female ownership. In addition, the *Notice* asks whether to establish a uniform biennial filing date and a uniform date as of which filers must identify ownership interests. The Notice also seeks comment on how to assure data quality, including whether the measures discussed in the accompanying Order (improving the computer interface process, building in additional checks for Form 323-E to perform verification and review functions, and ensuring that all data filed is in a format that can be electronically searched, aggregated, and cross-referenced) are appropriate and sufficient. The *Notice* also seeks comment on the extent of the burden on LPFM licensees, all of which are smaller noncommercial entities. The Commission especially encourages small entities to comment on the proposals in the *Notice* in this proceeding. The Commission welcomes comment including presentation of alternatives to or modifications of rules proposed herein on how to minimize any burdens on small business licensees.

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

None.

[15] 5 U.S.C. § 603(c).

[16] 5 U.S.C. § 603(b).

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 Third Further Notice of Proposed Rulemaking (*Third Further Notice*) in MB Docket No. 07-294.[2] The Commission sought written public comment on the proposals in the *Third Further Notice*, including *e* 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* adopts changes to FCC Form 323, Ownership Report for Commercial Broadcast Stations, and the filing requirements for Form 323, to improve the Commission's collection of data on minority and female broadcast ownership so that the Commission can more accurately assess and effectively promote diversity of ownership in the broadcast industry. The Order broadens the reporting requirements to require low power television stations ("LPTV") licensees, Class A television station licensees, and full power commercial broadcast licensees that are sole proprietors and partnerships comprised of natural persons, to file the form biennially. The Order also requires entities with financial interests that would be attributable (1) but for the single majority shareholder attribution exemption or (2) the higher Equity/Debt Plus threshold adopted in the Diversity Order for purposes of attributing certain interests in eligible entities, to file Form 323 every two years. To ensure that the entire collection of minority and female ownership data is current as of a single date for each filing cycle, the Order states that filings are due no later than November 1 of the filing year, with reported ownership information to be current as of October 1 of filing year. The first filings using the new Form 323 will be due no later than November 1, 2009. To address quality control issues, the Order delegates authority to the Media Bureau staff to perform random audits, and to improve our electronic interface process in order to perform verification and review functions and preclude the filing of incomplete or inaccurate data. The Order revises 47 C.F.R. § 73.3615 and adds 47 C.F.R. § 74.797 to implement these changes.

---

[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] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Notice of Proposed Rulemaking, MB Docket No. 07-294, et al., 23 FCC Rcd 5922, Appendix B (2008)

[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.

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 the additional burdens on broadcast licensees, including small entities. The National Association of Broadcasters and American Women in Radio and Television opposed requiring full power commercial broadcast licensees that are sole proprietors to file FCC Form 323 on a biennial basis. Instead, the commenters asked the Commission to retrieve the ownership data for minorities and women from either applications to request an assignment or transfer control of a broadcast station, or to require currently exempt entities to file Form 323 once, and not on a biennial basis. The Commission considered other ways to collect the ownership data, instead of a biennial filing, but determined that the biennial filings from the broader class of entities is needed to collect complete and accurate data. and ultimately to promote broadcast ownership among new entrants and small businesses, including minority- and women-owned businesses.

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 $14 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]

[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C.§ 601(6).

[8] 5 U.S.C. § 601(3) incorporates 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 such term which are appropriate to the activities of the agency and publishes the definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[9] 15 U.S.C. § 632.

[10] *See* 13 C.F.R. § 121.201, 2008 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, *available at* http://www.census.gov/econ/census02/data/industry/E515120.htm.

According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of February 19, 2009, about 918 (71 percent) of the 1,292 commercial television stations in the United States have revenues of $14 million or less. About 180 (14 percent) of the 1,292 commercial television stations are owned by sole proprietorships or partnerships and would be subject to new reporting requirements.[11] However, these figures take into account all partnerships, and only partnerships comprised of natural persons are subject to new reporting requirements. Therefore, our estimate likely overstates the number of small entities that might be affected. In addition, we note that in assessing whether a 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 filing requirements for FCC Form 323, 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.

8. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has $7 million or less in annual receipts as a small business.[13] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[14] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of February 19, 2009, about 10,600 (96 percent) of 11,050 commercial radio stations in the United States have revenues of $7 million or less. About 1,440 (13 percent) of the 11,050 commercial radio stations are owned by sole proprietors or partnerships, and would be subject to the new reporting requirements.[15] However, these figures take into account all partnerships, and only partnerships comprised of natural persons are subject to new filing requirements. Therefore, our estimate likely overstates the number of small entities that would be affected. In addition, we note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[16] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected

[11] Estimate based on staff analysis of the 2002 Economic Census http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0200A1&-_skip=200&-ds_name=EC0251SSSZ7&-_lang=en and BIA Financial Network, Inc. Master Access Pro Databases, March 2009.

[12] "[Businesses] are affiliates of each other when one [business] 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, 2008 NAICS code 515112.

[14] *Id.*

[15] Estimate based on staff analysis of the 2002 Economic Census http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0200A1&-_skip=200&-ds_name=EC0251SSSZ7&-_lang=en and BIA Financial Network, Inc. Master Access Pro Databases, March 2009.

[16] "[Businesses] are affiliates of each other when one [business] 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).

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.

9. 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.

10. **Class A TV and LPTV stations.** The rules and policies adopted herein apply to licensees of Class A TV stations and low power television ("LPTV") 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 $14.0 million in annual receipts.[17] Currently, there are approximately 554 licensed Class A stations and 2,300 licensed LPTV stations. 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.

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

11. Currently, the Commission requires certain full power commercial radio and television broadcast stations to periodically file Form 323 Ownership Report to identify their organizational and ownership structures, including information on owners' race, ethnicity, and gender. Licensees of full power commercial stations that are sole proprietors and partnerships comprised of natural persons, and licensees of low power broadcast stations are not required to file Form 323 biennially. The Order expands the class of entities that are required to file the Form 323 biennially to include all commercial licensees. Thus, sole proprietorships, partnerships of natural persons, and LPTV licensees, including, Class A licensees, must file the Form 323 biennially. In addition, the Order broadens the filing requirements to include holders of two classes of nonattributable ownership interests: (1) equity interests in a licensee that would be attributable but for the single majority shareholder exemption and (2) interests that would be attributable but for the higher Equity/Debt Plus thresholds adopted in the Diversity Order for purposes of determining attribution of certain interests in eligible entities. The Order states that the filings are due no later than November 1, 2009, and every two years thereafter. The Order also states that ownership data must be current as of October 1 of the filing year.

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

12. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which 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

[17] *See* 13 C.F.R. § 121.201, 2008 NAICS Code 515120.

compliance and 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.[18]

13. In order to minimize the administrative burdens on licensees, including small businesses, the Commission considered and declined to create a new form to collect the data on minority and female ownership. Instead, the Commission concluded that collecting the information on the current FCC Form 323 is the most efficient and least burdensome method of collecting minority and female broadcast ownership data. The *Order* considered as an alternative whether to enlarge the class of stations that are required to file Form 323 biennially and concluded that the most effective way to obtain comprehensive ownership data is to require all full power commercial broadcast stations, LPTV, and Class A stations to file the revised Form 323 biennially. Currently, if a licensee 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 each such entity. As suggested by NAB, the Commission considered the alternative of revising the reporting requirement so that a single form could be filed for all of the entities ultimately controlled by the same parent company or a single form for each licensee. The Commission did not revise the current reporting requirement because it was not convinced that requiring broadcasters to obtain all ownership data for parent corporations and attributable entities on a single form would be less burdensome. For instance, the Commission stated that licensees may find it burdensome to collect ownership information as to certain entities that hold interests in the licensee indirectly through a vertical ownership chain. However, to further improve the ability of researchers and other users of the data to cross-reference information and construct complete ownership structures, the Commission is requiring each attributable entity above the licensee in the ownership chain to list, on Form 323, the FCC Registration Number of the entity in which it holds an attributable interest. The Commission considered the alternative of modifying the existing rolling filing schedule which is tied to a station's renewal cycle. In order to permit rigorous analysis based on data that is current as of the same date for all filers, the Commission concluded that it is necessary to establish a uniform submission date for the biennial filings. Therefore, the Order states that filings are due no later than November 1, 2009, and every two years thereafter. The Order also states that ownership data must be current as of October 1 of the filing year.

G. Report to Congress

14. The Commission will send a copy of this Order, including this FRFA, in a report to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[19] In addition, the Commission will send a copy of this *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[20]

[18] 5 U.S.C. § 603 (c).

[19] *See* 5 U.S.C. § 801(a)(1)(A).

[20] *See* 5 U.S.C. § 604 (b).