Before the
DOCKET FILE COPY ORIGINAL Federal Communications Commission
Washington, D.C. 20554

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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 00-244
	)	
Ways to Further Section 257 Mandate and to Build on Earlier Studies	)	MB Docket No. 04-228

OCT 20 2009

MEMORANDUM OPINION & ORDER AND
FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: October 15, 2009 **Released: October 16, 2009**

By the Commission:

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]

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we consider petitions for reconsideration filed by the National Association of Broadcasters ("NAB") and David Wilson[1] of the Report and Order issued

[1] Petition for Reconsideration of the National Association of Broadcasters filed in MB Docket No. 07-294 , *et al.* (June 26, 2009) ("NAB Petition") and Petition for Reconsideration of David Wilson, licensee of stations WHDX-FM and WHDZ-FM, Buxton, North Carolina, filed in MB Docket No. 07-294, et al. (June 16, 2009) ("Wilson Petition").

in the above-captioned proceeding ("*323 Order*").[2] The *323 Order* adopted changes to the commercial broadcast ownership reporting requirements and delegated authority to the Media Bureau to revise FCC Form 323 accordingly. The Commission adopted these changes to increase the accuracy and comprehensiveness of the minority and female ownership data collected[3] and to address other flaws in the data collection process as identified by the United States Government Accountability Office ("GAO") and by study authors who have attempted to use the current data to analyze broadcast ownership issues.[4] Among other things, the Commission required sole proprietors and partnerships composed of natural persons to file Form 323 biennially, and it expanded the reporting requirement to include interests that are not attributable because of: (a) the single majority shareholder exemption; and (b) 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*.[5] The Commission also established a November 1 deadline for biennial filing of Form 323.[6]

2. We grant NAB's Petition to the extent that it requests that we reconsider the requirement that licensees report certain nonattributable interests and, as a result, we adopt herein a *Fifth Further Notice of Proposed Rulemaking* to invite comment on this issue. Otherwise, we deny NAB's Petition, specifically its request that we reconsider the requirement that sole proprietors file Form 323 ownership reports biennially. We dismiss Wilson's Petition for Reconsideration of the same requirement as repetitious.[7]

3. In addition, we ratify the Bureau's action extending the date for commercial licensees to file their initial biennial ownership reports on the new Form 323 to a date that is no earlier than 30 days after public notice of approval by the Office of Management and Budget ("OMB") of the revised Form, with data current as of November 1, 2009.[8] In the *323 Order*, the Commission adopted a November 1, 2009 initial biennial filing date, requiring data to be current as of October 1, 2009. We agree with the

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[2] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, et al., 24 FCC Rcd 5896 (2009). *See also* 47 C.F.R. §§ 73.3615, 73.6026, 74.797.

[3] *323 Order*, 24 FCC Rcd at 5902-03 ¶ 12. *See also 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 (2008) ("*Diversity Order*" and "*Third Further Notice*").

[4] *323 Order*, 24 FCC Rcd at 5900 ¶ 7, 5901-02 ¶ 10. In March 2008, the GAO released a report that identifies three weaknesses of the data submitted on Form 323: (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. "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").

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

[6] *323 Order*, 24 FCC Rcd at 5909 ¶ 22.

[7] Wilson's Petition states that the sole proprietor filing requirement is unnecessary because a person's ethnicity does not change over time, and he proposes that sole proprietors be required to file a new Form 323 only upon a change in ownership. Wilson Petition at 1. The Commission has already considered and rejected the argument that it can collect the necessary information from Form 323 submissions filed in connection with changes in ownership, and the petition does not introduce any new facts or circumstances that the Commission did not previously consider. *See 323 Order*, 24 FCC Rcd at 5905 ¶¶ 14-16; *see also Numbering Resource Optimization*, 22 FCC Rcd 8050, 8052 (2007) (dismissing petitions because they introduced no new facts and relied on arguments the Commission had previously considered and rejected). Were we to consider the merits of the Petition, we would deny it for the same reasons that we deny NAB's Petition on this issue.

[8] Order, MB Docket No. 07-294, et al., DA 09-2165 (MB, Oct. 2, 2009).

Bureau that deferral of those dates is necessary in order to provide licensees and other entities with sufficient time to review the new form and gather the necessary information.[9] The extension of these deadlines will apply only to the initial filing. Beginning with the 2011 filing, the form must be filed no later than November 1 with data current as of October 1 of the filing year.

II. DISCUSSION

4. *Sole Proprietors.* In its Petition, NAB seeks reconsideration of two aspects of the *Order.* First, NAB asks the Commission to reconsider the requirement that sole proprietors file ownership reports biennially. NAB is concerned that the biennial filing requirement will place a significant financial burden on sole proprietors, who may lack legal counsel or the personnel to track filing deadlines and other compliance matters.[10] Instead, NAB proposes that the Commission incorporate in the database the most recently filed Form 323 for each licensee sole proprietor. NAB contends that the ownership report on file will provide current information on race, ethnicity, and gender, as these characteristics would not change over time. For the same reason, NAB also objects to the Commission requiring sole proprietors to biennially review or update ownership reports, after the initial filing of the new Form 323.[11]

5. In its Opposition to NAB's Petition, UCC supports the Commission's decision to collect data from sole proprietors.[12] UCC disagrees with NAB that Form 323 creates a significant burden for sole proprietors, noting that sole proprietors already file an ownership report on other occasions, such as when they obtain a license. UCC adds that preparation time, including assembling the material and filing the form, should be minimal for sole proprietors because their ownership data will not change.[13] UCC does not oppose NAB's suggestion that sole proprietors be allowed to link back to previously filed ownership reports, so long as the data "quality, accuracy, accessibility and ease of use" is not compromised.[14] In response, NAB claims that UCC fails to provide sufficient rationale or facts to counter NAB's arguments concerning the burden on sole proprietors and disagrees that the burden on sole

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[9] The Commission submitted the revised Form 323 and supporting statement to OMB on August 11, 2009. OMB has not acted on the revised information collection as of the adoption date of this Order. Therefore, the extension is appropriate to afford sufficient time to file.

[10] NAB Petition at 3. Wilson also seeks reconsideration of this requirement, stating that it is unnecessary for the Commission to collect this information biennially from sole proprietors because "[a] person's ethnicity does not change over time and it is therefore a waste of resources to require these re-certifications." Wilson Petition at 1. In its Petition, NAB further elaborates on its arguments raised in its comments to the *Third Further Notice.* In its initial comments, NAB said the requirement might be burdensome and is not necessary because a sole proprietor's race and gender would not change unless a license is assigned or transferred. NAB Comments at 17. In its Petition, NAB asserts that the requirement will "place[] a significant burden" on sole proprietors, claiming that the filing fee associated with the form and the time required to complete it would be burdensome for sole proprietors and that sole proprietors would be subjected to the risk of missing a filing deadline or submitting inaccurate information. NAB Petition at 3. While NAB does not explain why it could not have provided this level of detail earlier, we believe that the public interest in ensuring a complete record warrants consideration of NAB's more detailed allegations. *See* 47 C.F.R. § 1.429(b); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 6 FCC Rcd 547, 548 (1991).

[11] *See* Letter from Erin Dozier, Counsel for the NAB, to Marlene H. Dortch, Secretary, FCC (Sept. 18, 2009) ("NAB Ex Parte"). *See also* Wilson Petition at 1.

[12] Opposition to Petition for Reconsideration filed by the Office of Communication of the United Church of Christ, Inc., Benton Foundation, Common Cause, Media Alliance, and National Organization for Women Foundation in MB Docket No. 07-294 (Aug. 11, 2009) at 3 ("Opposition"). *See also* Comments of Catherine J.K. Sandoval filed in MB Docket No. 07-294 (June 29, 2009) at 8-11("Sandoval Comments") (supporting decision to require sole proprietorships and partnerships comprised of natural persons to file biennial ownership reports).

[13] Opposition at 3.

[14] *Id.* at 4.

proprietors would be minimal.[15] NAB restates its position that demographic data on sole proprietors should be captured only at the licensing stage or when there is a change in ownership.[16]

6. We are not persuaded by NAB's arguments, and we affirm our decision to require sole proprietors to file Form 323 biennially. In its Petition, NAB reiterates its arguments made in comments to the *Third Further Notice* that the Commission provide a link in its Form 323 database to each sole proprietor's most recent Form 323.[17] NAB asserts that the Commission failed to adequately explain in the *323 Order* "why its system for tracking this data" cannot link back to the most recent report on file. However, the issue is not whether the tracking system *could* link data from an old ownership report. Rather, as UCC correctly observes, the issue is whether such information is reliable, accurate, and accessible. We do not believe it would be.

7. The revised Form 323 is intended to improve the quality, accuracy, and reliability of the information gathered over that collected in the old form. The GAO Report and researchers criticized the difficulty of aggregating and summarizing the data submitted on Form 323. Specifically, the GAO Report criticized the Commission's current 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. The GAO Report also criticized 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. Therefore, in the *323 Order*, in the Commission directed staff to modify Form 323 so that ownership data is incorporated into the database is searchable, and can be aggregated and cross-referenced electronically.[18]

8. On delegated authority pursuant to the *323 Order*, the Media Bureau made several revisions to the form to address the identified deficiencies.[19] The Bureau revised and improved the instructions and questions in all sections of the form in order to: (1) clarify the information sought in the form; (2) ensure that the data are collected in formats that can be easily incorporated in database programs used to prepare economic and policy studies and are not provided in unusable narrative exhibits; and (3) simplify completion of the form by giving respondents menu-style or checkbox-style options to enter data. To further improve the ability of researchers and other users of the data to cross-reference information and construct complete ownership structures, the Bureau is requiring each filing entity, including sole proprietors, to obtain a unique FCC Registration Number (FRN) and to report the FRNs of entities one step above and one step below it in the ownership chain. It must also identify the FRNs of its attributable officers, directors, and shareholders.[20] The revised form also has built-in edit checks and

[15] Reply to Opposition to Petition for Reconsideration filed by NAB in MB Docket No. 07-294 (Aug. 21, 2009) at 4 ("NAB Reply").

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

[17] NAB Petition at 3. On the same grounds, both NAB and American Women in Radio and Television ("AWRT") in their comments in response to the *Third Further Notice* objected to biennial filing requirements for sole proprietors. NAB Comments at 8-9, AWRT Comments at 5-6. NAB stated that the Commission "should simply rely upon information provided in the initial FCC Form 323 filed by a new owner following consummation of a license transfer/assignment or grant of a permit to construct and operate a new station" in lieu of applying the biennial filing requirement to sole proprietors." NAB Comments at 8-9.

[18] *323 Order*, 24 FCC Rcd at 5907-08 ¶ 20.

[19] The revised Form (OMB Control No. 3060-0010) is currently under review at OMB.

[20] In the *323 Order*, the Commission stated that each filing entity must identify by FRN the entity below it in the chain. *323 Order*, 24 FCC Rcd at 5908 ¶ 21. It also delegated authority to the staff to revisit this issue to determine whether additional modifications of the form are necessary. In the process of modifying Form 323 on delegated authority, the Bureau determined that it was necessary to expand the class of FRNs to be included to ensure the usefulness of the data.

prefill capabilities to assure greater accuracy and ease of completion. In addition, in the *323 Order*, the Commission replaced the staggered ownership report filing deadlines currently in effect with a uniform filing date and a uniform date "as of" which the data being reported must be accurate. Allowing filing of information on a rolling basis does not allow for comparisons of snapshots of all firms at uniform points in time, which creates difficulties for statistical and regression analysis, and reduces the precision of the estimates. The Commission's modifications to the filing requirements in the *323 Order*, as well as the Bureau's changes to the form and instructions will facilitate long-term comparative studies of ownership.

9. Under NAB's approach, none of the ownership data on sole proprietors that would be included in our database immediately following the initial filing date would be submitted in the research-friendly format of the revised form, nor would it pass through the built-in quality control mechanisms in the revised form, and its submission would not be informed by the significantly improved instructions that are incorporated in the revised form. Absent the biennial filing requirement, it could be literally years before some sole proprietors would submit an ownership report using the non-biennial form, and even then race, ethnicity, and gender data would not be reported because, as a result of revisions made to the form pursuant to the *323 R&O*, non-biennial filers will not be required to provide this information.[21] In many cases, a sole proprietor would never be required to file a new form, without a biennial filing requirement. The consequences of exempting sole proprietors from the initial biennial filing requirement would directly undermine core Commission objectives in undertaking to revise the form, including rendering our data uniform, comparable, reliable and accessible, and ensuring that the data acquired are as accurate as possible. The previous version of the ownership report contains critical flaws, cited by the GAO and study authors.[22] The GAO specifically identified the exemptions from the biennial filing requirement as one of the major weaknesses of our ownership data.[23] The Commission stated that "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."[24] The older data on sole proprietors that are available in our databases, which were submitted in different formats, at varying times and pursuant to older instructions, simply do not offer a reasonable alternative to filing on the revised form, given the data improvement goals that are at the core of this proceeding.[25] Accordingly, we reject NAB's argument.

10. Nor would exempting sole proprietors from filing biennially after their first initial filing on the revised Form 323 achieve our goals.[26] It is true that minority status and gender do not change over time. However, the biennial filing requirement will ensure that sole proprietors, like other filers, review and verify that the data on file are current. We believe that the verification process will greatly benefit our efforts to improve the accuracy and reliability of the data collection. Without requiring a sole proprietor to periodically certify that the information is accurate, the Commission must assume that a lack of a filing constitutes a licensee's assurance that its information is current. However, the absence of a filing also could mean that the licensee failed to file a report, even though its ownership information had changed. The information could be out of date, and the Commission and public would have no assurance to the contrary. In addition, the biennial requirement is necessary to capture changes in attributable interests that do not require prior Commission approval. For instance, a sole proprietor could have entered into an attributable local marketing agreement or joint sales agreement in a market in which it already owns a broadcast facility. Although the Commission's rules would require the licensee to

[21] *See infra* ¶ 10.

[22] *See generally* Sandoval Comments at 11-19 (describing limitations and flaws in current Form 323).

[23] *323 Order*, 24 FCC Rcd at 5901-02 ¶ 10.

[24] *Id.* at 5905 ¶ 16.

[25] *See Id.* at 5897 ¶ 1.

[26] *See* NAB Ex Parte; *see also* Wilson Petition at 1.

file such agreements, the licensee would not be required to update its ownership report.[27] The biennial filing requirement is the only mechanism in which we could capture this information in a readily searchable format so that it can be used in studies to accurately determine the universe of broadcast ownership by minorities and women.

11. We also disagree that the biennial filing requirement places an undue burden on sole proprietors. At the outset, because these licensees each have only one principal, determination of the relevant information should be a simple process. Moreover, after the initial filing, these licensees, with current reports on file, simply must recertify, once every two years that they have reviewed their current reports and that they are accurate. Using the Commission's electronic filing system, a filer will launch a pre-filled form that already contains the information from its previously submitted Form 323. If all of the information is up to date, sole proprietors, would then simply sign and electronically submit the pre-filled form. No additional data must be entered. This certification process, which was already in effect prior to the adoption of the *323 Order*, reduces the filing burden for sole proprietors.[28] Accordingly, to the extent that NAB requests that the Commission include a mechanism that minimizes the burden on filers whose ownership information has not changed, the revised form already includes such a mechanism. NAB does not provide any reasons why the Commission's existing pre-fill and re-submission mechanism, which could be used to complete the biennial reporting obligation in the absence of an ownership change, would prove burdensome. In addition, NAB's apparent complaint that the filing fees create an excessive burden is without merit. NAB has not adequately demonstrated that a $60 filing fee per license will create a hardship for sole proprietors.[29] Therefore, we are not persuaded that this small filing burden, once every two years, is excessive. In all events, as we stated in the *323 Order* and affirm here, we believe that the additional filing requirements imposed on sole proprietors "are counterbalanced by the need to ensure the completeness and accuracy of our data collection efforts."[30]

12. *Reportable Interests*. Second, NAB asks the Commission to reconsider its decision to obtain information from holders of certain nonattributable interests. The Commission expanded biennial reporting to include two categories of non-attributable interest holders: (a) shareholders with a minority voting interest in corporations with a single majority shareholder that would be attributable but for the single majority shareholder exemption; and (b) interests that would be attributable but for an exemption accorded to investments in eligible entities. NAB states that there was no clear notice on this issue in the *Third Further Notice* and that the record therefore lacks information as to potential harms or benefits of this new filing requirement.[31] In addition, NAB expresses doubt that information from nonattributable entities will provide the Commission with any useful information on the current status of minority and female ownership of broadcast stations. NAB states that, by excluding these interests from its attribution rules, the Commission has already determined that such interests fail to confer sufficient influence over a licensee's operations. Therefore, NAB questions how the ownership information will further the Commission's stated goals.[32] NAB also is concerned that the reporting requirement will deter investment in the broadcast industry by increasing investors' administrative and financial burdens and by requiring disclosure of information that they would otherwise consider private.[33] If the Commission affirms its

[27] Under Section 73.3613 of the Commission's rules, 47 C.F.R. § 73.3613, radio and TV licensees are required to file a copy of attributable local marketing agreements and radio licensees are required to file a copy of attributable joint sales agreements with the Commission.

[28] *See 323 Order*, 24 FCC Rcd at 5898-99 ¶ 4.

[29] *See* NAB Petition at 3 n.7.

[30] *323 Order*, 24 FCC Rcd at 5905 ¶ 16.

[31] NAB Petition at 6.

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

[33] *Id.* at 5, 7-8.

decision, NAB asks that reporting be limited to race, gender, and ownership percentage of the nonattributable investors, rather than full reporting of their names, addresses, familial relationships, and other media holdings.[34]

13. UCC supports the Commission's decision to obtain information from these two categories of nonattributable interest holders.[35] It agrees with the Commission that the information will enable the Commission to determine how such types of investments affect future policy decisions. UCC also states that collection of such information will not adversely affect capital investment because the form is relatively short and is filed only once every two years.[36] Therefore, according to UCC, the filing requirement is not so burdensome as to dissuade potential investors from investing in broadcast operations.[37] UCC also contests NAB's view that the Commission failed to provide adequate notice that it would expand the Form 323 filing obligations to include reporting of such nonattributable interests. According to UCC, that decision is a logical outgrowth of the Commission's request for comment on whether to expand the universe of parties required to file Form 323.[38]

14. In its Reply to UCC's Opposition, NAB contends that UCC fails to show how collection of data on "involvement" of nonattributable investors can be used in connection with the Commission's efforts to revise and revisit its ownership rules.[39] NAB argues that the *323 Order* "does not identify any specific potential regulatory purpose for the information it seeks, nor does the UCC Opposition."[40] NAB also disagrees with UCC's arguments that the new burdens are relatively minor, citing the time it will take to gather the financial information. NAB reiterates its proposal that the Commission adopt a less burdensome method of collecting information about nonattributable investors by restricting the types of data collected to general demographic information.[41]

15. Upon reconsideration, we will delete the requirement that these two types of nonattributable interests be reported. Accordingly, we modify Section 73.3615 of the Commission's rules, as set forth in Appendix A. In the *323 Order*, the Commission sought to revise Form 323 to "obtain an accurate, reliable, and comprehensive assessment of minority and female broadcast ownership in the United States."[42] As discussed in the *Order*, the Commission concluded that gathering race, ethnicity,

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[34] *Id.* at 9-10.

[35] Opposition at 6.

[36] *Id.*

[37] *Id.* at 4-6. *See also* Sandoval Comments at 9-11 (supporting collection of nonattributable interest data).

[38] Opposition at 5. CBS Corporation filed a Reply to the Opposition to Petition for Reconsideration without having filed such a reconsideration petition. While this pleading is procedurally defective under section 1.45(c) of our rules, 47 C.F.R. § 1.45(c), we will treat CBS's Reply as an *ex parte* filing and will consider its comments in the accompanying *Fifth Further Notice* in the interest of developing a full and complete record on our rulemaking proposals. CBS claims that the Commission violated Section 553(b)(3) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3), by failing to provide adequate notice of the new reporting obligation. CBS Reply at 5. CBS disagrees with UCC that the proposal to collect information on nonattributable interests is a logical outgrowth of the *Third Further Notice* "because potentially affected parties could not reasonably have anticipated that the FCC would require the disclosure of non-attributable ownership interests in broadcast station ownership reports." CBS Reply at 7. Because CBS's Reply is unauthorized, we need not address its claims on the merits in this Order. Nevertheless, we have considered and responded to substantially similar arguments raised by NAB in its Petition.

[39] NAB Reply at 4.

[40] *Id.*

[41] *Id.* at 5-6.

[42] *323 Order*, 24 FCC Rcd at 5898 ¶ 3.

and gender data on the holders of these two types of interests would be useful in achieving this goal.[43] And, while we also believe that this reporting requirement is a logical outgrowth of the *Third Further Notice* in this proceeding,[44] we acknowledge that our intention to impose the requirement was not explicitly stated and note that there were no comments specifically addressing the reporting of nonattributable interests in response to our question as to whether the scope of reporting should be expanded. Under these circumstances, we believe the better course is to issue a Further Notice to expressly invite additional comment on this issue in order to obtain a complete record. Accordingly, we adopt the *Fifth Further Notice* that follows below.

III. FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING

16. In the *323 Order*, the Commission determined 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.[45] The Commission concluded that while it 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. As noted above, we did not receive comments on this issue prior to adopting these conclusions. Therefore, in order to obtain a complete record on this question, we are commencing a Further Rulemaking on whether to expand the reporting requirements to include certain nonattributable entities. Specifically, we seek comment on whether to collect information from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption and from holders of interests that would be attributable but for the higher EDP thresholds adopted in the *Diversity Order* for purposes of determining attribution of certain interests in eligible entities.[46]

17. The single majority shareholder exemption provides that a minority shareholder's voting interests will not be attributed where a single shareholder holds more than 50 percent of the outstanding voting stock of the corporation in question.[47] In the *323 Order*, the Commission explained why reporting of information about minority shareholders in a corporation with a single majority shareholder is important:

> For purposes of assessing levels of minority ownership . . . 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

[43] *Id.* at 5905-07 ¶¶ 17-19.

[44] Under the "logical outgrowth" test applied by the courts, an additional round of rulemaking comments is not necessary where adopted rulemaking changes differing from the agency's stated proposals represent a "logical outgrowth" of those proposals. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[45] *323 Order*, 24 FCC Rcd at 5905 ¶ 17.

[46] For non-biennial reports, we do not propose to require reporting of or filing by these interest holders.

[47] *See* former 47 C.F.R. § 73.3555 Note 2(b).

need to take additional measures to increase minority ownership and in justifying any measures that we decide to take.[48]

For these reasons, we propose to require that voting stock interests that would be attributable but for the single majority stockholder exemption be reported on the biennial Form 323.

18. As is the case now, whether the holders of these direct or indirect interests in licensees that are held in vertical ownership chains will have to file a Form 323 themselves or will simply have their interest reported on a Form 323 filed by another entity would depend on the nature of the shareholder. Individuals holding such interests in licensees or in entities that hold interests in licensees would be reported on the Form 323 filed by the entity in which they hold the interest and would not have to file a form themselves. Corporations, partnerships, or other entities holding such interests in licensees or in entities that directly or indirectly hold interests in licensees, however, would both be reported on the Form 323 filed by the entity in which they hold the interest and would be required to file a Form 323 on their own behalf, using the same biennial Form 323 as all other filers would use and following the same format and instructions.[49] The distinction made here between individuals and entities for purposes of the Form 323 filing obligation is the same distinction that applies under the current rules.[50] We seek comment on all aspects of this proposal.

19. Under the Commission's EDP standard, an interest is deemed attributable 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.[51] In the *Diversity Order*, the Commission 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.[52]

20. In order to obtain more complete ownership data, we propose that interests that would be attributable but for the recently adopted EDP exemption for certain investments in eligible entities be reported on the biennial Form 323. In the *323 Order*, the Commission noted that it "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."[53]

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[48] *323 Order*, 24 FCC Rcd at 5907 ¶ 18 (footnote omitted).

[49] We note that we are discussing the issue of filing or reporting in the context of vertical ownership chains, and this distinction does not apply to sole proprietors. As discussed above, pursuant to the Commission's *323 Order*, we are now requiring sole proprietors of broadcast stations to file ownership reports biennially. By virtue of the fact that a licensee is a sole proprietor, there is no other person or entity that is authorized to certify and file the ownership report for that station.

[50] *See* 47 C.F.R. § 73.3615(a)(3)(iv)(B).

[51] 47 C.F.R. § 73.3555 Note 2(i).

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

[53] *See 323 Order*, 24 FCC Rcd at 5907 ¶ 19, *Diversity Order* at 5931-37 ¶¶ 17-34.

The Commission also noted that it 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.[54] While we do not believe there are many ownership interests held pursuant to this exemption, they are clearly interests within the scope of our concern in this proceeding. For this reason, we propose to require that they be reported. With respect to which interest holders will be reported and which will also file Form 323, we propose to apply the same distinction discussed in paragraph 18. Thus, individuals holding these interests would have to be reported by the entity in which the interest is directly held but would not themselves have to file a report, while entities in this category would have to file separate ownership reports and be reported by the entity in which the interest is directly held.

21. Will collection of race, ethnicity, and gender data on the holders of these two nonattributable interests further the Commission's goals to obtain reliable data on the precise status of minority and female ownership? NAB suggests that information from nonattributable entities will not provide the Commission with any useful information on the current status of minority and female ownership of broadcast stations.[55] We seek comment on this view. NAB states that by excluding these interests from its attribution rules, the Commission has already determined that such interests fail to confer sufficient influence over a licensee's operations. Therefore, NAB questions how the ownership information will further the Commission's stated goals.[56] We seek comment on NAB's position and on all aspects of our proposals.

22. We also seek comment on any adverse consequences of requiring reporting of individuals holding these nonattributable interests and of requiring entities holding these nonattributable interests to file separate Form 323s. We seek comment specifically on NAB's concern that the reporting requirement will deter investment in the broadcast industry by increasing investors' administrative and financial burdens and by requiring disclosure of information that they would otherwise consider private.[57] CBS argues that the potential costs and other burdens of compliance with these reporting requirements could persuade nonattributable investors to invest elsewhere or even divest their existing ownership interests.[58] We seek comment on these contentions. In the *323 Order*, the Commission explained that our attribution rules seek to identify financial interests in licensees that convey the potential and incentive to exert significant influence over core licensee functions, and thus should be counted under the multiple ownership rules.[59] At the same time, however, the Commission noted that it has sought to target the attribution rules precisely so as to avoid impeding capital flow to broadcasters.[60] The Commission concluded that, in this instance, the concern about impeding capital flow does not apply, and noted that the Commission's goal is to collect information so that we can accurately assess and effectively promote diversity of ownership in the broadcast industry.[61] We seek comment on whether a reporting requirement of nonattributable interests would adversely affect capital investment in broadcasting.

23. We seek comment on whether expanding the reporting requirements to include the two

[54] *323 Order*, 24 FCC Rcd at 5907 ¶ 19.

[55] NAB Petition at 8-9.

[56] *Id.*

[57] *Id.* at 5, 7-8.

[58] CBS Reply at 10.

[59] *323 Order*, 24 FCC Rcd at 5905-06 ¶ 17.

[60] *Id.* at 5906 ¶ 17. 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." *Id.* (footnote omitted).

[61] *Id.*

nonattributable interests we have identified will result in undue burdens on licensees, and in particular, small entities. The Commission recognized that it must balance the goal of collecting more comprehensive and more accurate data with the goal of minimizing burdens on respondents. In the *323 Order*, the Commission explained that 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 to be reported.[62] CBS suggests that broadcasters often do not possess the reportable information because publicly traded companies may have limited knowledge of the demographic information of a majority of shareholders, and may not know the underlying beneficial owners when the stocks are held by banks or other financial institutions.[63] We seek comment on whether licensees or other entities required to file revised Form 323 currently possess information on minority shareholders of single majority shareholder corporations. If not, what is the burden of collecting this information? Will licensees, parent corporations, or other entity filers have to obtain specialized counsel and conduct additional surveys to comply with the reporting requirements, as suggested by CBS?[64] We seek comment on whether the benefits of obtaining comprehensive minority and female ownership data outweigh the increased burden on respondents. Are alternatives available to reduce the filing burden without reducing the accuracy or completeness of our data?

24. We also seek comment on NAB's suggestion that, if the Commission adopts the reporting requirement discussed above, it should limit the reportable information to race, gender, and ownership percentage of the nonattributable investors, rather than full reporting of their names, addresses, familial relationships, and other media holdings.[65] Would data thus limited provide the Commission and outside researchers with sufficient information to conduct studies? If information on nonattributable media holdings is omitted, as suggested by NAB, would the Commission lack sufficient information to accurately determine the universe of minority and female ownership in broadcasting?

IV. PROCEDURAL MATTERS

A. Filing Requirements

25. *Ex Parte Rules.* The *Fifth 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.[66] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[67] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.

26. *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

[62] *323 Order*, 24 FCC Rcd at 5906 ¶ 17.

[63] CBS Reply at 8.

[64] *Id.* at 9.

[65] NAB Petition at 9-10.

[66] 47 C.F.R. § 1.1206(b).

[67] 47 C.F.R. § 1.1206(b)(2).

filing paper copies.[68]

27. 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.

28. Paper Filers: Parties that 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.

29. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service First-Class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

30. *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).

31. *Availability of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-0432 (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).

32. *Information*. For additional information on this proceeding, contact Mania Baghdadi, Amy Brett, or Kristi Thompson at (202) 418-2330. Press inquiries should be directed to David Fiske at (202) 418-0513.

B. Initial and Supplemental Final Regulatory Flexibility Analyses

33. *Supplemental Final Regulatory Flexibility Analysis*. We note that the Supplemental

[68] *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

FRFA addresses only the matters considered on reconsideration in this *Memorandum Opinion & Order*. Therefore, the Supplemental FRFA attached as Appendix C addresses only the decision that this Order on reconsideration reverses.

34. *Initial Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[69] 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 *Fifth 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.

C. Paperwork Reduction Act Analysis

35. *Initial Paperwork Reduction Act Analysis*. The Further Notice of Proposed Rulemaking has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[70] 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.

36. 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,[71] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

37. 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. 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.

38. *Final Paperwork Reduction Act Analysis*. This document contains revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. On August 11, 2009, the Commission submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA, the modified information collections pursuant to the *323 Order*. The Commission published a notice in the Federal Register seeking comments on the August 11 submission. The proposed modification and the supporting statement are pending at OMB. Due to public comments that were received with respect to FCC Form 323, the Commission in this Order has further revised the information collection requirements that were contained in the *323 Order*. The Commission will amend the supporting statement and adjust the burden hours and costs of the pending submission based on the

[69] *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).

[70] 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.).

[71] 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).

revised information collection requirements contained in this Order. We are submitting this revised information collection as an amendment to the pending submission, in response to the public comments that were received with respect to the form. The revised information collection requirements will have the effect of reducing the paperwork burden.[72]

D. Congressional Review Act

39. The Commission will send a copy of this *Memorandum Opinion and Order and Fifth 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).

V. ORDERING CLAUSES

40. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 2(a), 4(i)-(j), 257, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i)-(j), 257, and 303(r), this *Memorandum Opinion and Order* and *Fifth Further Notice of Proposed Rulemaking* **IS ADOPTED.**

41. **IT IS FURTHER ORDERED** that the rule amendment attached hereto as Appendix A, will become effective upon publication of a notice in the Federal Register announcing approval by the Office of Management and Budget.

42. **IT IS FURTHER ORDERED** that, pursuant to the authority contained in sections 1, 2(a), 4(i, j), 257, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i, j), 257, 303(r), **NOTICE IS HEREBY GIVEN** of the proposals described in this *Fifth Further Notice of Proposed Rulemaking.*

43. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by National Association of Broadcasters IS GRANTED to the extent discussed herein AND is otherwise DENIED.

44. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by David Wilson IS DISMISSED.

45. **IT IS FURTHER ORDERED** that the Reply to Opposition to Petition for Reconsideration filed by CBS Corporation IS DISMISSED, *see* 47 C.F.R. § 1.45(c), and will be treated as an *ex parte* filing.

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

[72] We have responded to the OMB concerning PRA-related comments filed with that Office.

47. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Memorandum Opinion and Order* and *Fifth 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).

FEDERAL COMMUNICATIONS COMMISSION

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 for Commercial Broadcast Stations (FCC Form 323) must be electronically filed every two years by: (1) each licensee of a commercial AM, FM, or TV broadcast station (a "Licensee"); and (2) each entity that holds an interest in the licensee that 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) (a "Respondent"). The initial filing deadline shall be set by Public Notice issued by the Media Bureau. Thereafter, the Form shall be filed biennially by November 1, 2011, and every two years thereafter. A Licensee or Respondent with a current and unamended Report on file at the Commission, which was filed on or by the initial filing date or thereafter, using the Form revised pursuant to the Commission's Orders in MB Docket Nos. 07-294, *et al.*, 24 FCC Rcd 5896 (2009) and ___ FCC Rcd ___ (FCC 09-92, rel. Oct. 16, 2009), and which is still accurate, may electronically validate and resubmit its previously filed Form 323. Ownership Reports shall provide the following information as of October 1 of the year in which the Report is filed, except that the Form filed by the initial filing date shall provide the following information as of November 1, 2009:

* * * * *

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 Initial Regulatory Flexibility Analysis ("IRFA") of the possible economic impact on small entities by the policies and rules proposed in this *Fifth 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 that would require entities that hold financial interests that would constitute attributable interests in the licensee (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 ownership reports biennially and would require reporting in biennial ownership reports of individuals that hold such interests. Consistent with current filing requirements, an individual holding an ownership interest is not required to file Form 323. 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.

B. Legal Basis

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

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 small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its

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

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] 5 U.S.C. § 603(b)(3).

[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).

field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

5. **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 reeeipts 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 August 14, 2009, 923 (72 percent) of the 1,289 commercial television stations in the United States have revenues of $14 million or less. We note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[9] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the 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.

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 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.

7. **Radio Broadcasting.** 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 Radio Analyzer Database as of August 14, 2009, about 10,660 (96 percent) of 11,100 commercial radio stations in the United States have revenues of $7 million or less. 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 ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

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

[7] 15 U.S.C. § 632.

[8] *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.

[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] *Id.*

[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).

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.

9. **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.[13] As of June 30, 2009, there are approximately 553 licensed Class A stations and 2,386 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.

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

10. We anticipate that changes in recording or recordkeeping requirements for commercial broadcast entities would result from the changes in the Commission's Form 323 necessary to implement the proposal to collect additional investor information. *See, generally*, paragraphs 12, 17-18, *supra*. Entities holding two types of nonattributable interests, as described in the Further Notice, see paragraphs 17-18, would be required to file Form 323, and individuals holding these interests would have to be reported on Form 323.

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 the rule, or any part thereof, for small entities.[14]

12. As noted, we are directed under law to describe any such alternatives we consider, including alternatives not explicitly listed above.[15] The *Notice* seeks comment on the tentative conclusion that obtaining certain nonattributable financial interests 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 or not require reporting of such information. The *Notice* also seeks

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

[14] 5 U.S.C. § 603(c).

[15] 5 U.S.C. § 603(b).

comment on whether the proposed data collection would impose a significant reporting, recordkeeping, or other compliance burden on commercial broadcast entities, especially smaller entities, and whether there are alternative ways to minimize burdens from this proposed reporting requirement.[16]

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

13. None.

[16] *See, e.g.*, paragraph 23.

APPENDIX C

Supplemental 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 comment on the IRFA. The Commission also prepared a Supplemental Initial Regulatory Flexibility Analysis in the *Further Notice of Proposed Rulemaking* (*Further Notice*),[3] a Second Supplemental Initial Regulatory Flexibility Analysis (Second Supplemental IRFA) in the *Second Further Notice of Proposed Rulemaking* (*Second Further Notice*),[4] and an Initial Regulatory Flexibility Analysis in the *Fourth Further Notice of Proposed Rulemaking* (Fourth Further Notice).[5] A Final Regulatory Flexibility Analysis (FRFA) was published in the Report and Order in this docket.[6] This present Supplemental FRFA, which conforms to the RFA,[7] supplements that FRFA.[8]

A. Need for, and Objectives of, the *Memorandum Report and Order* (MO&O)

2. The MO&O reaffirms its earlier conclusions in the Report and Order, except for one decision. In the Report and Order, the Commission decided to require broadcasters to report on Form 323 certain nonattributable interests and to require entities holding nonattributable interests to file Form 323. Specifically, the Commission required broadcasters to report every two years on Form 323 information on 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,. In addition, every two years, entities holding these interests would have to file Form 323. The Report and Order revised 47 C.F.R. § 73.3615 to implement this change. On reconsideration, the Commission determined that because no comments were filed on this issue, the record may not be complete. Therefore, the Commission will not require broadcasters to report these interests and will not require entities holding these interests to file Form 323. Instead, the Commission is issuing a further notice of proposed rulemaking to seek comment on this issue.

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

[2] *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] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, et al., 24 FCC Rcd 5896, Appendix B (2009).

[6] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, et al., 24 FCC Rcd 5896, Appendix C (2009).

[7] *See* 5 U.S.C. § 604.

[8] We note that we could, instead, have written a certification here, under 5 U.S.C. § 605, because our action removes a requirement and therefore will not have "a significant economic impact on a substantial number of small entities."

B. Legal Basis

3. This MO&O is adopted pursuant to Sections 1, 2(a), 4(i, j), 257, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i, j), 257, and 303(r).

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

4. The Commission did not receive any comments specifically in response to the IRFA. No commenters addressed the impact of this reporting requirement on small entities in their comments generally.

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.[9] 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.[10] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[11] 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.[12]

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."[13] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of August 14, 2009, about 923 (72 percent) of the 1,289 commercial television stations in the United States have revenues of $14 million or less. We note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[14] 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.

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[9] 5 U.S.C. § 603(b)(3).

[10] 5 U.S.C.§ 601(6).

[11] 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).

[12] 15 U.S.C. § 632.

[13] *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.

[14] "[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).

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.[15] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[16] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of August 14, 2009, about 10,6600 (96 percent) of 11,100 commercial radio stations in the United States have revenues of $7 million or less. We note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[17] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

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.[18] As of June 30, 2009, there are approximately 553 licensed Class A stations and 2,386 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. The MO&O eliminates one of the reporting, recordkeeping and compliance requirements adopted in the Order. Licensees will not be required to report 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

[15] *See* 13 C.F.R. § 121.201, 2008 NAICS code 515112.

[16] *Id.*

[17] "[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).

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

eligible entities. Thus, we have reduced the reporting and recordkeeping requirements associated with this form.

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 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.[19]

13. On reconsideration, the Commission reversed its decision in the Report and Order to require reporting of certain nonattributable interests. We believe that it is preferable to seek additional comment on this issue in a further notice of proposed rulemaking to develop a full record on this issue, and not require broadcasters to file this information based on the current record in this proceeding. We believe this is the fairest course of action. The MO&O reduces the burdens on small entities because these entities will not have to report on certain nonattributable interests and holders of those interests will not have to file Form 323 every two years. See the Initial Regulatory Flexibility Analysis, paragraph 12, which discusses alternative approaches considered in connection with the Fifth Further Notice of Proposed Rulemaking.

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.[20] 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.[21]

[19] 5 U.S.C. § 603 (c).

[20] *See* 5 U.S.C. § 801(a)(1)(A).

[21] *See* 5 U.S.C. § 604(b).