

contours.³¹⁴ We received no suggestions in filed comments about how to address this problem. Although we do not base our decision to repeal the rule on the rule's use of analog contours and the lack of digital equivalents, the difficulty of creating a consistent rule in the digital age is a factor we have considered. We seek comment on how we could overcome this difficulty to the extent commenters propose to maintain restrictions on radio/television cross-ownership. In particular, if commenters favor retaining a contour-based rule, we seek comment on what contour to utilize and how the rule should be applied.

E. Dual Network Rule

1. Introduction

136. Historically, the Commission has concluded that the dual network rule is necessary in the public interest to promote competition and localism.³¹⁵ In order to promote these goals, the current dual network rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the “top four” networks (ABC, CBS, Fox, and NBC).³¹⁶ The Commission concluded in the *2002 Biennial Review Order* that, given the level of vertical integration of each of the top four networks, as well as their continued operation as a “strategic group” in the national advertising market, a top-four-network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming.³¹⁷ The Commission reasoned that these competitive harms would reduce program output, choices, quality, and innovation to the detriment of viewers. The Commission also concluded that allowing a merger of any of the top four networks would harm localism by reducing the ability of affiliates to bargain with their networks for favorable terms of affiliation, diminishing affiliates' influence on network programming, and thus harming the ability of the affiliates to serve their communities.³¹⁸ In the *2006 Quadrennial Review Order*, the Commission concluded that the dual network rule continued to be necessary in the public interest to promote competition and localism.³¹⁹ The U.S. Court of Appeals for the Third Circuit upheld the Commission's decision to retain the rule, finding that the Commission reasonably relied on several unique features of the top four broadcast networks, such as their vertical integration and their ability to reach a larger audience than other networks.³²⁰ The Court also found that the Commission's description of the media marketplace as “dynamic” and “competitive” was not inconsistent with its decision to retain the rule, in part, to avoid the damage to competition that a merger of the top four networks would cause.³²¹

137. We note that since our last review significant changes have taken place in the television marketplace. In particular, the number and popularity of non-broadcast sources for video programming continue to grow. Nonetheless, we tentatively find that the top four broadcast networks continue to

³¹⁴ *Id.* at 6117-18, ¶ 103.

³¹⁵ *See id.* at 6096-97, ¶ 27; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2082, ¶ 139; *2002 Biennial Review Order*, 18 FCC Rcd at 13858, ¶ 621.

³¹⁶ The rule provides that “[a] television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations *unless* such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were ‘networks’ as defined in [Section] 73.3613(a)(1) of the Commission's regulations” 47 C.F.R. § 73.658(g) (emphasis in original).

³¹⁷ *2002 Biennial Review Order*, 18 FCC Rcd at 13850, ¶ 601. A “strategic group” refers to a cluster of independent firms within an industry that pursue similar business strategies. *Id.* at 13850, ¶ 601 n.1248.

³¹⁸ *Id.* at 13855, ¶ 611.

³¹⁹ *2006 Quadrennial Review Order*, 23 FCC Rcd at 2084, ¶ 141.

³²⁰ *Prometheus II*, 652 F.3d at 464.

³²¹ *Id.*

possess characteristics that distinguish them from other broadcast and cable networks and therefore still serve a unique role in the electronic media that justifies retaining a rule specific to them. As discussed in more detail below, the top four broadcast networks, as compared to other broadcast and cable networks, achieve substantially larger primetime audiences, which can then be sold at a premium to advertisers that want to reach large, nationwide audiences. Accordingly, we tentatively find that a top-four network merger would restrict the availability, price, and quality of primetime entertainment programming to the detriment of consumers. We also tentatively find that a top-four network merger would substantially lessen competition for advertising dollars in the national advertising market, which would reduce the incentives for the networks to compete against each other for viewers by providing innovative, high quality programming. For these reasons, we tentatively conclude that the dual network rule remains necessary in the public interest to promote competition and should be retained without modification. We seek comment on this tentative conclusion. We also seek comment on whether allowing a merger of any of the top four networks would harm localism by reducing the bargaining power of affiliates, which would consequently lessen their ability to influence network programming in ways that serve their local communities. We also seek comment on whether allowing a merger of any of the top four networks would promote localism.

2. Background

138. In the *NOI*, the Commission sought comment on issues related to the dual network rule, including whether the rule remains necessary to protect competition in the program acquisition and national advertising markets.³²² In the current proceeding, very few parties have addressed these issues. Several parties suggest that the dual network rule remains important to promoting the Commission's policy goals.³²³ By contrast, both CBS and Fox assert that, in light of changes in the marketplace, the dual network rule is no longer justified and should be eliminated.³²⁴ Specifically, CBS contends that the Commission has failed to identify the distinguishing characteristics of the top four networks that justify a rule specific to those networks, and that greater audience share in comparison to other broadcast and cable networks does not adequately explain why the top four networks should be specifically singled out.³²⁵

3. Discussion

139. *Competition.* Broadcast networks serve in multiple roles as an intermediary between content creators, advertisers, and local broadcast stations. As a result, we tentatively find that the top four broadcasters participate, and can affect competition, in more than one market. Specifically, we consider the implications of a top-four network merger for competition in the provision of primetime entertainment programming and competition in the sale of national advertising time.

140. Primetime network programming is generally designed to attract a mass audience, and financing such programming, in turn, requires the substantial revenue that only a mass audience can provide. The top four broadcast networks supply their affiliated local stations with primetime entertainment programming intended to attract mass audiences and the advertisers that want to reach such large, nationwide audiences. By contrast, other broadcast networks target more specialized, niche

³²² *NOI*, 25 FCC Rcd at 6113, ¶ 89.

³²³ See, e.g., CWA Comments at 31 (stating that the Commission "correctly maintained the Dual Network Rule" in the 2006 quadrennial review proceeding); Free Press Comments at 2-4, 13-14 (urging the Commission not to relax any of its current ownership limits); Jan. 27 Workshop Transcript at 206 (remarks of David Honig, President and Executive Director, MMTC, in opposition to modification of the dual network rule, among other rules, except to the extent the Commission might consider adding a public interest waiver process).

³²⁴ CBS Reply Att. at 46-52; Fox Comments Att. 1 at 17 n.62.

³²⁵ CBS Reply Att. at 47-48; but see *Prometheus II*, 652 F.3d at 464 (finding the FCC adequately identified several unique features of the four networks, including vertical integration and operation as a strategic group).

audiences similar to many cable television networks.³²⁶ We recognize that, in general, consumers substitute between broadcast and cable networks, and that cable networks earn substantial advertising revenues. Nevertheless, we tentatively find that the primetime entertainment programming supplied by the top four broadcast networks is a distinct product, the provision of which could be restricted if two of the four major networks were to merge.

141. First, the audience size for primetime entertainment programming provided by each of the top four broadcast networks remains unmatched by that of any other broadcast or cable network. The primetime audience for all cable networks taken together is greater than that of the broadcast networks³²⁷ and that the gap in size between broadcast and cable network audiences has been narrowing over time.³²⁸ Nonetheless, the average audience size for each of the top four broadcast networks remains significantly larger than the audience size for even the most popular cable networks. For example, over an 11-month period in 2009-2010, the average primetime audience across the four broadcast networks was 8.61 million.³²⁹ During the same period, the highest rated cable networks were USA Network, Nickelodeon, Disney Channel, and ESPN. Their average primetime audience was approximately 2.79 million.³³⁰ Thus, the average broadcast network audience was more than three times larger than the average audience for the highest rated cable networks. Additionally, during the same period, the fifth highest rated broadcast network was Univision, which provides Spanish-language programming, and which had an average primetime audience of 3.62 million.³³¹ The next highest rated English-language broadcast network was the CW, which ranked sixth overall, with an average primetime audience of 1.78 million.³³² Thus, the average primetime audience for the top four broadcast networks was more than twice as large as that of the fifth highest rated broadcast network, and nearly five times larger than that of the next highest rated English-language broadcast network.

142. Similarly, among individual primetime entertainment programs, the audiences for the top four broadcast networks remain substantially larger than those for other broadcast and cable networks. With the exception of certain individual sports events, cable network programs do not regularly rank among the highest rated television programs. For instance, during the first three months of 2011, the highest rated single episode of a non-sports primetime program on a cable network was an episode of *Jersey Shore*, which achieved an audience of 8.87 million when it appeared on MTV during the week of

³²⁶ For example, Univision targets Hispanic viewers, and the CW network targets women between the ages of 18 and 34. See Univision Communications Inc., *Media Properties – Univision Network*, <http://www.univision.net/corp/en/univision.jsp> (visited Oct. 19, 2011); The CW Television Network, *About The CW*, <http://www.cwtv.com/thecw/about-the-cw> (visited Oct. 19, 2011).

³²⁷ For example, according to data from the first 28 weeks of the 2010-2011 television season (*i.e.*, through April 3, 2011), ad-supported cable networks had a household primetime share of 60 percent, while broadcasters had a share of 36 percent. See INFORMATION NEEDS OF COMMUNITIES at 73.

³²⁸ For example, according to FCC staff analysis of data from SNL Kagan, the difference in average primetime rating between the top four broadcast networks and the top four cable networks was 3.41 in 2007, 3.17 in 2008, and 2.65 in 2009. Average primetime rating refers to the average percent of the universe of households viewing a network in primetime during the average minute according to Nielsen Media Research.

³²⁹ FCC staff analysis of Nielsen data for the period Sept. 29, 2009 through Aug. 22, 2010. NBC was the lowest rated of the top four broadcast networks, with an average audience of 7.67 million viewers.

³³⁰ FCC staff analysis of Nielsen data for the period Sept. 29, 2009 through Aug. 22, 2010. USA Network had an average of 3.38 million viewers, Nickelodeon had 2.74 million, Disney Channel had 2.56 million, and ESPN had 2.46 million.

³³¹ *Id.* We note that Univision is a Spanish-language network and may not significantly compete with the four major broadcast networks for their viewers.

³³² *Id.*

January 17-23, 2011.³³³ Despite this sizable audience, for the week, a total of 21 non-sports programs that aired on top-four broadcast networks achieved larger audiences.³³⁴ Primetime programs on broadcast networks outside the top four likewise generally achieve smaller audiences than primetime programs carried on the top four networks. For instance, for the 2009-2010 television season, no program from any non-top-four broadcast network ranked among the 100 highest rated broadcast programs.³³⁵

143. Another indicator of the distinctiveness of the top four broadcast networks is the wide disparity in advertising prices between the top four broadcast networks and cable networks. Some advertisers are willing to pay a premium per viewer for programs that attract larger audiences. As the Information Needs of Communities Report notes, despite a fragmented audience, broadcast television networks still retain some clout, relative to most cable networks, as an effective way for advertisers to reach large audiences.³³⁶ As evidence of this, the top four broadcast networks generally earn higher advertising rates than cable networks. In 2009, among the top four broadcast networks, CBS had the lowest average advertising rate, as measured in cost per thousand views (referred to as cost per mille or “CPM”), but its CPM was still 38 percent higher than the highest CPM among non-sports cable networks (MTV) and 178 percent higher than the CPM for the highest rated cable network (USA).³³⁷ The appeal of the top four broadcast networks to advertisers seeking large, national audiences is also reflected in data on net advertising revenues. The top-four broadcast network with the lowest net advertising revenue in 2009 was Fox, but it still received more than three times that of any non-top four broadcast network.³³⁸ It also

³³³ FCC staff analysis of week-by-week cable television ratings data from Nielsen, as provided on the website TV by the Numbers, for the period Jan. 3, 2011 through Mar. 27, 2011. Over the entire three month period, Jersey Shore was consistently the highest rated program on cable with an average of nearly 8 million viewers.

³³⁴ See Robert Seidman, *TV Ratings Broadcast Top 25: Jets-Steelers, American Idol, Hawaii Five-O, NCIS, Modern Family Top Week 18 Viewing*, TV BY THE NUMBERS, Jan. 25, 2011, <http://tvbythenumbers.zap2it.com/2011/01/25/tv-ratings-broadcast-top-25-jets-steelers-american-idol-hawaii-five-0-ncis-modern-family-top-week-18-viewing/80030/> (visited Oct. 19, 2011).

³³⁵ See Bill Gorman, *Final 2009-10 Broadcast Primetime Show Average Viewership*, TV BY THE NUMBERS, June 16, 2010, <http://tvbythenumbers.zap2it.com/2010/06/16/final-2009-10-broadcast-primetime-show-average-viewership/54336/> (visited Oct. 19, 2011). According to Nielsen ratings data, as reported by the website TV by the Numbers, the highest rated broadcast show that did not air on a top four network was The Vampire Diaries, which aired on the CW network and was the 118th rated broadcast show, with an average of 3.6 million viewers during the season. *Id.*

³³⁶ INFORMATION NEEDS OF COMMUNITIES at 75.

³³⁷ FCC staff analysis of data from SNL Kagan. CBS had an average CPM of \$14.62, while MTV’s average was \$10.62. The highest rated cable networks, USA and Nickelodeon, had CPMs of \$5.07 and \$5.23, respectively. Among the top four broadcast networks, the highest CPM belonged to Fox, with an average CPM of \$27.90. The cable network with the highest CPM was ESPN, with an average CPM of \$14.07. See also SNL Kagan, *Cable Network Ad Revenue Growth Back on Track*, ECONOMICS OF ADVERTISING, Oct. 1, 2010. The average CPM for cable networks in 2009 was \$5.13, which still lagged behind the broadcast networks (*i.e.*, it is about a third of CBS’s average CPM). CPM data for other broadcast networks is either not available, or it is not comparable because of their more limited schedules. For instance, the CW had a much higher reported CPM of \$43.18, but its schedule did not include the near 24-hour programming schedule of the major broadcast and cable networks. We note that advertising rates tend to be higher during primetime.

³³⁸ FCC staff analysis of data from SNL Kagan; see also SNL KAGAN ADVERTISING FORECASTS 2010 at 30. Fox had \$2.34 billion in net advertising revenues in 2009, while NBC had the highest revenues among the top four networks, with \$3.94 billion. We note that Fox has a more limited schedule of programming, which reduces its total advertising revenues. Meanwhile, Univision ranked fifth among broadcast networks, with \$0.75 billion in net advertising revenues, and the CW network ranked sixth with \$0.56 billion.

received double that of the highest rated non-sports cable network (USA).³³⁹

144. We disagree with the assertion by CBS that greater audience share in comparison to other broadcast and cable networks does not justify a rule specific to the top four networks. We find that the top four broadcast networks have a distinctive ability to attract larger primetime audiences regularly relative to other broadcast and cable networks, which enables them to earn higher rates from advertisers that are willing to pay a premium for such audiences. Thus, a combination between top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences, which could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high quality programming. We therefore tentatively conclude that primetime network entertainment programming and national television advertising are each distinctive products, the availability, price, and quality of which could be restricted, to the detriment of consumers, if two of the top four networks were to merge. Accordingly, we tentatively conclude that the dual network rule remains necessary to foster competition in the provision of primetime entertainment programming and the sale of national advertising time. We seek comment on these tentative conclusions. In particular, we seek comment on whether the top four networks face competition from any other sources that are also capable of delivering a large, national audience to advertisers, such that they provide a reasonable substitute for the top four networks in the national advertising market. We also seek comment as to whether the dual network rule is necessary to promote and protect competition in the primetime network entertainment programming and national television advertising markets, or if antitrust laws and our public interest standard are sufficient for reviewing any possible merger between the four networks.

145. We also seek comment on whether a merger between top-four broadcast networks would give rise to any other potential competitive concerns. For instance, we seek comment on whether, as the Commission has previously determined, the level of vertical integration of each of the top four networks is such that a top-four-network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming.³⁴⁰ In addition, we seek comment on the role that the top four broadcast networks play in the provision of national news content.³⁴¹ As the Information Needs of Communities Report notes, despite their declining audiences, the three broadcast network evening newscasts (ABC, CBS, and NBC) still draw 22 million viewers—five times the number tuning in to the three major cable news networks (CNN, FOX, and MSNBC) during primetime.³⁴² We seek comment on whether a merger among the top four broadcast networks would

³³⁹ FCC staff analysis of data from SNL Kagan; *see also* SNL KAGAN ADVERTISING FORECASTS 2010 at 30, 50-60. Nickelodeon received \$1.0 billion, and USA received \$0.89 billion. ESPN received the most of any cable network, with \$1.37 billion.

³⁴⁰ *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2082-84, ¶¶ 139-41; *2002 Biennial Review Order*, 18 FCC Rcd at 13850, ¶ 601.

³⁴¹ Three of the top four networks (ABC, CBS, and NBC) provide a national early evening newscast, and all provide Sunday morning news and analysis. In addition, Univision and Telemundo (which is affiliated with NBC) provide Spanish-language network evening news programming. Fox and the CW network do not provide network evening news programming. Furthermore, some cable news networks are owned by broadcast network companies. For example, among the top four broadcast networks, both NBC and Fox are affiliated with cable news networks. NBC is affiliated with CNBC and MSNBC, and Fox is affiliated with Fox News.

³⁴² INFORMATION NEEDS OF COMMUNITIES at 104 (citing STATE OF THE NEWS MEDIA 2010 at Local TV Summary Essay). Similarly, the evening newscasts of ABC, CBS, and NBC achieve much larger audiences than those of any other broadcast network. For example, as measured by the percentage of U.S. households for their average audiences on Monday through Friday during the first quarter of 2011, NBC Nightly News, ABC World News Tonight, and the CBS Evening News achieved audiences of 6.3, 5.7, and 4.1, respectively. TVB Local Media Marketing Solutions, *Broadcast Network News Ratings Trend*, <http://www.tvb.org/measurement/4748> (select “National News Comparison” for audience data) (visited Oct. 19, 2011). By contrast, Noticiero Univision and Noticiero Telemundo achieved audiences of 1.1 and 0.4, respectively. *Id.*

significantly restrict the availability of diverse sources of national television news. We also seek comment on whether other sources of news—including cable television, newspapers, and the Internet—are sufficient to ensure a diverse and competitive market for national news, or whether the dual network rule remains necessary to protect against excessive concentration in this market. We also seek comment as to whether the dual network rule is necessary to promote and protect competition in a national news market and purchasing or pricing of such programming, or if antitrust laws and our public interest standard are sufficient for reviewing any possible merger between the four networks.

146. *Localism.* We seek comment on the continued validity of the Commission's previous finding that the dual network rule is necessary to foster localism.³⁴³ In particular, we seek comment on potential ways in which a merger among the top four broadcast networks would impair the ability of their affiliates to serve the interests of their local communities. Specifically, does the rule remain necessary to preserve the balance of bargaining power between the top-four networks and their affiliates? Would a top-four network merger reduce the ability of a TV station, in bargaining with its affiliated network, to use the availability of other top independently owned networks as a bargaining tool? Furthermore, would the availability of fewer alternatives give an affiliate less influence on network programming decisions? For instance, would it reduce the ability of an affiliate to engage in a dialogue with a network over the suitability for local audiences of either the content or scheduling of network programming? We also seek comment as to whether the dual network rule is necessary to ensure options and preserve the bargaining power and independence of affiliates, or if antitrust laws, our public interest standard, and other Commission rules are sufficient for reviewing any possible merger between the four networks. In addition, we seek comment on whether the growth of alternate sources for local content should have any impact on our decision whether the dual network rule remains necessary to promote localism.

IV. DIVERSITY ORDER REMAND/ELIGIBLE ENTITY DEFINITION

147. We seek comment in this NPRM on issues that previously were being addressed in a separate rulemaking proceeding focused on enhancing the diversity of ownership in the broadcast industry, including by increasing ownership opportunities for minorities and women (the "Diversity" proceeding). As explained below, the Third Circuit in *Prometheus II* remanded the measures adopted in the Commission's 2008 *Diversity Order* that relied on a revenue-based "eligible entity" standard and emphasized that the actions required on remand from the *Diversity Order* should be completed "within the course of the Commission's 2010 Quadrennial Review of its media ownership rules."³⁴⁴ Accordingly, we seek comment in this proceeding on how the Commission should respond to the court's remand and on other actions we should consider to increase the level of broadcast station ownership by minorities and women.

148. *Current Diversity Initiatives.* The Commission believes that promoting diversity of ownership among broadcast licensees³⁴⁵ and expanding opportunities for minorities and women to

³⁴³ See 2006 Quadrennial Review Order, 23 FCC Rcd at 2082-84, ¶¶ 139-41; 2002 Biennial Review Order, 18 FCC Rcd at 13855-56, ¶¶ 611-15.

³⁴⁴ *Prometheus II*, 652 F.3d at 472.

³⁴⁵ As the Supreme Court has recognized, "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990), *overruled in part on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); see also *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 663-64 (1994) ("[I]t has long been a basic tenet of national communications policy that 'the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" (quoting *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972); see also 47 U.S.C. § 257(b) (directing the Commission to "promote the policies and purposes of [this Act] favoring diversity of media voices" in carrying out its responsibilities under Section 257(a) of the Communications Act to eliminate market barriers for entrepreneurs and small businesses); *Diversity Order*, 23

participate in the broadcast industry are important parts of our mission under the Communications Act.³⁴⁶ We currently have a number of rules and initiatives in place that are designed to advance these objectives. For example, although the Third Circuit remanded the provisions adopted in the *Diversity Order* that relied on the eligible entity definition, it expressly upheld a number of other actions the Commission has taken to promote diversity of ownership.³⁴⁷ These actions include, among others, a ban on discrimination in broadcast transactions,³⁴⁸ a “zero tolerance” policy for ownership fraud,³⁴⁹ and a requirement that non-discrimination provisions be included in advertising sales contracts.³⁵⁰ Similarly, the *Prometheus II* opinion did not question the Commission’s decision to reinstate the failed station solicitation rule (“FSSR”), which is intended to provide out-of-market buyers, including minorities and women, with notice of a sale and an opportunity to bid on stations.³⁵¹ Accordingly, these measures remain in place.

FCC Rcd at 5924, ¶ 2 (“By broadening participation in the broadcast industry, we seek to strengthen the diverse and robust marketplace of ideas that is essential to our democracy.”).

³⁴⁶ See 47 U.S.C. § 309(j)(3)(B) (directing the Commission in designing systems of competitive bidding to “disseminat[e] licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women”); 47 U.S.C. § 309(j)(4)(D) (directing the Commission in prescribing regulations concerning competitive bidding systems to “ensure that . . . businesses owned by members of minority groups and women are given the opportunity to participate in . . . spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures”); see also generally Omnibus Reconciliation Act of 1993, H.R. REP. NO. 111, at 255 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 582 (stating that “the Commission should adopt regulations pursuant to this section to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process”); 47 U.S.C. § 151 (directing the Commission to regulate interstate and foreign communications services so that they are “available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex”); *Diversity Order*, 23 FCC Rcd at 5924, ¶ 1 (seeking to expand opportunities for “new entrants and small businesses, including minority- and women-owned businesses” to own broadcasting outlets).

³⁴⁷ *Prometheus II*, 652 F.3d at 471 n.41.

³⁴⁸ *Diversity Order*, 23 FCC Rcd at 5939-40, ¶¶ 40-42 (adopting “a rule that bars discrimination on the basis of race or gender and related protected categories in broadcast transactions” and requiring certification of compliance); see also 47 C.F.R. § 73.2090.

³⁴⁹ *Diversity Order*, 23 FCC Rcd at 5940-42, ¶¶ 43-50 (explaining that the Commission will show no tolerance for applications seeking a preference that are not complete and correct or that “creat[e] an appearance of qualification that does not accord with reality[,]” will address such violations on a “fast track” basis, and will provide, when permissible, confidentiality to whistleblowers).

³⁵⁰ *Id.* at 5940-42, ¶¶ 43-50; see also *id.* at 5941-42, ¶¶ 49-50 (requiring broadcasters renewing their licenses to certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination). The Commission has revised its Form 303-S license renewal application form to include this certification requirement. FCC Form 303-S, Section II, Item 7; see also *Media Bureau Announces Revisions to License Renewal Procedures and Form 303-S; Radio License Renewal Cycle to Commence on May 2, 2011*, Public Notice, 26 FCC Rcd 3809 (Med. Bur. 2011). The court also expressly upheld several other measures adopted by the Commission in the *Diversity Order*, including the commissioning of longitudinal research on minority and women ownership trends, enabling the Commission’s Office of Communications Business Opportunities to coordinate with the Small Business Administration to encourage local and regional banks to make loans through SBA’s guaranteed loan programs, the holding of “Access to Capital” conferences, and the creation of a guidebook on diversity. *Prometheus II*, 652 F.3d at 471 n.41; see also *Diversity Order*, 23 FCC Rcd at 5939-45, ¶¶ 40-64.

³⁵¹ The FSSR provides that, before selling a station to an in-market buyer, an applicant for a waiver of the local television ownership rule or the radio/television cross-ownership rule must demonstrate that the in-market buyer is the only entity ready, willing, and able to operate the station, and that sale to a buyer outside the market would result in an artificially depressed price. 47 C.F.R. § 73.3555, Note 7; see also *2006 Quadrennial Review Order*, 23 FCC Rcd at 2069, ¶ 109; *1999 Ownership Order*, 14 FCC Rcd at 12396-97, ¶ 74. In the *2002 Biennial Review Order*, the

149. Over the past several years, the Commission also has implemented recommendations from the Advisory Committee on Diversity for Communications in the Digital Age (“Advisory Committee”) designed to enhance opportunities for minorities, women, and other underrepresented groups to participate in the broadcast industry.³⁵² For example, based on a recommendation from the Advisory Committee, the Commission’s Office of Communications Business Opportunities (“OCBO”) hosts annual capitalization strategies workshops in order to facilitate lending to and investment in minority- and women-owned entities.³⁵³ Most recently, OCBO convened a Capitalization Strategies Workshop that focused on capital acquisition for small, women- and minority-owned businesses in broadcasting, telecommunications, and related fields.³⁵⁴ In addition, as explained further below, the Commission currently is considering a recommendation from the Advisory Committee to afford bidding credits in license auctions to persons or entities that have overcome substantial disadvantage.³⁵⁵ We seek input in this NPRM on how the Commission most effectively can expand upon its diversity initiatives at the same time that we address the Third Circuit’s concerns and other legal considerations, including potential impediments to affording licensing preferences to minorities and women under current standards of constitutional law.³⁵⁶

150. *Eligible Entity Standard and Prometheus II Remand.* Aside from implementing the initiatives noted above, the Commission also has sought to promote diversity through the measures adopted in the *Diversity Order* that incorporated the eligible entity definition. As discussed below, the Third Circuit in *Prometheus II* vacated and remanded each of these measures.³⁵⁷ Accordingly, we seek comment on how the Commission should respond to the court’s criticisms of our previous eligibility standard, how we should proceed with respect to the measures that previously relied on that standard, and any other actions we should consider to advance our diversity objectives.

Commission eliminated the FSSR, finding that the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. 18 FCC Rcd at 13708, ¶ 225. The *Prometheus I* court remanded the issue on the basis that the Commission did not consider the potential impact on minority owners when it eliminated the rule. 373 F.3d at 420-21. In the 2006 *Quadrennial Review Order*, the Commission reinstated the FSSR to ensure that potential minority owners would not be negatively impacted. 23 FCC Rcd at 2068, ¶ 105.

³⁵² The Advisory Committee was created in 2003. Its mission is “to make recommendations to the Commission regarding policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries. See FCC, *Advisory Committee for Diversity in the Digital Age*, <http://transition.fcc.gov/DiversityFAC/> (visited Oct. 19, 2011).

³⁵³ See Letter from Julius Genachowski, Chairman, FCC, to Henry Rivera, Chairman, Advisory Committee for Diversity in the Digital Age (Jan. 5, 2010), available at <http://transition.fcc.gov/DiversityFAC/120309/genachowski-letter.pdf>.

³⁵⁴ The November 2010 workshop featured panel discussions with finance experts that examined capitalization strategies for a range of media sectors, including broadband, cable, radio and television broadcast, wireless, and wireline. *Capitalization Strategies Workshop For Small, Minority- And Women-Owned Businesses Friday, November 12, 2010, 9:00 A.M. - 5:00 P.M.*, Public Notice (OCBO, rel. Nov. 1, 2010), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1101/DOC-302517A1.pdf.

³⁵⁵ *Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage*, GN Docket No. 10-244, Public Notice, 25 FCC Rcd 16854 (Med. Bur./Wireless Tel. Bur. 2010) (“*Auction Preference PN*”).

³⁵⁶ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (holding that “strict scrutiny” applies to “all racial classifications”); *Nev. Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (applying intermediate scrutiny to gender-based classifications).

³⁵⁷ *Prometheus II*, 652 F.3d at 471.

151. As defined in the *Diversity Order*, an “eligible entity” is any entity that qualifies as a small business under revenue-based standards that have been established by the Small Business Administration (“SBA”).³⁵⁸ In adopting measures based on this definition, the Commission concluded that it would “be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including minorities and women.”³⁵⁹ The Commission also noted that adopting this “race- and gender-neutral definition” would avoid the “constitutional difficulties” associated with a race-conscious definition “that might create impediments to the timely implementation” of the measures adopted in the *Diversity Order*.³⁶⁰ In response to commenters’ requests that the Commission take direct action to increase minority and female ownership of broadcast stations,³⁶¹ however, the Commission asked for comment in the *Third Further Notice of Proposed Rulemaking to the Diversity Order* (the “*Diversity Third FNPRM*”) on whether it should adopt an alternative, race-conscious eligibility definition as well as other potential definitions.³⁶² The alternative definitions proposed in the *Diversity Third FNPRM* are discussed below in paragraphs 163 and 164.

152. In *Prometheus II*, the Third Circuit held that the Commission’s revenue-based eligible entity definition was arbitrary and capricious.³⁶³ While noting that other actions in the *Diversity Order* “take a strong stance against discrimination and are no doubt positive,” the court found that the Commission failed to show that measures based on the eligible entity definition “will enhance significantly minority and female ownership, which was a stated goal of” the rulemaking proceeding in question.³⁶⁴ The court further observed that, in discussing its decision to adopt this definition, the Commission had referred “only to ‘small businesses,’ and occasionally ‘new entrants,’ as expected beneficiaries.”³⁶⁵ In addition, the court expressed doubt that the Commission would be able to provide an adequate explanation on remand of how “measures using this definition would achieve the stated goal” of increasing broadcast ownership by minorities and women.³⁶⁶ In particular, the court pointed to data cited by the Commission showing that “minorities comprise 8.5 percent of commercial radio station owners that qualify as small businesses, but 7.78 percent of commercial radio stations as a whole — a difference of less than 1 percent.”³⁶⁷ The court also noted that, in adopting the eligible entity standard, “[t]he Commission referenced no data on television ownership by minorities or women and no data regarding

³⁵⁸ *Diversity Order*, 23 FCC Rcd at 5925, ¶ 6; see also 13 C.F.R. § 121.201. At present, the SBA defines a small business to include a television broadcasting station that has no more than \$14 million in annual receipts and a radio broadcasting entity that has no more than \$7 million in annual receipts. 13 C.F.R. § 121.201. The Commission originally adopted this eligible entity definition in the *2002 Biennial Review Order*, 18 FCC Rcd at 13810-11, ¶¶ 488-89.

³⁵⁹ *Diversity Order*, 23 FCC Rcd at 5927, ¶ 9.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² See *Diversity Third FNPRM*, 23 FCC Rcd at 5951-52, ¶¶ 81-85.

³⁶³ *Prometheus II*, 652 F.3d at 471.

³⁶⁴ *Id.*; see also *id.* at 470 (finding that the Commission had failed to “explain how the eligible entity definition adopted [in the *Diversity Order*] would increase broadcast ownership by minorities and women”); *id.* at 471 (finding that the eligible entity definition “lacks a sufficient analytical connection to the primary issue that Order was intended to address”).

³⁶⁵ *Id.* at 470.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

commercial radio ownership by women.”³⁶⁸

153. Finding that the Commission had not provided a “sufficiently reasoned basis for deferring consideration” of the alternative definitions proposed in the *Diversity Third FNPRM*, the court specifically directed it to consider those proposals within the course of the 2010 Quadrennial Review.³⁶⁹ The Third Circuit also admonished that the Commission could not further delay its consideration of its prior proposals simply because of the constitutional difficulties they may present.³⁷⁰ To the extent that the Commission “requires more and better data” in order to complete its analysis, the court directed the Commission to “get [such] data and conduct up-to-date studies.”³⁷¹

154. *Data Collection Concerning Minority and Female Ownership*. Since the adoption of the *Diversity Order*, the Commission actively has sought to improve the broadcast ownership information available to it and has gathered additional data regarding the current levels of minority ownership of broadcast stations. In 2009, the Commission implemented a number of changes to its Form 323 ownership reports to further its goal that the data reported in the form, including data regarding minority and female broadcast ownership, are reliable, accurate, searchable, and aggregable.³⁷² In addition, the Commission set a new uniform biennial filing deadline for the Form 323 and expanded the class of entities required to file the form.³⁷³ The Commission requires all full power commercial broadcast stations and all low power television stations, including Class A stations, to file the new form biennially. It also eliminated the exemption from the biennial reporting requirement that formerly applied to sole proprietorships and partnerships of natural persons that are commercial broadcast licensees.³⁷⁴ In addition, all attributable interest holders must now obtain unique FCC registration numbers for purposes of filing the form in order to facilitate cross-referencing of reported ownership interests.³⁷⁵

155. The Commission’s first data collection that incorporates these changes reflects ownership interests as of November 1, 2009. The deadline for filing the data with the Commission was July 8, 2010, and on February 28, 2011 the Commission released to the public a data set compiling all of the ownership reports that were filed.³⁷⁶ That release included descriptions of the data and instructions on accessing

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 471.

³⁷⁰ *Id.* at 471 n.42 (“Stating that the task is difficult in light of *Adarand* does not constitute ‘considering’ proposals using an SDB definition.”).

³⁷¹ *Id.*

³⁷² See *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Fourth FNPRM, 24 FCC Rcd 5896 (2009) (“*323 Order*” and “*Diversity Fourth FNPRM*”), *recon. granted in part*, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009) (“*323 MO&O*” and “*Diversity Fifth FNPRM*”). The *Diversity Fourth FNPRM* sought comment on modifications to the Form 323-E ownership report for noncommercial broadcast stations to gather minority and gender ownership data for non-commercial broadcast stations, including low power FM stations, and related matters. See 24 FCC Rcd at 5910-11, ¶¶ 27-30. In the *323 MO&O and Diversity Fifth FNPRM*, the Commission subsequently reconsidered its decision to require licensees to report certain nonattributable interests and sought comment on the issue. 24 FCC Rcd at 13045-47, 13049-50, ¶¶ 12-15, 22-24.

³⁷³ *323 Order and Diversity Fourth FNPRM*, 24 FCC Rcd at 5904-05, 5909-09, ¶¶ 14-16, 22.

³⁷⁴ *323 Order* at 5905, ¶ 16.

³⁷⁵ *Id.* at 5908, ¶ 21.

³⁷⁶ See *Media Bureau Announces Availability of 2009 Biennial Ownership Data Set For Commercial Broadcast Licensees*, MB Docket No. 07-294, Public Notice, 26 FCC Rcd 2024 (Med. Bur. 2011).

them to permit interested parties to analyze and manipulate the data.³⁷⁷ This data set represents the first “snapshot” of broadcast ownership data in a series of planned biennial reviews that collectively should provide a reliable basis for analyzing ownership trends in the industry, including ownership by minorities and women.

156. Commission staff has reviewed the 2009 biennial ownership filings of full power commercial broadcast television stations in order to determine the number of stations controlled by reported racial and ethnic categories.³⁷⁸ There were 1,394 full-power commercial television stations in the United States as of November 1, 2009, the information collection date.³⁷⁹ According to the Commission’s review of the 2009 data, 29 of these stations, or 2.1 percent, are minority owned. Of those 29 stations, 9 have Black or African-American owners, accounting for 0.6 percent of all stations. American Indian or Alaska Native owners control 10 stations, or 0.7 percent, while Asian owners control nine stations, or 0.6 percent. Native Hawaiian or Pacific Islanders own one station, or 0.1 percent. Hispanic or Latino owners control 36 stations, or 2.6 percent. By comparison, our review showed that non-Hispanic White owners control 1,021 stations, or 73.2 percent of the total stations. In addition, the Commission was not able to categorize the race or ethnicity of the ownership for 244 stations, representing 17.5 percent of the total stations, because at least 50 percent of the ownership of these stations was not reportable via the Form 323. Information was unavailable for 64 stations, or 4.6 percent.

157. Several of the Media Ownership Studies provide additional analysis of these subjects. These and other studies are discussed more fully in Section V herein. Media Ownership Study 7 considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences.³⁸⁰ The study finds that Black and Hispanic listeners have very different listening preferences from the White population.³⁸¹ The study also finds that although most minority-targeted stations are not minority-owned, most minority-owned stations target minority listeners,³⁸² and the presence of minority-owned stations in a market appears to raise the amount of minority-targeted programming.³⁸³ Media Ownership Study 2 concludes that consumers value diversity of opinion and community news to varying degrees that generally increase with age, education, and income.³⁸⁴ The study also examined the value listeners place on multiculturalism, however, which was found to decrease with age. The study further concludes that White male consumers generally do not value multiculturalism.³⁸⁵

³⁷⁷ *Id.*

³⁷⁸ For purposes of this analysis, the Commission examined the race or ethnicity of owners with attributable voting interests in the entity that ultimately owns the station license and defined a controlling interest as an interest that exceeds 50 percent alone or in the aggregate.

³⁷⁹ *March 31, 2011 Broadcast Station Totals Press Release.*

³⁸⁰ Media Ownership Study 7.

³⁸¹ *Id.* at 8-9, 24. For example, urban stations attract 51.2 percent of Black listeners, but less than five percent of non-Black listeners. *Id.* at 8. Furthermore, Spanish-language stations account for 48 percent of Hispanic listening and negligible amounts of non-Hispanic listening. *Id.* at 9. Overall, Spanish-language station audiences are 96 percent Hispanic. *Id.*

³⁸² *Id.* at 10, 24.

³⁸³ *Id.* at 21, 24. Specifically, the study finds that markets with an additional station with a Black owner have roughly 0.1-0.4 additional stations targeted at Black listeners, while markets with an additional station with a Hispanic owner have roughly 0.2-0.45 additional stations targeted at Hispanic listeners.

³⁸⁴ *See* Media Ownership Study 2 at 2.

³⁸⁵ *Id.*

158. We recognize that the data currently in the record of this proceeding are not complete and are likely insufficient either to address the concerns raised in *Prometheus II* or to support race- or gender-based actions by the Commission. Although we would prefer to be able to propose specific actions in response to the Third Circuit's remand of the measures relying on the eligible entity definition in this NPRM, we believe that making legally sound proposals would not be possible based on the record before us at this time. Accordingly, we plan to undertake the following actions in preparation for the 2014 broadcast ownership review to establish with the requisite foundation and clarity what additional policies can be implemented promoting greater broadcast ownership diversity, including female and minority ownership: 1) Continue to improve our data collection so that we and the public may more easily identify the diverse range of broadcast owners, including women and minorities, in all services we license; 2) Commission appropriately-tailored research and analysis on diversity of ownership; and 3) Conduct workshops on the opportunities and challenges facing diverse populations in broadcast ownership. In addition, we ask interested parties to supplement the record and provide any and all data available that can complete a picture of the current state of ownership diversity, including minority and female ownership in the broadcast industry and to justify any prospective actions the Commission may take on remand.

159. *Options for Reconsideration of the Eligible Entity Standard.* We seek comment herein on a number of actions we could take with respect to the remanded eligible entity definition. With respect to these proposals and any others that may be suggested, we emphasize that interested parties should squarely address the potential legal impediments to any specific approach. We ask commenters to explain the constitutional law analysis that would apply to, as well as the potential constitutional problems with, any proposals for a new eligibility definition. Commenters should explain in detail, based on relevant case law, whether and how the Commission could overcome the application of strict or intermediate constitutional scrutiny to any race- or gender-based standard. Commenters also should explain whether and how proposals can be supported by data and whether they can be applied in a consistent and rational manner.

160. As an initial matter, we invite comment regarding the possibility of reinstating the preexisting eligible entity definition. Recognizing the Third Circuit's apparent skepticism that the Commission would be able to demonstrate on remand that the revenue-based eligibility definition serves our goal of increasing broadcast ownership by minorities and women,³⁸⁶ we ask commenters to address whether or not there is additional evidence available that would show a stronger connection between according licenses preferences to small businesses and promoting this goal. Is there evidence demonstrating that there are now more small businesses, particularly those that are owned by minorities or women, that own broadcast outlets than there were when the eligible entity standard was put in place? We strongly encourage parties to supply any such information to the Commission. We also note the Third Circuit's statement that "it is hard to understand how measures using [the eligible entity] definition would achieve the stated goal" of increasing broadcast ownership by minorities and women in light of Commission data showing that "minorities comprise 8.5 % of commercial radio station owners that qualify as small businesses, but 7.78 % of the commercial radio industry as a whole"³⁸⁷ We seek comment on whether this comparison of minority representation in different segments of the radio industry accurately reflects the potential impact of the eligible entity standard on minority and female ownership. In addition, we invite input on whether it is possible that the preexisting definition would have a more substantial impact on minority and female station ownership if we modify the licensing preferences to which the definition applies. As discussed in more detail in paragraphs 168 through 170, we invite commenters to propose changes to these preferences and to explain how such changes would promote our minority and female ownership objectives.

³⁸⁶ *Prometheus II*, 652 F.3d at 470.

³⁸⁷ *See id.*

161. Alternatively, should we consider reinstating the eligible entity definition to support other policy objectives aside from the promotion of minority and female station ownership? For example, should increasing station ownership by small businesses be considered an independent policy goal in this proceeding and, if so, would readopting the preexisting eligibility definition be a reasonable and effective means of promoting this objective?³⁸⁸ We also ask commenters to consider whether creating opportunities for small businesses to participate in the broadcast industry via the eligible entity standard would serve our traditional goals of fostering viewpoint diversity, localism, and competition. In the *Diversity Order*, the Commission suggested that the use of the eligible entity standard would “result in a wider array of programming services, including some that are responsive to local needs and interests and audiences that are underserved.”³⁸⁹ In this regard, the Commission “anticipate[d] that small businesses will be more likely than large corporations to have ties to the communities that they serve, and thus be more attuned to local needs and interests.”³⁹⁰ We seek comment on this prediction and on other ways in which the continued use of the eligible entity definition could serve our traditional policy objectives.

162. We also seek comment on whether there are other race- and gender-neutral standards for defining eligible entities that we should consider for the measures adopted in the *Diversity Order* and any others we may implement in the future. Given the Third Circuit’s conclusion that the Commission failed to demonstrate a connection between the previous revenue-based definition and our stated diversity goals, commenters should supply specific evidence demonstrating why a proposed definition is likely to serve our policy objectives, especially our goal of increasing station ownership by minorities and women. In addition, we ask commenters to discuss any potential legal problems as well as any administrative issues associated with their proposals.

163. In the *Diversity Third FNPRM*, the Commission sought comment on replacing the eligible entity standard with a standard based on the SBA’s definition of socially and economically disadvantaged businesses (“SDBs”) used for purposes of its Business Development Program.³⁹¹ African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Pacific Americans, and Native Americans are presumed to qualify for the Business Development Program, and other individuals may qualify for the program if they can show by a preponderance of the evidence that they are disadvantaged.³⁹² We again seek comment on this proposal in this proceeding.³⁹³ In addition, we seek comment on whether there is an alternative race-conscious and/or gender-specific standard that we should adopt.

³⁸⁸ Several provisions of the Communications Act require the Commission to promote the interests of small businesses. See, e.g., 47 U.S.C. § 309(j)(3)(B) (obligating the Commission to “disseminat[e] licenses among a wide variety of applicants, including small businesses” in authorizing the Commission to award licenses via competitive bidding); see also 47 U.S.C. § 257(a) (directing the Commission to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services . . .”); 47 U.S.C. § 614(a)(i) (establishing a “Telecommunications Development Fund” to, among other purposes, “promote access to capital for small businesses in order to enhance competition in the telecommunications industry”).

³⁸⁹ *Diversity Order*, 23 FCC Rcd at 5926, ¶ 7.

³⁹⁰ *Id.*

³⁹¹ *Diversity Third FNPRM*, 23 FCC Rcd at 5950, ¶ 81.

³⁹² 13 C.F.R. §§ 124.103(b)-(c), 124.104(a). To qualify for this program, a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals. See *id.* at § 124.105; see also U.S. Small Business Administration, 8(a) *Business Development*, <http://www.sba.gov/content/8a-business-development-0> (visited Oct. 19, 2011).

³⁹³ See *Prometheus II*, 652 F.3d at 471, 472 (directing the Commission to seek comment on “proposed SDB definitions” in the *Diversity Third FNPRM* on remand).

164. To be lawful, race-based and gender-based governmental action must satisfy the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court has established that race-based classifications are subject to strict scrutiny and may be upheld “only if they are narrowly tailored measures that further compelling governmental interests.”³⁹⁴ Gender classifications are subject to intermediate scrutiny, under which the government’s actions must be substantially related to the achievement of an important objective.³⁹⁵ Commenters advocating a race-conscious classification, therefore, should explain, based on relevant judicial precedent and empirical data, how such a classification would satisfy the strictest level of constitutional scrutiny. To justify the adoption of a race-conscious standard, would it be possible for the Commission to demonstrate a compelling interest in fostering viewpoint diversity,³⁹⁶ redressing past discrimination,³⁹⁷ or some other interest? If the Commission could establish such an interest, how could we demonstrate that a race-based standard would be a narrowly tailored means of achieving this interest? Similarly, could the Commission meet the relevant constitutional standards for a gender-specific standard? Commenters also should explain what data we would need in order to adequately support a race- and/or gender-based definition. Commenters should provide relevant data and are encouraged to submit peer-reviewed studies.

165. The Commission also sought comment in the *Diversity Third FNPRM* on an “individualized full-file review” approach to awarding the preferences adopted in the *Diversity Order*.³⁹⁸ Under this proposal, applicants would be accorded licensing preferences if they could demonstrate that they have overcome “significant social and economic disadvantages.”³⁹⁹ After the release of the *Diversity Third FNPRM*, the Media and Wireless Bureaus sought comment on a proposal made by the Advisory Committee to award bidding credits in licensing auctions to applicants that demonstrate that they have overcome a “substantial disadvantage.”⁴⁰⁰ We seek comment on the use of this type of standard for purposes of the licensing preferences adopted in the *Diversity Order*. Would these standards, both of which are based on individualized reviews to determine whether applicants have overcome considerable disadvantages, be subject to strict judicial scrutiny and would they be able to survive this level of constitutional analysis? Alternatively, would it be feasible for the Commission to conduct such reviews in a race- and gender-neutral manner that would be subject to a lower level of constitutional scrutiny? If so, would the Commission be able to satisfy the Third Circuit’s concern that the use of a race- and gender-neutral approach may not materially advance our minority and female ownership goals? In addition, we ask commenters to consider how we could ensure that the highly individualized reviews of broadcast applications that would be required under a substantial disadvantage standard could be administered in a sufficiently objective and consistent manner as well as in accordance with First Amendment values. We also would like interested parties to comment on the Commission resources that would be required to conduct, as a matter of course, highly fact-specific reviews of this nature. What data

³⁹⁴ *Adarand*, 515 U.S. at 227; see also *Grutter*, 539 U.S. at 326 (quoting *Richmond v. J.A. Cronson Co.*, 488 U.S. 469, 493 (1989)) (“We apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”).

³⁹⁵ *Hibbs*, 538 U.S. at 721.

³⁹⁶ See generally *Grutter*, 539 U.S. 306.

³⁹⁷ See generally *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986).

³⁹⁸ *Diversity Third FNPRM*, 23 FCC Rcd at 5951-52, ¶¶ 84-85.

³⁹⁹ See *id.* With regard to this proposal, which is intended to be analogous to that used by certain state university admissions departments, the Commission noted that the overcoming of significant disadvantages could be “predictive of success in a challenging industry and of the promotion of diversity of information and perspectives and satisfaction of unmet needs in the industry.” *Id.* at 5951, ¶ 84.

⁴⁰⁰ See *Auction Preference PN*, 25 FCC Rcd at 16854.

would we need to support the adoption of this type of standard? We seek comment as to the practicability of implementing such a standard and what information would be required by the Commission to determine potential eligibility. What privacy concerns, if any, are raised by collecting such information? Would the Commission have statutory authority to adopt it? To the extent that additional data are needed, commenters are encouraged to provide such information.

166. In addition, we seek comment on any other approaches we should consider. Commenters advocating alternative proposals should explain how the proposal would satisfy the applicable level of constitutional scrutiny, how it would advance our policy goals, how the Commission could address any administrative burdens or practical considerations inherent in the proposed approach, and what data the Commission would need in order to justify it. Again, commenters are strongly encouraged to supply any relevant data to the Commission.

167. Finally, we ask commenters to consider whether we should decline to adopt any new eligibility standard specifically aimed at increasing minority and female station ownership in light of the record in front of the Commission in this proceeding. In particular, we ask parties to consider, on the one hand, the Third Circuit's dissatisfaction with our prior race- and gender-neutral approach. On the other hand, we ask parties to consider the high constitutional hurdles the Commission would face if it were to adopt an expressly race- or gender-based standard on remand and the data that would be necessary to justify such a standard prior to the completion of the 2010 Quadrennial Review. While we continue to believe that promoting minority and female ownership is an important goal, we also recognize that implementing a program expressly aimed at this goal in the context of this proceeding would require the support of a substantial evidentiary record that the Commission has not yet been able to amass. Accordingly, we seek comment on how the Commission most effectively could continue to pursue its longstanding goals of promoting diversity among broadcast licensees, and especially of fostering broadcast ownership by minorities and women, in the event that the Commission determines that it is unable to support a new eligibility standard in this proceeding.

168. *Measures Relying on Eligible Entity Standard.* In addition to seeking comment on the eligible entity definition, we also seek comment on how the Commission should proceed with respect to the licensing preferences that previously relied on this definition, each of which was remanded in *Prometheus II*. As numbered in the *Diversity Order*, these measures include: (1) Revision of Rules Regarding Construction Permit Deadlines;⁴⁰¹ (2) Modification of Attribution Rule;⁴⁰² (3) Distress Sale

⁴⁰¹ *Diversity Order*, 23 FCC Rcd at 5931, ¶ 15 (revising construction permit rules to allow the sale of expiring construction permits to eligible entities that agree to complete construction within the time remaining on the permit or within 18 months, whichever period is greater). In response to the *Prometheus II* decision, on July 25, 2011, the Media Bureau issued a Public Notice announcing the suspension of the eligible entity revisions to the construction permit rules. *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on The Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (Med. Bur. 2011). The Bureau provided guidance on the treatment of final application grants, non-final application grants, and pending applications involving the assignment of broadcast construction permits to eligible entities. MMTC has requested that the Commission further modify this rule change by clarifying that eligible entities also will be afforded up to 18 months for construction under expired permits for "major modifications of authorized facilities." Letter from David Honig, President and Executive Director, MMTC, to Marlene H. Dortch, Secretary, FCC, Att. at 3 (July 12, 2011) (MMTC July 12 *Ex Parte* Letter).

⁴⁰² *Diversity Order*, 23 FCC Rcd at 5936, ¶ 31 (relaxing the equity/debt plus (EDP) attribution standard for interest holders in eligible entities by "allow[ing] 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 EDP standard] 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

Policy;⁴⁰³ (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity;⁴⁰⁴ (5) Extension of Divestiture Deadline in Certain Mergers;⁴⁰⁵ and (6) Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities.⁴⁰⁶ We seek comment on whether or not the Commission, either in this proceeding or a separate rulemaking, should attempt to reinstate any of these measures. In particular, if the Commission decides to readopt the preexisting eligible entity definition on remand, should it also reinstate each of the measures that rely on this definition? Alternatively, if the Commission adopts a new standard to replace or supplement the eligible entity definition, should we apply that revised standard to each of the above-listed measures, but otherwise reinstate them in their current form? Are there reasons why we should either decline to readopt any of these measures on remand or make any changes to them if we implement a new eligibility standard? We also seek comment on whether reinstating these measures, either in their current form or with proposed changes, would be an effective means of advancing our policy goals and whether such action would be consistent with applicable constitutional law standards. We further invite comment on whether the Commission would need additional data in order to justify the readoption of any of these measures and, if so, we request that such data be submitted to the Commission.⁴⁰⁷

169. The Commission also sought comment on a number of additional measures intended to promote diversity among broadcast licensees in the *Diversity Third FNPRM*.⁴⁰⁸ Several of these proposals rely on the now vacated eligible entity definition or another proposed eligibility standard. As set forth in the FNPRM, these proposals include: (1) Share-Time Proposals;⁴⁰⁹ (2) Retention of AM Expanded Band Owners' Station if One Station Is Sold to an Eligible Entity;⁴¹⁰ (3) Structural Waivers for

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”).

⁴⁰³ *Id.* at 5939, ¶ 39 (modifying the distress sale policy by allowing a licensee that has been designated for a revocation hearing or has a renewal application that has been designated for hearing on basic qualification issues to sell the station to an eligible entity prior to the hearing).

⁴⁰⁴ *Id.* at 5943, ¶ 56 (giving an applicant for a duopoly that agrees to finance or incubate an eligible entity priority over other applicants in the event that competing duopoly applications simultaneously are filed in the same market).

⁴⁰⁵ *Id.* at 5943-44, ¶¶ 57-60 (agreeing to consider requests to extend divestiture deadlines when applicants actively have solicited bids for divested properties from eligible entities and further stating that entities granted such an extension must sell the divested property to an eligible entity by the extended deadline or have the property placed in an irrevocable trust for sale by an independent trustee to an eligible entity).

⁴⁰⁶ *Id.* at 5944-45, ¶ 61 (permitting the assignment or transfer of a grandfathered radio station combination intact to any buyer, and not just an eligible entity as previously allowed, so long as the buyer files an application to assign the excess stations to an eligible entity or to an irrevocable divestiture trust for the ultimate assignment to an eligible entity within 12 months after consummation of the purchase of the grandfathered stations).

⁴⁰⁷ By contrast, if the Commission decides that it is not feasible to replace the eligible entity definition and therefore declines to adopt any new definition on remand, then, absent further action by the Commission, each of the measures vacated by the court would remain void. Accordingly, these measures would be rescinded by the Commission.

⁴⁰⁸ *Diversity Third FNPRM*, 23 FCC Rcd at 5952-57, ¶¶ 87-101.

⁴⁰⁹ *Id.* at 5953, ¶ 87 (seeking comment on a proposal to grant “FM licensees that broadcast in HD using IBOC technology the voluntary option of assigning the right to operate an HD radio stream to an SDB” and seeking comment on a plan “to use share-time procedures to permit the bifurcation of a single channel, analog FM station into an ‘Entertainment Station’ and a ‘Free Speech Station’ ” where the “‘Free Speech Station’ would be independently owned by an SDB”).

⁴¹⁰ *Id.* at 5953, ¶¶ 90-91 (seeking comment on a proposal to extend the period during which AM licensees have been permitted to operate on an expanded band pursuant to Section 73.3555, Notes 9 and 10 of the Commission’s rules,

Creating Incubator Programs;⁴¹¹ and (4) Proposals of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition.⁴¹² A number of parties filed comments on these proposals in response to the *Diversity Third FNPRM*.⁴¹³ With regard to the third proposal, MMTC recently has urged the Commission to take action on a similar Minority Ownership Incubation Proposal.⁴¹⁴ In light of the Third Circuit's remand, we again seek comment on the proposals in the *Diversity Third FNPRM*, as well as those that have been suggested more recently, in this proceeding. In

47 CFR § 73.355, Notes 9 and 10, and to allow licensees, before a specified disposition date, to assign or transfer control of one of the paired AM stations to a radio broadcaster that qualifies as a small business as defined by the SBA).

⁴¹¹ *Id.* at 5955-56, ¶ 97 (seeking comment on a two-year "Trial Incubation Plan" that would allow entities that create and maintain an incubator program for SDBs to receive a waiver of the local radio ownership rule for the acquisition of one additional station above the existing caps rules in large markets). MMTC recently has urged the Commission to take action on a similar Minority Ownership Incubation Proposal. *See* MMTC July 12 *Ex Parte* Letter Att. at 1.

⁴¹² "Specifically, the Rainbow/PUSH Coalition has proposed that the Commission (1) examine assignment and transfer applications to discern potential impact on minority ownership; (2) decline to grant temporary waivers of local ownership rules to parties proposing a transaction that would create station combinations that exceed the ownership caps; (3) treat local marketing agreements as attributable interests; and (4) allow minorities to own station combinations equal to the largest combination in a market in order to counterbalance the economic impact of grandfathered holdings." *Diversity Third FNPRM*, 23 FCC Rcd at 5956-57, ¶ 101; *see also infra* Section V.

⁴¹³ *See, e.g.*, DCS July 30, 2008 Comments, MB Docket No. 07-294, at 15 (stating that the Commission should afford minorities a head start by initially limiting share-time rule assignments of FM HD and DTV sub-channels to SDBs); NPR July 30, 2008 Comments, MB Docket No. 07-294, at 5-6 (stating that that the Commission should reject the proposal to give an existing FM licensee the ability to assign a portion of its digital bit stream to an independent third party); St. Thomas More Foundation July 30, 2008 Comments, MB Docket No. 07-294, at 4 (supporting the AM expanded band proposal and advocating for inclusion of non-profit organizations as entities eligible for pairing under this proposal); Bryan Broadcasting *et al.* July 30, 2008 Comments, MB Docket No. 07-294, at 2-6 (stating that a broadcaster operating in the expanded band should be required to transfer one of the paired stations at the close of its five year transition period or two years from the date the Commission grants authority for current holders of expanded band licenses to transfer one of their licenses to designated entities, whichever is later); NAB July 30, 2008 Comments, MB Docket No. 07-294, at 4-5 (stating that the Commission should not limit any waiver policy for incubating stations to radio stations in large markets); Venture Technologies Group July 30, 2008 Comments, MB Docket No. 07-294, at 2-3 (stating that a waiver policy for incubating stations will decrease diversity by allowing large radio groups to avoid ownership limits); *see also* DCS July 30, 2008 Comments, MB Docket No. 07-294, at 27-28 (supporting the proposals of NABOB and the Rainbow/PUSH Coalition); NAB July 30, 2008 Comments, MB Docket No. 07-294, at 12 (stating that the NABOB and Rainbow/PUSH proposal would be vulnerable to court challenge as a race-based rule and suggesting an alternative model).

⁴¹⁴ *See* MMTC July 12 *Ex Parte* Letter Att. at 1. Specifically, MMTC has proposed an incubation program pursuant to which the local radio ownership rule would be waived for radio broadcasters that engage in one of six "Qualifying Activities," including (1) selling or donating a commercial radio station to a qualified entity; (2) entering into a local marketing agreement with an independent programmer for a five year period for the use of an FM HD-2 or HD-3 channel; (3) financing one year of operations and providing in-kind technical and engineering assistance or equipment that enables an eligible entity to reactivate and restore to full service a dark commercial or noncommercial broadcast station; (4) donating a commercial or noncommercial station to an Historically Black College or University, an Hispanic Serving Institution, an Asian American Serving Institution, or a Native American Serving Institution; (5) "providing loans, loan guarantees, lines of credit, equity investments or other direct financial assistance to a qualified entity to cover more than 50 [percent] of the purchase price of a radio station"; or (6) engaging in another action that is "likely to enhance radio station ownership opportunities for qualified entities." *Id.* at 1-2. Under MMTC's proposal, the Qualifying Activity must occur in either the same market as or a larger market than the market for which the waiver is requested. *Id.* at 1. Radio broadcasters that engage in Qualifying Activities would be eligible to receive an unlimited number of waivers of the AM and FM subcaps and a specified number of waivers of the local radio ownership caps based on market size. *Id.* at 3.

particular, we ask for input on how the court's remand of the provisions relying on the eligible entity definition should impact our consideration of each of these proposals. We also seek comment on whether the adoption of these measures would advance our policy objectives and on the legal implications of implementing these proposals. Further, we invite parties to comment on whether the Commission would need additional data in order to justify any of these measures and encourage parties to provide any data that may be helpful to our analysis.

170. *Additional Measures to Further the Commission's Diversity of Ownership Goals.* We also seek comment on any other measures we should consider that would advance our longstanding goal of having a wide diversity of broadcast licensees and, more specifically, of increasing the number of minority- and women-owned broadcast stations. In addition to the measures noted above, the *Diversity Third FNPRM* sought comment on several other proposals designed to increase participation in the broadcast industry by new entrants and small businesses, including minority- and women-owned businesses.⁴¹⁵ These proposals include: (1) Opening FM Spectrum for New Entrants;⁴¹⁶ (2) Must-Carry for New Class A Television Stations;⁴¹⁷ and (3) Reallocation of TV Channels 5 and 6 for FM service.⁴¹⁸ We seek to refresh the record on these proposals in this proceeding. We also ask commenters to suggest any additional actions the Commission should consider to advance our important diversity objectives.⁴¹⁹ We ask commenters specifically to explain how their proposals would serve our goals and whether they would satisfy relevant constitutional law standards.

V. MEDIA OWNERSHIP STUDIES

171. To provide data on the impact of market structure on the Commission's policy goals of competition, localism and diversity, the Commission has commissioned eleven Media Ownership Studies, which are listed in Appendix A and have now been completed. The economic studies were completed and subject to formal peer review during the period January to July 2011. The studies, peer reviews, and author comments on the peer reviews are available on the Commission's media ownership website at <http://www.fcc.gov/encyclopedia/2010-media-ownership-studies>.⁴²⁰ We invite interested parties to submit any comments on the studies on the same comment dates indicated on the first page of this document.

⁴¹⁵ *Diversity Order*, 23 FCC Rcd at 5924, ¶ 1.

⁴¹⁶ *Diversity Third FNPRM*, 23 FCC Rcd at 5956, ¶ 98 (seeking comment on a proposal to authorize FM stations to change their community of license to any community within the same market, provided that if the community being vacated has no other full power AM or FM station or an LPFM station that originates local programming for at least 15 percent of its airtime (a "Local Service LPFM"), then the licensee that is vacating the original community must underwrite the cost of licensing, construction, and one full year of operation of a new Local Service LPFM to be licensed to the original community).

⁴¹⁷ *Id.* at 5956, ¶ 99 (seeking comment on whether the Commission has authority to adopt rules requiring cable carriage of Class A television stations).

⁴¹⁸ *Id.* at 5956, ¶ 100 (seeking comment on a proposal to reallocate TV Channels 5 and 6 for FM broadcasting); see also MMTC July 12 *Ex Parte* Letter Att. at 3.

⁴¹⁹ For example, MMTC has suggested that the Commission seek to reinstate and expand its previous Tax Certificate Policy by coordinating with the White House on draft legislation. See, e.g., MMTC July 12 *Ex Parte* Letter Att. at 2.

⁴²⁰ We have provided the public with access to the underlying data or source material for the studies, subject to the procedures set forth in the June 15, 2011 Protective Order. *2010 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. 09-182, Protective Order, 26 FCC Rcd 8474 (Med. Bur. 2011) ("*2010 Quadrennial Review Protective Order*").

172. As discussed below, each of these studies defines a relevant performance metric with respect to one or more of the three policy goals and examines how results vary across markets with differing ownership structures. Generally, the research was designed to relate relevant performance metrics directly to changes in ownership of broadcast facilities in local markets, the attribute of the market that our rules directly affect. In some cases the studies found useful and important correlations. In other cases variations were found across markets but with little correlation to local market ownership structure. We seek comment on how to interpret and apply these results. Are there other statistical studies available that we should consider that relate relevant performance metrics to market structure using statistical analysis of a reasonably large sample of markets? Are there individual market case studies available that are relevant and, if so, what role should they have in our deliberations?

A. Studies Relating to Competition

173. With standard private goods, a study of competitive performance would normally begin with an examination of the relationship between price and marginal cost. Broadcast television and radio programming do not have end user prices, so this approach cannot be implemented here. This leaves two other options. First, we can examine television viewing and radio listening on the assumption that, other things being equal, higher viewing and listening levels in a market are associated with higher consumer satisfaction (we value competition because it provides high levels of consumer satisfaction). Second, we can survey consumers about their valuation of the media environment. Competition can benefit consumers not only by delivering a valued mix of programming at a point in time, but also by promoting innovation. Our slate of studies included both approaches to the direct assessment of consumer satisfaction and also examines one manifestation of innovation. We tentatively conclude that these metrics are appropriate to analyze competition and seek comment on that conclusion, as well as the structure and conclusions of the studies described below.

174. Media Ownership Study 1 examines television audience ratings during parts of the day when programming is locally selected (in particular, dayparts other than prime time, because most prime time programming is network selected).⁴²¹ The study found no significant relationship between variations in viewing and variations in market structure across markets.⁴²² We seek comment on the use of these metrics to measure competition, as well as the results of Media Ownership Study 1.

175. Media Ownership Studies 5 and 7 each provide some analysis of variations across markets in radio listening. Media Ownership Study 5 examines listening to news radio stations.⁴²³ It finds no significant correlation between market structure and listening, although it does find that the addition of a public news station has a significant impact on news listening.⁴²⁴ In many if not most markets, there is not more than one public news station, so the results are plausibly understood as suggesting that adding the first public news station in a market has a significant effect. It is not clear that adding additional public news stations would have the same effect. We seek comment on the structure and conclusions of Media Ownership Study 5, including how we should consider the impact of public news stations on competition given the results of the study.

176. Media Ownership Study 7 focuses on the provision of radio programming to minority audiences.⁴²⁵ It first documents the significant differences in listening patterns across the Black and

⁴²¹ Media Ownership Study 1.

⁴²² *Id.* at 15.

⁴²³ Media Ownership Study 5.

⁴²⁴ *Id.* at 17.

⁴²⁵ Media Ownership Study 7.

White and across the Hispanic and non-Hispanic demographic groups.⁴²⁶ The study also examines the impact of market structure on listening with inconclusive results.⁴²⁷ We seek comment on the design of Media Ownership Study 7, as well as its results with respect to radio listening, and what, if anything, those results can contribute to our analysis.

177. Media Ownership Study 2 utilizes survey data as a basis for estimating consumers' willingness to pay for (*i.e.*, valuation of) various characteristics of their media environment (diversity of opinion, community news, multiculturalism, and advertising).⁴²⁸ The portion of the Media Ownership Study 2 analysis most directly related to competition is the study of advertising and consumers' revealed willingness to pay for reductions in it. Some past research has interpreted the amount of advertising as a kind of "price" that consumers must pay to receive television programming.⁴²⁹ The market structure analysis in Media Ownership Study 2 focuses on the number of television voices in the market, and the results appear to show that an increase raises the amount of advertising.⁴³⁰ We seek comment on whether the characteristics used in Media Ownership Study 2 to measure consumer satisfaction adequately measure total consumer satisfaction. In particular, we seek comment on the extent to which correlations between market structure and the amount of advertising in a market provide a useful proxy for competition in the marketplace. Commenters who argue that important elements of the media environment are missing from the study are requested to indicate how consumer satisfaction is affected by the missing elements as well as how the missing elements are likely to be correlated with the elements of the media market structure our ownership rules can influence.

178. Media Ownership Study 10 examines how the structure of the television market has influenced the increase in television stations' use of multicasting.⁴³¹ Innovation as evidenced by the spread of technological advances is another area where competition in our media markets can be observed. One could view increases in multicasting as the result of competition among television stations in a market. The study offers two measures of multicasting: the total number of multicast channels in the market and the average number of multicast channels per television station in the market.⁴³² The study finds little evidence that variations in ownership structure affect the extent of multicasting.⁴³³ Rather it appears that other market characteristics, such as the market size and the number of television stations operating in the market, are more relevant factors.⁴³⁴ We seek comment on the use of multicasting as a metric to study innovation and competition in the market, including whether one measure used in Media Ownership Study 10 is a more appropriate one than the other.

B. Studies Relating to Localism

179. We sought to measure localism, in part, by looking at the effect of local market structure on the quantity of local news and public affairs programming provided at both the market level and the

⁴²⁶ *Id.* at 8-9.

⁴²⁷ *Id.* at 23.

⁴²⁸ Media Ownership Study 2.

⁴²⁹ *See, e.g.*, Television Station Ownership Structure and the Quantity and Quality of TV Programming, by Gregory S. Crawford (2007) (Ownership Study 3 in the 2006 quadrennial review proceeding).

⁴³⁰ *See* Media Ownership Study 2 at 88, Table 20.

⁴³¹ Media Ownership Study 10.

⁴³² *Id.* at 33-34.

⁴³³ *Id.* at 54.

⁴³⁴ *Id.*

station level.⁴³⁵ Media Ownership Study 1 examines a number of factors relating to the quantity and quality of local information and correlates that information with the structure of the local media market. In this study, quality is measured by using ratings as the variables to determine how much people prefer certain types of programming, including local news programming.⁴³⁶ The study does not identify a relationship between ownership structure and local news ratings or hours of programming.⁴³⁷ We seek comment on how well Media Ownership Study 1 measures the degree to which the localism needs of the local population are being served. The study defines television ratings, restricted to the evening time period, as a reasonable measure for the quality of the local television content in the market.⁴³⁸ Does a measure of the rating of local news provide a better measure of localism than a measure of all content viewing during this period? Should our localism metric necessarily rely on consumer preference? Media Ownership Study 1 also examines three measures of the amount of news available in the market: the number of news formatted radio stations, the number of hours of local news, and daily newspaper circulation.⁴³⁹ Is the number of news formatted radio stations an appropriate measure of localism in the absence of information on the type of news carried by the stations? Would one expect the amount of local news on a news formatted station to vary across markets in a predictable manner? Is the circulation of daily newspapers in a market a reasonable measure of the availability of local content? How should it be interpreted? What, if anything, does a high newspaper circulation level indicate about local content on television and radio stations in the same market?

180. Media Ownership Study 4 also provides an analysis of the quantity of local television news and public affairs programming.⁴⁴⁰ Media Ownership Study 4 finds that local news and public affairs minutes provided in a market increases with the number of television stations and the number of Big Four (ABC, NBC, CBS, Fox) affiliates in the market.⁴⁴¹ The presence of a newspaper-television combination in a market appears to reduce total local news minutes in the market, even though the cross-owned station itself produces more local news than otherwise comparable stations.⁴⁴² At the station level, Media Ownership Study 4 finds that radio-television cross-ownership appears to increase local news.⁴⁴³ Superficially Media Ownership Study 1 and Media Ownership Study 4 appear similar because each measures the quantity of local news. We note, however, that the sources each study uses to catalog the amount of news are different. In addition, the empirical models differ. How should the Commission weigh each of these studies? Is one data source superior to another? Media Ownership Study 4 examines individual station and market behavior. How should we weigh conflicting results between market outcomes and station behavior?

181. Media Ownership Study 5 examines the prevalence of news formatted radio stations and the listenership of those stations.⁴⁴⁴ The data for this study do not separate local and national news

⁴³⁵ We note that our studies do not address local content that is locally-originated, but not news related. To the extent that locally-originated, non-news content may contribute to localism, such content is not evaluated in the media ownership studies.

⁴³⁶ Media Ownership Study 1 at 11-12.

⁴³⁷ *Id.* at 15-16.

⁴³⁸ *Id.* at 11.

⁴³⁹ *Id.*

⁴⁴⁰ Media Ownership Study 4.

⁴⁴¹ *Id.* at 25.

⁴⁴² *Id.* at 27-28.

⁴⁴³ *Id.* at 28.

⁴⁴⁴ Media Ownership Study 5 at 1-2.

programming or account for news programming on stations that are not designated as news formatted. Is the news content of news-formatted stations sufficiently local that we can use the number of such stations as a reliable metric for the amount of localism in a radio market? The study also analyzes usage of news, via the overall ratings of the news-formatted radio stations. Are ratings a sufficient measure of the quality of the local content provided by the station? We note that the study examines only radio markets defined by Arbitron, which tend to be in the more populous areas of the country. Should we expect the more rural areas to differ? The study concludes there are few significant relationships between news formatted stations and ownership structure.⁴⁴⁵ The study does provide weak evidence, however, that an increase in the size of the largest local owner group is associated with an increase in the number of news stations and the number of different news formats offered in the market.⁴⁴⁶ We seek comment on these conclusions.

182. Media Ownership Study 6 examines the state of local news on the Internet to determine whether the Internet provides a net increase to media diversity in local markets.⁴⁴⁷ Media Ownership Study 6 first determines which news sites are not affiliated with a traditional media outlet such that they can be considered a new or independent news source.⁴⁴⁸ The study provides data on online local news sites within the top 100 U.S. television markets that reach more than a minimum threshold of traffic. Media Ownership Study 6 concludes that there is a very limited amount of local news on the Internet that is provided by organizations that are not broadcasters or print media organizations.⁴⁴⁹ We tentatively conclude from Media Ownership Study 6 that, while the potential of the Internet for local, or even hyper-local, news is great, very few such sites today reach a significant audience, at least in the top 100 markets. We seek comment on that tentative conclusion. We also note that the analysis is based upon the most widely visited sites. Is it possible that a sufficient number of lightly visited sites carrying content produced by non-traditional media exist such that they act as a reservoir of local content available to consumers? If not, are the barriers to entry into web publishing sufficiently low such that a failure by broadcasters to provide consumers with their desired level of local news and information will attract competitors? Does the current relative absence of competitors provide any indication of how well the traditional media are serving the needs of consumers?

183. Media Ownership Study 3 examines public knowledge and civic participation to determine whether consolidation results in a more or less informed public.⁴⁵⁰ Media Ownership Study 3 considers several metrics of civic engagement, including knowledge of political candidates and issues, as potential indicators of how well the media environment supplies information about local issues.⁴⁵¹ It finds little relationship between media market structure and consumers' knowledge about presidential and congressional candidates, interest in politics, or turnout at the polls.⁴⁵² The peer reviewer raised several

⁴⁴⁵ *Id.* at 11-17.

⁴⁴⁶ *Id.* at 14.

⁴⁴⁷ Media Ownership Study 6.

⁴⁴⁸ *Id.* at 15-19.

⁴⁴⁹ *Id.* at 29-30.

⁴⁵⁰ Media Ownership Study 3, *How the Ownership Structure of Media Markets affects Civic Engagement and Political Knowledge, 2006-2008*, by Lynn Vavreck, Simon Jackman, and Jeffrey B. Lewis ("Media Ownership Study 3").

⁴⁵¹ *Id.* at 17-20, 54-55.

⁴⁵² *Id.* at 51-53, 78-79.

questions about the usefulness of these particular measures of civic knowledge and engagement.⁴⁵³ Are the metrics reliable indicators of such characteristics? The study does find a relationship between political participation and political advertising on television.⁴⁵⁴ Could there be a connection that Media Ownership Study 3 did not measure between market structure and a political candidate's decision to advertise in that market, which influenced civic knowledge and participation? We seek comment on these issues.

184. Finally, Media Ownership Study 2, discussed above in the Competition section, provides the Commission with information on the relative value consumers place on our diversity and localism goals. When examining the influence of market structure on consumer valuation, the study finds that the number of television voices does not have an impact on the consumer's perception of the amount of community news provided.⁴⁵⁵ We note that the average consumer places a higher value on opinion diversity and local news content than on content diversity.⁴⁵⁶ How should the Commission evaluate this trade-off? Is the valuation by the average consumer the most appropriate measure or should we look at the valuations broken down by demographic groups?

C. Studies Relating to Diversity

185. In commissioning ownership studies on diversity, the Commission elected to measure the availability of news and civic engagement in local markets as it relates to local market structure in a variety of ways, as described below. We tentatively conclude that these metrics are appropriate to analyze diversity and seek comment on that conclusion, as well as the individual studies described below. Media Ownership Study 5 examines whether ownership structure impacts the availability and listenership of radio stations with a news format in local radio markets, as discussed above. Markets with more news formatted radio stations would be considered to have a greater level of program diversity. The study concludes there is no evidence that newspaper-radio cross-ownership increases news variety or listening.⁴⁵⁷ As discussed above, the study provides weak evidence that an increase in the size of the largest local owner group is associated with an increase in the number of news stations and the number of commercial news varieties present in the market.⁴⁵⁸ Are these format categories for news and information useful measures of program diversity?

186. We also assessed diversity in Media Ownership Study 2. The study analyzes the existing and preferred quantity of information of interest specifically to women and minorities, which it refers to as multiculturalism.⁴⁵⁹ Analysis of the survey results allowed the researchers to estimate the value consumers place on increased amounts of this media market characteristic.⁴⁶⁰ We tentatively conclude that what the study labeled as multiculturalism is a useful, though not singular, indicator of the level of program diversity in the market. The survey asked consumers about their media environments overall rather than the characteristics of a particular medium such as radio or television. When examining the

⁴⁵³ Peer Review of Study 3 of the FCC Media Ownership Studies, "Report to the FCC: How the Ownership Structure of Media Markets Affects Civic Engagement and Political Knowledge, 2006-2008," at 4, 6-8, by Scott L. Althaus.

⁴⁵⁴ Media Ownership Study 3 at 51-53.

⁴⁵⁵ See Media Ownership Study 2 at 88, Table 20.

⁴⁵⁶ *Id.* at 40.

⁴⁵⁷ Media Ownership Study 5 at 17.

⁴⁵⁸ *Id.* at 14.

⁴⁵⁹ Media Ownership Study 2 at 35-41.

⁴⁶⁰ *Id.* at 40-41.

influence of market structure on consumer valuation, the study finds that the number of television voices has a significantly positive impact on consumers' valuation of opinion diversity and multiculturalism, even after accounting for the number of stations in the market.⁴⁶¹ Examining the effect of a combination of two television stations in a market, the study finds such a combination leads to a loss in average consumer welfare which is greater in smaller markets.⁴⁶² The study finds that the combination does benefit consumers due to a reduction in the perceived amount of advertising.⁴⁶³ While the changes in consumer welfare from such a transaction vary significantly by market size for opinion diversity and advertising, the effect on multiculturalism varies substantially less by market size.⁴⁶⁴ How should we assess consumers' satisfaction against the overall media environment when balancing the benefits of program diversity with any possible countervailing effects?

187. Media Ownership Study 8B directly measures the diversity of content by measuring the diversity of viewpoints discussed on local television news programs.⁴⁶⁵ The study catalogs words used in broadcasts and then measures variation among stations in a market.⁴⁶⁶ Viewpoint diversity in this study is considered in terms of diversity in discussions of political figures, issues, and local regions.⁴⁶⁷ How should each of these measures of content diversity be weighted? The analysis is based on the content available in 37 large markets.⁴⁶⁸ Would the results of this study likely hold in smaller markets? Can the findings for television news be generalized to other sources of news, such as radio and newspapers?

188. Media Ownership Study 9 is a theoretical and experimental study of the impact of market structure on the incentives of media outlets to withhold information from citizens when withholding could benefit the policy position the media owner favors.⁴⁶⁹ In the past, many analyses of market structure and diversity have focused on the idea that, to ensure a wide range of viewpoints are provided, it is important to have multiple independent media outlets. The underlying presumption is that with many independent outlets it is likely that the decision makers for content transmission will have varying points of view and so varying points of view will be disseminated.

189. Media Ownership Study 9 emphasizes the importance for information transmission of having multiple outlets with the same viewpoint, with rivalry among outlets with similar viewpoints serving to prevent information withholding.⁴⁷⁰ The theoretical model is an abstraction, beginning with two outlets and a single policy issue on which they can have differing viewpoints and adding additional outlets. One conclusion is that "competition within viewpoints dramatically enhances information revelation."⁴⁷¹ In the real world, there are of course multiple issues and likely more than two alternative viewpoints per issue. Nevertheless, the analysis is valuable because it provides strong support for having at least four independent media voices, since every issue has at least two viewpoints and two outlets per

⁴⁶¹ See *id.* at 88, Table 20.

⁴⁶² *Id.* at 50-51.

⁴⁶³ *Id.*

⁴⁶⁴ See *id.* at 90, Table 22.

⁴⁶⁵ Media Ownership Study 8B.

⁴⁶⁶ *Id.* at 5.

⁴⁶⁷ *Id.* at 5-8.

⁴⁶⁸ *Id.* at 5.

⁴⁶⁹ Media Ownership Study 9.

⁴⁷⁰ *Id.* at 2, 45-47.

⁴⁷¹ *Id.* at 47.

viewpoint are needed in the model to ensure information regarding a viewpoint is not withheld. The experimental results are also suggestive, first because, broadly speaking, they confirm the theoretical predictions, but also because they indicate the market performance improves with additional media outlets, but that the marginal value (for information transmission) of additional outlets declines as the number of outlets increases. We seek comment on the validity of the theoretical model and the extent to which inferences based on it are relevant to our diversity analysis.

190. While Media Ownership Studies 5 and 8B focus on diversity measures relating to the content of the medium, Media Ownership Study 8A measures diversity of content by observing how consumers react to the content delivered to them.⁴⁷² Can consumer behavior provide a reliable indicator of the level of diversity? The study utilizes variations in viewing patterns of local television news programs as compared to local viewing patterns for national television news programs to develop a measure of diversity of content on local news programs.⁴⁷³ The study compares the dispersion of the market shares of national news programs to the dispersion of the market shares of local news to benchmark the diversity offered by local news in a market.⁴⁷⁴ It finds little correlation between viewpoint diversity and local market ownership structure.⁴⁷⁵ We seek comment on these results.

191. Media Ownership Studies 1 and 5 measure the market share of local television news programs and news-formatted radio stations, respectively. Media Ownership Study 1 examines variations in viewing of local television news programming but finds little relationship to market structure.⁴⁷⁶ Can these metrics also provide information about the diversity of content provided by the media in addition to satisfaction with the media? Will diverse content necessarily attract a larger audience than less diverse content, or is the effect contingent on the diversity of the population within the market? We seek comment on whether these two studies can provide additional information on the level of diversity in a local market.

192. Measures of civic engagement also can be used to assess the level of viewpoint diversity in a market. For instance, if media outlets in a market supply programming with a diverse range of viewpoints, consumers may be better informed, which can lead to increased local civic participation. As noted above, Media Ownership Study 3 provides data relevant to this analysis. It measures civic participation and knowledge. Does this metric also provide useful information about the level of viewpoint diversity in the market? Several measures examined by the study may have relevance to diversity depending on how consumers react to hearing diverse viewpoints. The study measures consumers' recognition of politicians.⁴⁷⁷ Is it reasonable to conclude that markets where consumers are more likely to recognize the positions held by various politicians are markets in which more diverse information is available? We seek comment on the relevance of civic participation for measuring the level of viewpoint diversity in the market.

D. Study Relating to Minority and Women Ownership Issues

193. Media Ownership Study 7 considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences.⁴⁷⁸ It provides

⁴⁷² Media Ownership Study 8A.

⁴⁷³ *Id.* at 8-13.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 22.

⁴⁷⁶ Media Ownership Study 1 at 15.

⁴⁷⁷ Media Ownership Study 3 at 54-78.

⁴⁷⁸ Media Ownership Study 7 at 1.

mixed evidence on whether minority-owned radio stations better serve minority populations. This study looks at the provision of radio programming to minority (African-American and Hispanic) audiences, as reflected in the choices of radio stations to select formats that are popular with minority audiences.⁴⁷⁹ It reflects that minority audiences—specifically Black and Hispanic listeners—have very different listening preferences from the majority non-Hispanic, White population.⁴⁸⁰ For example, the study shows that a single programming format, Urban- attracts half of black listening, while it attracts less than five percent of nonblack listening.⁴⁸¹ The data also suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market— in other words, that minority-owned stations are more likely to provide programming targeted to minorities than are non-minority owned stations.⁴⁸² The data do not indicate a clear relationship between ownership concentration and the number of different radio formats in each market, although the cross-sectional analysis does suggest that ownership concentration promotes a greater number of formats in the market.⁴⁸³ We seek comment on this study and on the appropriate application of its analysis to our policy goals. Are there other statistical studies available that we should consider, relating market structure and the promotion of content that is specifically of interest to minorities and women? Do such studies use statistical analysis of a reasonably large sample of markets? Are there individual market case studies available that are relevant and, if so, what role is there for such case studies in our deliberations?

VI. ATTRIBUTION MATTERS

194. The Commission's broadcast attribution rules define which financial or other interests in a licensee must be counted in applying the broadcast ownership rules. They seek to identify those interests in licensees that confer on their holders a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."⁴⁸⁴ Although we did not seek comment on attribution issues in the *NOI*, we do so now in order to address issues raised in the record regarding the impact, both positive and negative, of certain agreements on our ownership rules and fundamental policy goals.

195. We seek comment in particular regarding local news service ("LNS") agreements and shared service agreements ("SSAs"). An LNS agreement is defined by commenters as an agreement in which multiple local broadcast television stations contribute certain news staff and equipment to a joint news gathering effort coordinated by a single managing editor.⁴⁸⁵ According to commenters, an SSA is

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 8-9.

⁴⁸¹ *Id.* at 8.

⁴⁸² *Id.* 20-21, 24.

⁴⁸³ *Id.* 22-23, 25.

⁴⁸⁴ *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559, 12560, ¶ 1 (1999) ("*1999 Attribution Order*"), *recon. granted in part*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097 (2001), *stayed*, Order, 16 FCC Rcd 22310 (2001).

⁴⁸⁵ CWA Comments at 23; CWA Reply App. 1.1, CWA May 7, 2010 Comments, GN Docket No. 10-25, at 12 ("CWA Reply App. 1.1"); Free Press Comments at 10. CWA explains that under such an agreement a managing editor will determine which stories the LNS will cover and the resulting story produced by the LNS is then available for use by the participating stations. CWA Reply App. 1.1 at 12-13. CWA bases its description of LNSs on its review of a redacted copy of a Fox/CBS LNS agreement in the Boston market and a Fox/ABC LNS agreement in the Detroit market. *Id.* at 12. CWA believes these agreements to be representative of LNS agreements in general as Fox is a party to twelve of the seventeen LNSs identified by CWA. *Id.* CWA distinguishes these arrangements