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

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FCC Mail Room

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review – Review of	)	MB Docket No. 09-182
the Commission’s Broadcast Ownership Rules and	)	
Other Rules Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	
	)	
Promoting Diversification of Ownership	)	MB Docket No. 07-294
In the Broadcasting Services	)	

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: December 22, 2011**

**Released: December 22, 2011**

**Comment Date: [45] days after publication in the Federal Register**

**Reply Comment Date: [75] days after publication in the Federal Register**

By the Commission: Commissioner Copps approving in part, dissenting in part and issuing a statement; Commissioner McDowell approving in part, concurring in part and issuing a statement; and Commissioner Clyburn issuing a statement.

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## I. INTRODUCTION

1. Pursuant to our statutory mandate under the Telecommunications Act of 1996,<sup>1</sup> we seek comment in this Notice of Proposed Rulemaking (“*NPRM*”) on the Commission’s media ownership rules and proposed changes thereto. We are required by statute to review our media ownership rules every four years to determine whether they “are necessary in the public interest as the result of competition.”<sup>2</sup> Our challenge in this proceeding is to take account of new technologies and changing marketplace conditions while ensuring that our media ownership rules continue to serve our public interest goals of competition, localism, and diversity. We also are seeking comment on economic studies analyzing the relationship between local media market structure and the policy goals that underlie the Commission’s media ownership rules. In addition, we seek comment in this proceeding on the aspects of the Commission’s 2008 *Diversity Order*<sup>3</sup> that the Third Circuit remanded in *Prometheus Radio Project v. FCC* (“*Prometheus I*”).<sup>4</sup>

2. The proliferation of broadband Internet and other new technologies has had a dramatic impact on the media marketplace. Consumers are increasingly turning to online and mobile platforms to access news content and audio and video programming. For example, in 2010 and in the first quarter of 2011, satellite radio and TV companies, which offer both satellite and online access to content, have

<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (“1996 Act”); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (“Appropriations Act”) (amending Sections 202(c) and 202(h) of the 1996 Act). The media ownership rules subject to this quadrennial review are the local television ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the dual network rule. These rules are found, respectively, at 47 C.F.R. §§73.3555(b), (a), (d), and (c) and 47 C.F.R. §73.658(g).

<sup>2</sup> Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note. Section 202(h) of the 1996 Act further requires the Commission to “repeal or modify any regulation it determines to be no longer in the public interest.” *Id.* In *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus I*”), the Third Circuit concluded that “necessary in the public interest” is a “‘plain public interest’ standard under which ‘necessary’ means ‘convenient,’ ‘useful,’ or ‘helpful,’ not ‘essential’ or ‘indispensable.’” *Id.* at 394. The court stated that “the first instruction [of § 202(h)] requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain ‘necessary in the public interest.’” *Id.* at 391. In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. See Appropriations Act § 629, 118 Stat. at 100.

<sup>3</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (“*Diversity Order*” and “*Diversity Third FNPRM*”).

<sup>4</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (“*Prometheus II*”).

reported growth in subscribership.<sup>5</sup> Similarly, content providers are increasingly looking to the Internet and other new media platforms to bypass traditional media and reach consumers directly. Social media sites are empowering individuals to share news and information in real time, becoming tools of social interaction and revolution throughout the world.

3. For the broadcast and newspaper industries, the growth of these new technologies both challenges established business models and provides opportunities to reach new audiences and generate new revenue streams. Broadcast and newspaper consumption in traditional forms is in decline, and advertising revenues have been shrinking in recent years. Some broadcast and newspaper outlets have contracted the size of news staffs in response. These economic realities have sounded an alarm for some who are concerned that non-traditional media sources are not adequate substitutes for the provision of local news and information by broadcasters subject to public interest obligations. In voicing such concerns, some commenters have asserted that the Commission's media ownership limitations remain vitally important, as increased consolidation places control of programming choices in the hands of too few owners, limiting diversity and underserving the needs of local and minority communities.<sup>6</sup>

4. In short, the media marketplace is in transition, particularly as a result of broadband Internet; but new media are not yet available as ubiquitously as traditional broadcast media. Our nation has not yet reached universal deployment or adoption of broadband. Too much of the country is unserved or underserved by broadband, and the average broadband speed available to consumers varies in different areas and lags behind some other nations. Broadband adoption remains under 70 percent, meaning that tens of millions of Americans do not have access to news and other programming on the Internet.<sup>7</sup> Some parts of the population, including minorities, people with disabilities, and low-income Americans, have much lower rates of broadband adoption.<sup>8</sup> Access to sufficient broadband speeds is critical for consumers to take full advantage of today's online programming and applications, including access to media content through streaming technology and downloading programs. According to one estimate, more than 14 million Americans do not have access to broadband infrastructure that can support today's applications.<sup>9</sup> Much of the content available by streaming and downloads requires minimum broadband speeds. We are taking important steps to close this digital divide, but much work remains.

5. The Commission began this proceeding with a series of workshops held from November 2009 through May 2010. Participants in the workshops discussed the scope and content of the review

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<sup>5</sup> See, e.g., Martin Peers,  *DirecTV's Subscriber Growth Stays Aloft*, WALL STREET JOURNAL, Nov. 12, 2010, <http://online.wsj.com/article/0,,SB10001424052748703848204575608603486967076,00.html> (stating that between 2006 and 2010, the two largest direct broadcast satellite television providers in the United States—DirecTV and Dish Network—experienced subscriber growth of 21 percent and 12 percent, respectively) (visited Oct. 12, 2011); Sirius XM Radio Inc., *SiriusXM Reports First Quarter 2011 Results* (press release), May 3, 2011 (stating that subscribership for SiriusXM, the largest satellite radio provider in the United States, reached a new high of 20.6 million in the first quarter of 2011, up nine percent over the previous year).

<sup>6</sup> See *infra* note 10 and accompanying text.

<sup>7</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8010, ¶ 2 n.9 (2011) (stating that 31.8 percent of U.S. households have not adopted broadband); OMNIBUS BROADBAND INITIATIVE, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 167 (2010) ("NATIONAL BROADBAND PLAN"), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (stating that the national adoption rate is 65 percent).

<sup>8</sup> NATIONAL BROADBAND PLAN at 167.

<sup>9</sup> *Id.* at 129.

process.<sup>10</sup> Thereafter the Commission released a *Notice of Inquiry* (“*NOI*”) on May 25, 2010, seeking comment on a wide range of issues to help us determine whether the current media ownership rules continue to serve our policy goals.<sup>11</sup> The *NOI* sought input on developments in the marketplace since the last review and on whether we should adopt alternatives to bright-line, sector-specific rules. It also sought comment on our fundamental goals of competition, localism, and diversity and how to balance these goals when they conflict. In response, industry participants and representatives, public interest groups, and members of the public filed a significant number of comments.

6. To provide data on the impact of market structure on the Commission’s policy goals of competition, localism, and diversity, the Commission commissioned eleven economic studies, as listed in Appendix A, which were conducted by outside researchers and Commission staff.<sup>12</sup> We previously released the studies to allow parties additional time to review the data and analyses and now are seeking formal comment on them herein.<sup>13</sup> As discussed in Section II, the Commission reaffirms that its media ownership rules are necessary to further the Commission’s longstanding policy goals of fostering competition, localism, and diversity. In particular, the Commission reaffirms that a major goal of the rules is to encourage the provision of local news, and we invite suggestions about how that goal can be further achieved.

7. In *Prometheus II*, the Court of Appeals for the Third Circuit considered appeals of the

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<sup>10</sup> The Media Bureau held six public workshops to discuss aspects of the review process. On November 2, 3, and 4, 2009, the Bureau held workshops to discuss the scope and methodology of the proceeding and the analytical framework the Commission should use for conducting its review. See Media Ownership Workshop - Policy Scholars’ Panel, <http://www.fcc.gov/ownership/workshop-110209.html>; Media Ownership Workshop - Public Interest Group Panel, <http://www.fcc.gov/ownership/workshop-110309.html>; and Media Ownership Workshop - Broadcasters & Industry Panel, <http://www.fcc.gov/ownership/workshop-110409.html>. On January 12, 2010, the Bureau held a workshop to examine current financial and economic conditions and marketplace factors affecting the media industry and how the FCC should take them into account in establishing its ownership framework. See Media Ownership Workshop - Financial & Marketplace Issues, <http://www.fcc.gov/ownership/workshop-011210.html>. On January 27, 2010, the Bureau held a workshop to examine how the media ownership rules affect the Commission’s goal of promoting minority and female ownership and other issues relating to diversity in broadcasting. See Media Ownership Workshop – Minority & Female Ownership, <http://www.fcc.gov/ownership/workshop-012710.html>. On February 23, 2010, the Bureau held a workshop in Columbia, South Carolina on the state of local radio and television. See Media Ownership Workshop – Local Television & Radio Marketplace Issues, <http://www.fcc.gov/ownership/workshop-022310.html>. On April 20, 2010, the Bureau held a workshop in Tampa, Florida on the impact of newspaper/broadcast cross-ownership in the media marketplace. See Media Ownership Workshop – Newspaper/Broadcast Cross-Ownership Impact on Competition and Diversity in the Media Marketplace, <http://www.fcc.gov/ownership/workshop-042010.html>. On May 21, 2010, the Bureau held a workshop in Palo Alto, California to discuss the impact of new media on broadcast stations. See Media Ownership Workshop – The Impact of New Media on Broadcast Stations, <http://www.fcc.gov/ownership/workshop-052110.html>. Webcasts of these workshops and comments received in connection with them are included in the record of this proceeding and are available on the Commission’s media ownership website.

<sup>11</sup> See *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, Notice of Inquiry, 25 FCC Rcd 6086 (2010) (“*NOI*”).

<sup>12</sup> *Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding*, MB Docket No. 09-182, Public Notice, 25 FCC Rcd 7514 (Med. Bur. 2010).

<sup>13</sup> *FCC Releases Five Research Studies on Media Ownership and Adopts Procedures For Public Access to Underlying Data Sets*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 8472 (Med. Bur. 2011); *FCC Releases Three Additional Research Studies on Media Ownership*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 10240 (Med. Bur. 2011); *FCC Releases the Final Three Research Studies on Media Ownership*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 10380 (Med. Bur. 2011).

Commission's review of the media ownership rules in the *2006 Quadrennial Review Order*.<sup>14</sup> As discussed in more detail below, the court affirmed the Commission's decision to retain the local television and radio rules to protect competition in local media markets.<sup>15</sup> The court also affirmed the Commission's decision to retain the dual network rule based on potential harm to competition that would result from mergers of the top four networks.<sup>16</sup> The court also affirmed the Commission's conclusion to retain the radio/television cross-ownership rule as well as, in part, to retain the local radio rule based on the benefits to the Commission's diversity goal.<sup>17</sup> Moreover, the Third Circuit vacated and remanded the newspaper/broadcast cross-ownership rule as modified by the Commission in the *2006 Quadrennial Review Order*, concluding that the Commission failed to comply with the notice and comment provisions of the Administrative Procedures Act.<sup>18</sup> As discussed in more detail below, the court also vacated and remanded a number of measures adopted in the Commission's *2008 Diversity Order*, which we now address in this proceeding.<sup>19</sup>

8. As discussed in detail in Section III, as part of its regular review of broadcast ownership rules required by the Communications Act, the Commission proposes the elimination of one rule and suggests leaving the others largely unchanged. We believe that the public interest is best served by these modest, incremental changes to our rules.<sup>20</sup> Recognizing current market realities, we seek comment on the following proposals:

- *Local Television Ownership Rule.* We tentatively conclude that we should retain the current local television ownership rule with minor modifications. Specifically, we propose to eliminate the Grade B contour overlap provision of the current rule. We tentatively conclude that we should retain the prohibition against mergers among the top-four-rated stations, the eight-voices test, and the existing numerical limits. In addition, we seek comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, we seek comment on whether multicasting should be a factor in determining the television ownership limits.
- *Local Radio Ownership Rule.* We propose to retain the current local radio ownership rule. We also seek comment on modifications to the rule and whether and how the rule should account for other audio platforms. We propose to also retain the AM/FM subcaps, and seek comment on the impact of the introduction of digital radio. We seek comment on whether to adopt a waiver standard and on specific criteria to adopt.
- *Newspaper/Broadcast Cross-Ownership Rule.* We tentatively conclude that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. We propose to use Nielsen Designated Market Area ("DMA") definitions to determine the relevant market area for television stations, given the lack of a digital equivalent to the analog Grade A service contour. We propose to adopt a rule that includes elements of the 2006 rule, including the top 20 DMA demarcation point, the top-four

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<sup>14</sup> *Prometheus II*, 652 F.3d at 437.

<sup>15</sup> *Id.* at 460-61, 462-63.

<sup>16</sup> *Id.* at 463-64.

<sup>17</sup> *Id.* at 456-58, 463.

<sup>18</sup> *Id.* at 453. The court did not address the Commission's substantive modifications to the rule.

<sup>19</sup> *Id.* at 471.

<sup>20</sup> The ownership rules discussed in this paragraph, are found, respectively, at 47 C.F.R. §§ 73.3555(b), (a), (d), and (c), and 47 C.F.R. § 73.658(g).

television station restriction, and the eight remaining voices test. We seek comment on these proposals and whether to incorporate other specific elements and factors of the 2006 rule.

- *Radio/Television Cross-Ownership Rule.* We propose to eliminate the radio/television cross-ownership rule in favor of reliance on the local radio rule and local television rule. We believe that the local radio and television ownership rules adequately protect our localism and diversity goals and seek comment on this proposal.
- *Dual Network Rule.* We tentatively conclude that the dual network rule remains necessary in the public interest to promote competition and localism and should be retained without modification.

9. *Minority and Female Ownership.* As noted above, we seek comment in this proceeding on the aspects of the Commission's 2008 *Diversity Order* that the Third Circuit remanded in *Prometheus II*. Specifically, the court vacated and remanded a number of measures adopted in the *Diversity Order* that were designed to increase ownership opportunities for "eligible entities," including minority- and women-owned entities, because it determined that the Commission's revenue-based eligible entity definition was arbitrary and capricious.<sup>21</sup> The court directed the Commission to address this issue in the course of the 2010 Quadrennial Review. As directed by the court, the Commission invites views on how its ownership rules and policies can promote greater minority and women ownership of broadcast stations. The Commission will explore a broad range of potential actions it might take to that end, consistent with judicial precedent.<sup>22</sup>

## II. POLICY GOALS

10. We reaffirm that media ownership rules are necessary to further the Commission's longstanding policy goals of fostering competition, localism, and diversity. In the *NOI*, the Commission sought comment on how these goals should be defined and measured and on whether there are additional goals we should consider.<sup>23</sup> We did not receive many specific comments on defining, measuring, and evaluating the performance of our policy goals, and we invite such comment again. In particular, in Section V below, we describe and seek comment on the Commission's 11 Media Ownership studies that evaluate the impact of local media market structure on our policy goals.<sup>24</sup> In addition, we invite parties to submit their own studies evaluating the impact of particular market structures on our goals. Below, we discuss the Commission's competition, localism, diversity, and other policy goals. We also discuss how we should evaluate the costs and benefits of our media ownership rules.

11. *Competition.* As the Commission noted in the *NOI*, because broadcast content is available for free to end users, broadcast competition cannot be assessed in the same manner as in many other markets. Specifically, the Commission cannot examine changes in price to assess the impact of different levels of ownership concentration.<sup>25</sup> Accordingly, the Commission sought comment on a variety of potential ways to assess competition in the media marketplace.<sup>26</sup> The Commission discussed whether competition among broadcast outlets is likely to benefit consumers by making available programming that satisfies consumer preferences.<sup>27</sup>

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<sup>21</sup> *Prometheus II*, 652 F.3d at 471.

<sup>22</sup> See *infra* ¶ 147.

<sup>23</sup> *NOI*, 25 FCC Rcd at 6097-98, ¶ 30.

<sup>24</sup> The Commission released the studies between June 15 and July 26. See *infra* note 415 and accompanying text.

<sup>25</sup> *NOI*, 25 FCC Rcd at 6098, ¶ 33.

<sup>26</sup> *Id.* at 6098-6100, ¶¶ 34-43.

<sup>27</sup> *Id.* at 6098-99, ¶ 34.

12. We reaffirm our longstanding commitment to ensure that media markets are competitive.<sup>28</sup> The Commission strives to set ownership rules that create a marketplace in which broadcast programming meets the needs of consumers, and we believe competition is a key means to that end. Moreover, we reaffirm the Commission's previous findings that our local ownership rules should be analyzed in the context of local markets.<sup>29</sup> We find however that for the Dual Network rule, competition is appropriately analyzed in the national advertising and programming markets.

13. *Localism.* In the *NOI*, the Commission sought comment generally on how to define and promote localism in the context of the media ownership rules, including whether our traditional localism goal needs to be redefined in light of today's media marketplace.<sup>30</sup>

14. We reaffirm our commitment to promote localism through our media ownership rules.<sup>31</sup> At its core, localism policy is "designed to ensure that each station treats the significant needs and issues of the community that it is licensed to serve with the programming that it offers."<sup>32</sup> Our media ownership rules, as part of the Commission's overall regulatory framework, seek to promote a marketplace in which broadcast stations "respond to the unique concerns and interests of the audiences within the stations' respective service areas."<sup>33</sup> We continue to evaluate the extent of localism in broadcasting markets by determining whether programming is responsive to local needs and interests. Our focus continues to be on news and public information programming.<sup>34</sup> We continue to believe that these types of programming are relevant to evaluating the extent of localism as it exists in local markets. While our core commitment to promoting localism in media remains undiminished, we also recognize that changes in the marketplace and changes in consumer preferences may impact aspects of localism in today's marketplace. Thus, we believe that the appropriate definition of localism today, in the digital age, may not be the same definition as in decades past.

15. As a result of the growing availability of the Internet and the proliferation of wireless technology, consumers are accessing news and public affairs programming through their computers and electronic devices. Moreover, the potential for hyper-local websites and blogs to provide consumers with local news and information, such as neighborhood-specific news and events, may contribute to meeting the current or future needs and interests of local communities. As consumers continue to rely more and more on additional, multiple sources of local news, we seek comment on whether, and how, to reevaluate localism to account for changes in the way consumers get local news.

16. *Diversity.* In the *NOI*, the Commission sought comment on how to define and measure

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<sup>28</sup> 2006 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2016-17, ¶ 9 (2008) ("2006 *Quadrennial Review Order*").

<sup>29</sup> See, e.g., 2002 *Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 *passim* (2003) ("2002 *Biennial Review Order*"); 2006 *Quadrennial Review Order*, 23 FCC Rcd at *passim*.

<sup>30</sup> *NOI*, 25 FCC Rcd at 6103, ¶ 54.

<sup>31</sup> See 2002 *Biennial Review Order*, 18 FCC Rcd at 13643, ¶ 73.

<sup>32</sup> *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1327, ¶ 4 (2008) ("*Broadcast Localism Report*") (citing *FCC Chairman Powell Launches "Localism in Broadcasting" Initiative*, News Release (Aug. 20, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-238057A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf)).

<sup>33</sup> *Broadcast Localism Report*, 23 FCC Rcd at 1327, ¶ 6.

<sup>34</sup> 2002 *Biennial Review Order*, 18 FCC Rcd at 13644, ¶ 78; *Broadcast Localism Report*, 23 FCC Rcd at 1326, ¶ 2.

diversity in today's marketplace to determine whether our current media ownership rules are meeting our diversity goal. The Commission has relied on its media ownership rules to ensure that diverse viewpoints and perspectives are available to the American people in the content they receive over the broadcast airwaves.<sup>35</sup> The policy is premised on the First Amendment, which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>36</sup> The Commission historically has approached the diversity goal from five perspectives: viewpoint, outlet, program, source, and minority and female ownership diversity.<sup>37</sup> The Commission has regulated media ownership as a means of enhancing viewpoint diversity based on the premise that diffuse ownership among media outlets promotes the presentation of a larger number of viewpoints in broadcast content than would be available in the case of a more concentrated ownership structure.<sup>38</sup>

17. We reaffirm our belief that media ownership limits are necessary to preserve and promote viewpoint diversity. Furthermore, we also reaffirm our conclusion that viewpoint diversity is generally promoted by competition among independently owned media outlets.<sup>39</sup> We believe that a key measure of how well the Commission's current rules promote our overall diversity goal is the availability of local news and information, and we examine that availability as it relates to local ownership structure and the level of civil engagement in Section V.

18. *Minority and Female Ownership.* In the *NOI*, the Commission sought comment on a variety of questions regarding the impact of our ownership rules on minorities and females, including minority and female ownership of broadcast stations. The Commission asked how our localism goal should be defined and measured as applied to historically underserved minority communities.<sup>40</sup> The Commission sought comment on what aspects of localism are most relevant specifically to minority communities, as well as on the effect of consolidated ownership on the availability of a variety of diverse viewpoints to women and minority consumers. The *NOI* asked if women and minorities are increasing

<sup>35</sup> See, e.g., *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, Second Report and Order, 50 FCC 2d 1046, 1048, ¶ 9 (1975) ("1975 Second Report and Order").

<sup>36</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 87-8, Further Notice of Proposed Rule Making, 10 FCC Rcd 3524, 3547, ¶ 57 (1995) ("1995 TV Broadcasting NPRM") (quoting *Assoc'd Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>37</sup> See, e.g., *2002 Biennial Review Order*, 18 FCC Rcd at 13627-37, ¶¶ 18-52. In the *2002 Biennial Review Order*, the Commission concluded that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation and that our media ownership rules ensure competition in local markets. *Id.* at 13632, ¶ 37. In addition, the Commission concluded that source diversity was not one of the diversity goal objectives of the media ownership rules. *Id.* at 13633, ¶ 43. We reaffirm those conclusions.

<sup>38</sup> The Commission previously has discussed two schools of thought on the relationship between ownership and diversity. On one side is the notion that the more independently owned outlets there are, the greater the viewpoint diversity. The concept is that 51 station owners will provide more diverse viewpoints than 50 station owners. *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, First Report and Order, 22 FCC 2d 306, 311, ¶ 21 (1970). The second school of thought is that concentrated ownership will provide an opportunity for diverse content. According to this view, an owner of multiple stations in a local market will provide a variety of programming and viewpoints in order to gain the widest audience and market share. See *1995 TV Broadcasting NPRM*, 10 FCC Rcd at 3550-51, ¶ 63. It can be questioned whether the latter approach is as likely to provide the public with information from "diverse and antagonistic sources," *Assoc'd Press*, 326 U.S. at 20. We seek comment on this issue and on how we should account for this aspect of our diversity goal in any rules we might adopt.

<sup>39</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13631-32, ¶¶ 36-37.

<sup>40</sup> *NOI*, 25 FCC Rcd at 6104-05, ¶ 59.

their ownership shares in companies that are content providers or in other aspects of media production aside from station ownership.<sup>41</sup>

19. There were only limited comments on these issues. According to Diversity and Competition Supporters (“DCS”), significant barriers to entry for minority ownership remain in both the traditional and new media industries.<sup>42</sup> DCS states that minority-owned stations are more likely than non-minority owned stations to provide programming geared toward minority audiences and that minority communities are underserved as a result of the lack of minority media ownership.<sup>43</sup> DCS supports measures that facilitate minority media ownership.<sup>44</sup>

20. We tentatively conclude that our policy goals of competition, localism, and diversity are the appropriate framework within which to evaluate and address minority and female interests as they relate to our media ownership rules. We seek comment on this tentative conclusion. We also seek additional comment on how the proposed framework for each of our media ownership rules, as explained herein, would affect minority and female ownership opportunities.

21. *Additional Policy Goals.* In the *NOI*, the Commission sought comment on whether we should consider any other formal policy goals, in addition to our competition, diversity, and localism goals, in determining ownership limits in this proceeding.<sup>45</sup> Specifically, we sought comment on whether to consider the impact of our media ownership rules on the availability to all Americans of news and information, including national news and information.<sup>46</sup> We also sought comment on whether we should consider the impact of our rules on investigative journalism, and whether any specific aspects of the National Broadband Plan, including issues related to broadband access, are relevant to our media ownership rules. We tentatively conclude not to adopt any other formal policy goals in this proceeding. As described above, our longstanding policy goals of competition, localism, and diversity are broadly defined to promote the core responsibilities of broadcast licensees. We note that our media ownership rules seek to further consumer welfare by promoting the availability of community-responsive news and public affairs programming from a variety of sources. We seek comment on our tentative conclusion not to adopt any policy goals other than competition, localism, and diversity in this proceeding.

22. *Balancing the Costs and Benefits of Limiting Media Combinations.* We seek information that will help us balance the positive benefits of our ownership limits in promoting our policy goals against the costs that specific limits may impose on consumers and firms. We have discussed in broad terms in this section the policy goals we seek to promote. Section V presents the studies that we commissioned to quantify the influence of our rules on the policy goals. In particular, Media Ownership Study 2 quantifies the benefits and costs of particular media market structures on consumers.<sup>47</sup> We seek comment on the appropriate use of this study in quantifying the impact of our rules on consumers and

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<sup>41</sup> *Id.* at 6108, ¶ 72.

<sup>42</sup> DCS Comments at 3-5, 7-9.

<sup>43</sup> *Id.* at 11-14; *see also id.* at 12 (citing Catherine Sandoval *et al.*, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest* (Nov. 2, 2009) (“Sandoval *et al.* *Minority Commercial Radio Ownership in 2009*”)) (“A study published in 2009 shows that approximately 73 percent of minority-owned stations serve the community by broadcasting minority oriented programming . . .”).

<sup>44</sup> DCS Comments at 18-20.

<sup>45</sup> *NOI*, 25 FCC Rcd at 6109-10, ¶ 78.

<sup>46</sup> *Id.*

<sup>47</sup> Media Ownership Study 2, *Consumer Valuation of Media as a Function of Local Market Structure*, by Scott J. Savage and Donald M. Waldman (“Media Ownership Study 2”).

balancing the positive effects on consumers with any adverse effects on firms.

23. Our studies do not address the direct impact ownership limits have on media outlets. We seek detailed information on the benefits that would accrue to media outlets from entering into combinations that currently are impermissible. What are the cost-savings associated with a combination of two TV stations in markets where duopolies are not currently permitted? What are the sources of those cost savings? Are the savings a one-time event or are they recurring? Do they vary by the size of the market or the popularity of the TV station? We seek similar detailed estimates of cost savings for the combination of radio stations as well as cross-media combinations between newspapers, TV stations, and radio stations. Commenters should document to the extent possible the sources and methods of their estimates.

24. How should we balance the effects of our rules on consumers with those on firms, in particular, media outlets? Should each receive equal weight? How should we account for situations in which the costs and the benefits of a change in the rules occur at different points in time? We encourage commenters to provide examples of the suggested balancing of our rules.

### III. MEDIA OWNERSHIP RULE PROPOSALS

#### A. Local Television Ownership Rule

##### 1. Introduction

25. As discussed in the *NOI*, in the *2006 Quadrennial Review Order*, the Commission determined that the then long-standing local television ownership rule promotes competition within local television markets.<sup>48</sup> Consistent with this conclusion, the Commission retained that rule. The rule allows an entity to own two television stations in the same DMA (“duopoly rule”) only if there is no Grade B contour overlap between the commonly owned stations, or at least one of the commonly owned stations is not ranked among the top-four stations in the market (“top-four prohibition”) and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined (“eight-voices test”). The court in *Prometheus II* upheld the Commission’s decision in the *2006 Quadrennial Order* to retain the local television ownership rule, specifically concluding that the Commission was justified in retaining the top-four prohibition, the eight-voices test, and the duopoly rule.<sup>49</sup>

26. Based on the record in this proceeding, we tentatively conclude that the local television ownership rule, with certain modifications discussed below, remains necessary in the public interest as a result of competition.<sup>50</sup> We tentatively agree with the Commission’s previous determination that the local television ownership rule is necessary to promote competition.<sup>51</sup> While we propose to adopt a local television ownership rule to advance our competition goal, we seek comment on whether our proposed rule also is necessary to promote our localism and viewpoint diversity goals.

27. As discussed in greater detail below, we propose to eliminate the Grade B contour overlap provision of the current rule and seek comment on this proposal. We tentatively conclude that we should retain the prohibition against mergers among the top-four-rated stations. We propose to also retain the

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<sup>48</sup> *NOI*, 25 FCC Rcd at 6093, ¶19; see also *2006 Quadrennial Review Order*, 23 FCC Rcd at 2064, 2066, ¶¶ 97, 101. The Commission also found that the local television ownership rule was not necessary to foster diversity because there were other outlets for diversity of viewpoint in local markets. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2065-66, ¶ 100.

<sup>49</sup> *Prometheus II*, 652 F.3d at 458-61.

<sup>50</sup> Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note.

<sup>51</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2060, ¶ 87.

eight-voices test and the existing numerical limits, but seek comment on whether modifications to either the voice test or numerical limits is warranted. In addition, we seek comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, we seek comment on whether and how the digital transition and multicasting may impact television ownership limitations. Finally, we seek comment on the impact of our proposed rule on minority and female ownership.

## 2. Background

28. In the *NOI*, the Commission sought comment on whether to retain the current rule, including the eight-voices test, the top-four prohibition, and the contour overlap definition.<sup>52</sup> It also asked whether relaxation of the rule is warranted in small markets to help broadcasters achieve efficiencies sufficient to compete with other video programming providers.<sup>53</sup>

29. Television broadcasters generally support relaxing the local television ownership rule, asserting that they face decreased revenues, as a result of both increased competition from nonbroadcast video programming providers and the recent economic downturn. Broadcasters assert that the efficiencies gained from combined ownership will allow them to compete better in today's changing marketplace.<sup>54</sup> According to broadcasters, common ownership can increase viewpoint diversity, as owners of multiple stations seek to capture the greatest possible audience share by diversifying their news and public interest program offerings among co-owned properties.<sup>55</sup> In addition, they contend that the cost savings generated by common ownership allow stations to add local newscasts and other locally oriented programming.<sup>56</sup>

30. Public advocacy groups, on the other hand, caution the Commission against using current economic conditions as a justification for relaxing the local television ownership rule.<sup>57</sup> *UCC et al.*, for example, assert that every U.S. industry was impacted by the declining economy and that signs suggest that the broadcast television industry has emerged from the downturn.<sup>58</sup> Moreover, they contend that, if certain stations cannot survive in the current economic climate, then the public interest is best served by allowing new entrants to become broadcasters or finding new uses for the broadcast spectrum.<sup>59</sup> In addition, public advocacy groups assert that further consolidation will reduce viewpoint diversity through reductions in female and minority ownership and the loss of independent news operations.<sup>60</sup> Contrary to the broadcasters' assertion, the public advocacy commenters cite to studies that have found that consolidation does not lead to increases in local programming, suggesting that additional consolidation

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<sup>52</sup> *NOI*, 25 FCC Rcd at 6111, ¶ 83.

<sup>53</sup> *Id.* at 6112, ¶ 84.

<sup>54</sup> *See, e.g.*, Nexstar Comments at 12; Belo Comments at 2.

<sup>55</sup> *See, e.g.*, NAB Comments at 29-30 (citing Matthew Spitzer, *Television Mergers and Diversity in Small Markets*, 6 J. COMPETITION L. & ECON. 705 (2010) ("Spitzer Study")); Nexstar Comments at 11; Coalition of Smaller Market Television Stations ("Small Market Coalition") Comments Ex. 2, Spitzer Study.

<sup>56</sup> *See, e.g.*, Belo Comments at 7. Belo provides examples of increases in local news, politics, sports, and public affairs programming that it has been able to implement as a result of efficiencies generated by its duopolies in the Tucson and Seattle-Tacoma markets. *Id.* at 6-9.

<sup>57</sup> *See* Free Press Comments at 7; *UCC et al.* Comments at 5-6.

<sup>58</sup> *UCC et al.* Comments at 5-6.

<sup>59</sup> *Id.* at 6-7.

<sup>60</sup> *See, e.g.*, CWA Comments at 15-19.

would not serve our localism goal.<sup>61</sup>

31. In our studies, we sought data to help us determine how best to structure a local television ownership rule to satisfy our policy goals. Particularly relevant to the local television rule, Media Ownership Study 1 examines whether common ownership of stations affects the amount of local news provided by television stations in the local market.<sup>62</sup> The study does not find significant evidence that common ownership affects local media usage or programming.<sup>63</sup> In addition, Media Ownership Study 4 analyzes, at both the market level and the station level, the relationship between media ownership and the amount of local news and public affairs programming provided in a local television market.<sup>64</sup> The study suggests that multiple ownership in a local market does not impact the amount of local information programming at the market level or at the station level.<sup>65</sup> Media Ownership Study 9 provides a theoretical analysis of the impact of media ownership structure on viewpoint diversity, finding that more independent outlets can increase viewpoint diversity in a market.<sup>66</sup>

### 3. Discussion

32. *Market.* Broadcasters generally assert that they are facing increased competition from new technologies, which has led, at least in part, to a reduction in advertising revenues, which could threaten the financial viability of local television stations.<sup>67</sup> Broadcasters contend, therefore, that we should modify our local television ownership rule to permit increased common ownership in local markets.<sup>68</sup>

33. We propose that our local television ownership rule continue to focus on promoting competition among broadcast television stations in local television viewing markets. We tentatively conclude that the video programming market is distinct from the radio listening market.<sup>69</sup> We find that local broadcast television stations compete directly with each other, particularly during the parts of the day in which these stations do not transmit the programming of affiliated broadcast networks. We note that the Commission previously has determined that the video programming market includes both broadcast television stations and cable networks.<sup>70</sup> Moreover, we recognize that viewers are increasingly able to

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<sup>61</sup> Free Press Comments at 6 (citing Consumer Union *et al.* Jan. 16, 2007 Reply, MB Docket No. 06-121, at 95; Danilo Yanich, Ownership Matters: Localism, Local Television News, and the FCC (May 20, 2009) (presented at the International Communication Association annual meeting)); AFTRA Comments at 13-14 (citing The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations, 1999-2006, at 2-3, by Allen S. Hammond, IV, Barbara O'Connor, and Tracy Westen (2007) (Ownership Study 8 in the 2006 quadrennial review proceeding)). However, NAB asserts that additional research conducted by Consumers Union *et al.* reached a different conclusion, finding that "duopolies may lead to more local news and public affairs." NAB Reply at 17 (citing Consumers Union *et al.* Oct. 22, 2007 Further Comments, MB Docket No. 06-121, at 98).

<sup>62</sup> Media Ownership Study 1, Local Media Ownership and Media Quality, by Adam D. Rennhoff and Kenneth C. Wilbur ("Media Ownership Study 1").

<sup>63</sup> *Id.* at 1.

<sup>64</sup> Media Ownership Study 4, Local Information Programming and the Structure of Television Markets, by Jack Erb ("Media Ownership Study 4").

<sup>65</sup> *Id.* at 28.

<sup>66</sup> Media Ownership Study 9, A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied 2-3, by Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie ("Media Ownership Study 9").

<sup>67</sup> NAB Comments at 63-66, 69-70.

<sup>68</sup> *Id.* at 85-86.

<sup>69</sup> See 2006 Quadrennial Review Order, 23 FCC Rcd at 2064, ¶ 97.

<sup>70</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13673, ¶ 143; see also 2006 Quadrennial Review Order, 23 FCC Rcd at 2064, ¶ 97.

access current network programming (both broadcast and cable) and an increasing array of video programming alternatives via the Internet, including on mobile devices. However, competition between local television stations and cable networks may be of limited relevance, because national cable networks generally do not alter their programming decisions based on the actions of individual local television stations.<sup>71</sup> Competition in local markets among local television stations and programming alternatives available via the Internet may be similarly limited, as these alternatives compete largely in national markets and are not likely to respond to conditions in local markets. We seek comment on whether the development of local and hyperlocal websites should alter this analysis. We seek data in support of alternative conclusions, for example, that nonbroadcast video programmers modify programming decisions based on the actions of individual local television stations.

34. We also seek comment on the impact of alternative video platforms on the continued viability of broadcast television stations. While the growth of MVPDs and Internet delivery of video programming is undeniable, the impact of this growth on the broadcast television industry is unclear. While broadcast television's share of television viewing has been on the decline, broadcast network programming remains popular.<sup>72</sup> Viewership, however, appears to be fractured between local affiliates, the Internet, and other mobile platforms. Is there evidence that viewers find broadcast television stations to be interchangeable with new technologies, or is broadcast television unique? If it is unique, what characteristics define it as such? Should we determine that, contrary to our tentative conclusion, our local television ownership rule should focus on promoting competition among broadcast television stations and alternatives to broadcast television stations in local markets, we seek comment below on whether and how to include these alternatives in the rule, either in the eight-voices test or any alternate framework we may adopt for determining whether to permit common ownership in a local market.

35. Moreover, we seek comment on whether the product market for review of the local television rule should include more than video programming. For instance, some of the alternative sources of locally oriented content, such as websites and blogs, may not be entirely in video form. Is the relevant product market expanding from a video-only market to one that also contains non-video sources of local news and information? We tentatively conclude that, although the relevant product market may expand beyond video programming over time, it has not done so at this point. Evidence suggests that, in the aggregate, Internet-only websites provide only a small amount of local news content.<sup>73</sup> We have not seen evidence that non-video information sources modify programming decisions based on the actions of local television stations or vice versa. We seek comment on these tentative conclusions.

36. *Contour Overlap.* The current local television ownership rule employs a Grade B contour overlap test for determining whether to allow common ownership of television stations. The Grade B contour is an analog contour that is no longer relevant now that television stations have completed the

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<sup>71</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13673, ¶ 145; 2006 Quadrennial Review Order, 23 FCC Rcd at 2064, ¶ 97.

<sup>72</sup> For example, in the 2002-03 television season, broadcast television stations achieved a 49 share of primetime viewing and nonbroadcast channels achieved 51 share of primetime viewing. THE NIELSEN CO., TELEVISION AUDIENCE 2009, at 14 (2010). In the 2008-09 television season, the broadcast stations' primetime audience share fell to a 38, while nonbroadcast channels' primetime audience share grew to a 62. *Id.* A share is the percent of all households using television during the time period that are viewing the specified station(s) or network(s). Due to simultaneous multiple-set viewing, Nielsen reports audience shares that exceed 100 percent when totaled. We have normalized the reported audience shares by recalculating them on a base (or denominator) equaling 100 percent, and adjusting the numerators accordingly.

<sup>73</sup> Media Ownership Study 6, Less of the Same: The Lack of Local News on the Internet 23-24, by Matthew Hindman ("Media Ownership Study 6").

digital transition and ceased broadcasting in analog.<sup>74</sup> We sought comment in the *NOI* on whether an overlap provision or some reliance on contours in the local television ownership rule was still necessary or whether we should rely on geographic areas, such as a television DMAs.<sup>75</sup> NAB asserts that we should, to the extent feasible, maintain a contour-based approach for our local television ownership rule.<sup>76</sup> Grant Group asks the Commission to grandfather existing combinations in the event an alternate approach is adopted and to permit the sale of grandfathered combinations to a single party.<sup>77</sup>

37. We believe that eliminating the contour approach is necessary to be consistent with today's marketplace realities. Therefore, we tentatively conclude that we will eliminate the Grade B contour approach and rely solely on Nielsen DMAs. Because of the Commission's mandatory carriage requirements,<sup>78</sup> MVPDs generally will carry all the broadcast stations assigned to the DMA in which they are located. These MVPDs are also likely to carry most major cable networks. Therefore, the DMA most accurately captures the universe of broadcast and MVPD video programming available to viewers. As such, any combination of stations in a particular DMA could have an impact on the levels of competition in that local market. However, our current rule permits certain mergers between stations that compete in the same market simply because of a lack of Grade B contour overlap – a factor that may not have any significant impact on the level of competition between those stations. Therefore, we tentatively conclude that eliminating the contour-overlap requirement in favor of the DMA-based approach would result in a more consistent application of our local television ownership rule. Moreover, we believe that the grandfathering provisions discussed below will preserve existing ownership combinations, thus avoiding disruption of settled expectations and alleviating any negative impact this change could have on the provision of television service in rural areas. We seek comment on these tentative conclusions.

38. We note that the Commission previously adopted a geographic market definition for the local radio rule. In the radio context, Arbitron Metro market definitions were found to be an industry standard and to represent a reasonable definition of the geographic market within which radio stations compete.<sup>79</sup> Adopting Arbitron Metro markets was found to improve the Commission's ability to preserve and promote competition by more accurately identifying actual geographic markets; more accurately measuring concentration levels in local markets; and providing for a more consistent application of the local radio ownership rule.<sup>80</sup> We have long recognized in our television ownership rule that DMAs are the relevant geographic market in which television stations compete, and we expect that a DMA-based approach here will achieve benefits similar to those found in adopting the Arbitron Metro market standard

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<sup>74</sup> We recognize that the Commission has developed a digital contour (NLSC), 47 C.F.R. § 73.622(e), to approximate the same probability of service as the Grade B contour and has stated that the two are roughly equivalent. *NOI*, 25 FCC Rcd at 6117, ¶ 103. However, the Commission has not adopted a digital contour that is equivalent to the Grade A contour, which is currently used for purposes of determining compliance with the radio/television and the newspaper/television ownership rules. For further discussion on digital contours, see *id.* at 6116-18, ¶¶ 102-03.

<sup>75</sup> *Id.* at 6111, 6116-18, ¶¶ 83, 101-05.

<sup>76</sup> NAB Comments at 94.

<sup>77</sup> Grant Group Comments at 14-16.

<sup>78</sup> 47 C.F.R. § 76.56.

<sup>79</sup> 2002 *Biennial Review Order*, 18 FCC Rcd at 13725, ¶ 276.

<sup>80</sup> *Id.* at 13712-13, 13720, ¶¶ 239, 258-60. We recognize however, that radio Metros and DMAs are not similar geographic market definitions to the extent that only television stations may rely on MVPD carriage to extend their coverage beyond their signal contour to an entire DMA service area. That is not the case for radio stations in Arbitron markets, which are over-the-air signals.

in the radio context.<sup>81</sup> Finally, unlike Arbitron Metro markets, which do not cover large portions of the United States and its territories, the DMA-based approach covers the entire country and includes all television stations.<sup>82</sup>

39. We recognize, however, that a DMA-based approach may disproportionately impact certain DMAs that have unique characteristics. For instance, in a geographically large DMA two stations may be so far removed from one another that the stations do not actually compete over-the-air (though they are both carried by MVPDs throughout the DMA). While the Grade B provision of the existing rule allowed common ownership of those stations, a DMA-based approach could prohibit common ownership. Therefore, we seek comment on whether and how to accommodate such a situation and other types of situations in which the Grade B provision allowed ownership of stations but a DMA-based rule would prohibit common ownership. We seek comment on how frequently such situations arise. We tentatively conclude to grandfather ownership of existing combinations of television stations that would exceed the ownership limit under the proposed local television ownership rule by virtue of the change to a DMA-based approach. Compulsory divestiture is disruptive to the industry and a hardship for individual owners, and any benefits to our policy goals would likely be outweighed by these countervailing considerations.<sup>83</sup> Consistent with the Commission's previous decisions, we seek comment regarding whether to allow the sale of combinations only if the station groups comply with the local television ownership rule in place at the time the transfer of control or assignment application is filed.<sup>84</sup> Are our policy goals served by allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with the local television ownership rule?<sup>85</sup> What is the effect on the stations if they are sold separately? Is it possible that such a rule could have the unintended consequence of causing a station to close? We seek comment on these tentative conclusions.

40. *Top-Four Prohibition.* The top-four prohibition prevents mergers between two of the top-four-rated stations in a local market, subject to the other provisions of the local television ownership rule. In the previous media ownership proceeding, the Commission retained the top-four prohibition because mergers between these stations "would be the most deleterious to competition."<sup>86</sup> Such mergers would often result in a single firm obtaining a significantly larger market share than other firms in the market and would reduce incentives for local stations to improve programming that appeals to mass audiences.<sup>87</sup> The Commission also found that a significant "cushion" of audience share continued to separate the top-four stations from the fifth-ranked station.<sup>88</sup> We tentatively conclude that retaining the top-four prohibition is

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<sup>81</sup> See 2006 Quadrennial Review Order, 23 FCC Rcd at 2067-68, ¶ 104; 2002 Biennial Review Order, 18 FCC Rcd at 13673-74, 13691-92, ¶¶ 146, 187.

<sup>82</sup> In instances where a station's community of license is located in one DMA but the station is assigned by Nielsen to another DMA the station will be considered to be within the DMA assigned by Nielsen for purposes of this rule. In addition, Puerto Rico, Guam, and the U.S. Virgin Islands, which are not assigned a DMA by Nielsen, each will be considered a single DMA.

<sup>83</sup> See, e.g., 1975 Second Report and Order, 50 FCC 2d at 1080, ¶ 112 (stating that "divestiture should be limited to use in only the most egregious cases"); see also 2002 Biennial Review Order, 18 FCC Rcd at 13808, ¶ 484.

<sup>84</sup> See, e.g., 2002 Biennial Review Order, 18 FCC Rcd at 13809-10, ¶ 487.

<sup>85</sup> 1975 Second Report and Order, 50 FCC 2d at 1076, ¶ 103; see also 2002 Biennial Review Order, 18 FCC Rcd at 13809-10, ¶ 487. We would continue to allow *pro-forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. 1975 Second Report and Order, 50 FCC 2d at 1076, ¶ 103.

<sup>86</sup> 2006 Quadrennial Review Order, 23 FCC Rcd at 2066, ¶ 102.

<sup>87</sup> *Id.* (citing 2002 Biennial Review Order, 18 FCC Rcd at 13695, ¶ 194).

necessary to promote competition for the reasons set forth in the *2006 Quadrennial Review Order*.<sup>89</sup> We continue to believe that this rationale supports retention of the top-four prohibition, and we seek comment on these tentative conclusions.

41. We seek comment also on the impact of the top-four prohibition on our localism goal. NAB supports mergers among the top-four stations in a local market because it argues that many of these stations cannot afford to produce local news independently.<sup>90</sup> Allowing these stations to combine, they argue, could lead to increased news offerings.<sup>91</sup> We note, however, that evidence suggests that the majority of top-four stations are already originating substantial amounts of local news.<sup>92</sup> Moreover, there is generally a drop off between the fourth- and fifth-rated station in the market in the amount of local news broadcast.<sup>93</sup> Based on this evidence, it is not clear that permitting mergers among top-four stations generally would result in additional local news or other local programming.<sup>94</sup> We seek comment on these issues. We also seek information regarding whether the amount of local news provided between the top four stations and any others depends upon the size of the market and a community's ability to support multiple news outlets.

42. In addition, we seek comment on whether we should retain the top-four prohibition to also promote our viewpoint diversity goal. Media Ownership Study 9's theoretical analysis shows that a market structure with four firms — two firms presenting each viewpoint — provides efficient information transmission, and the experimental work confirms the value of competition among outlets with similar

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<sup>88</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2067, ¶ 102. The Commission also found that mergers involving two top-four stations would harm competition in the local broadcast television advertising market. *Id.* We tentatively conclude that this market does not have a direct impact on consumers and should not be a focus of our inquiry. We seek comment on these tentative conclusions.

<sup>89</sup> *Id.* at 2066-67, ¶ 102.

<sup>90</sup> See NAB Reply at 14-15 (citing NAB Oct. 23, 2006 Comments, MB Docket No. 06-121, at 105-06). In its 2006 comments, NAB cited to filings in the 2002 ownership review proceeding that claimed that many markets outside of the top 50 DMAs were served by less than four local newscasts. NAB Oct. 23, 2006 Comments, MB Docket No. 06-121, at 105 (citing Nexstar Sept. 4, 2003 Petition for Reconsideration, MB Docket No. 02-277, at 9-10 (providing results of phone survey performed by Nexstar that found that “[i]n markets below the top fifty DMAs, 69 of the number four ranked stations do not produce their own news, and in markets below the top ninety DMAs, 44 of the number three ranked stations do not produce their own local news. Even worse, in DMAs 157 and below, 15 of the number two ranked stations are not producing local news.”); LIN & Raycom Sept. 4, 2003 Petition for Reconsideration, MB Docket No. 02-277, at 9-10 (asserting that the study relied on by the Commission in 2002 biennial ownership proceeding to uphold the top-four prohibition actually demonstrated that many top-four rated stations outside the largest markets are not providing local news)).

<sup>91</sup> See NAB Reply at 14-16.

<sup>92</sup> For instance, according to FCC staff analysis of scheduling data from Tribune Media Service (“TMS”), in 58.1 percent of television markets, four or more stations are providing at least 30 minutes of local news per day. Furthermore, based on this analysis, of the 1614 full-power television stations in the TMS database, 849 (or 50.4 percent) provide at least 30 minutes of local news per day.

<sup>93</sup> For example, across all Nielsen Markets, the number four rated station provides an average of 177 local news minutes per day, while the number five rated station provides only 87 local news minutes per day. FCC staff analysis of TMS data for the period Nov. 1, 2009 through Nov. 14, 2009 and Nielsen data for the period Oct. 29, 2009 through Nov. 25, 2009.

<sup>94</sup> As discussed in greater detail below, with respect to a potential waiver standard applicable to small markets, we seek comment on whether permitting common ownership in small markets, even between top-four stations, would promote additional local news. See *infra* ¶ 53.

viewpoints.<sup>95</sup> Although we recognize the limitations of this finding for our analysis, since a top-four prohibition does not guarantee the theoretical result,<sup>96</sup> Media Ownership Study 9 provides some support for maintaining at least four strong independent outlets. Furthermore, we recognize that, in some instances, there may be other significant sources of viewpoint diversity in a market (e.g., local newspapers or local radio stations). Nonetheless, because evidence suggests a link between more independent television outlets and increased viewpoint diversity in a market and given the significance of television as a source of local news and information, retaining the top-four prohibition should advance our viewpoint diversity goal. We seek comment on Media Ownership Study 9's findings, as well as how the top-four prohibition impacts our viewpoint diversity goal.

43. Furthermore, we invite commenters to provide evidence demonstrating why a different criterion might be more appropriate. For example, would it be more appropriate to impose a top-five or the top-six prohibition in all markets or in certain markets? If so, why?

44. Unlike the other ownership rules we discuss here, the top-four component of the Commission's local television ownership rule relies on the in-market ranking of the stations to be commonly owned, and this is subject to change over time.<sup>97</sup> Accordingly, the rule specifies that the ranks of the stations are to be determined "[a]t the time of application to acquire or construct the station(s)..." If, at that time, both stations are ranked among the top-four stations in the market, common ownership would not be permitted. The Commission's local television ownership rule intends, then, to prohibit an entity from *acquiring* two top-four stations.<sup>98</sup> However, a broadcaster that owns two television stations located in the same market will not be required to divest a station "if the two merged stations subsequently are both ranked among the top four stations in the market."<sup>99</sup> The Commission adopted this approach to encourage licensees to improve the quality of the programming and operations of their stations and so not to constrain commercial activity that is designed to effect such improvements.<sup>100</sup>

45. The point of applicability of the top-four prohibition at the time of an application to the Commission creates a potential for evading the intent of the rule. Accordingly, we seek comment on whether and, if so, how we should address circumstances in which a licensee obtains two in-market stations, both of which are ranked among the top-four stations in the market through agreements that may be considered the functional equivalent of a transfer of control or assignment of license in the context of this rule, but that do not require an application or prior Commission approval. For example, an existing licensee with two stations, one of which is among the top four stations in the market, purchases the network affiliation of another top-four-ranked market station and airs that network's programming on its second, lower-ranked station. The licensee's party to this transaction also exchange call signs. As a consequence, the second, lower-ranked station becomes a top-four-ranked station and the licensee now

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<sup>95</sup> Media Ownership Study 9 at 26-27.

<sup>96</sup> For example, a top-four prohibition does not guarantee competing pairs of firms — two firms presenting each viewpoint — because, even with the prohibition in place, three or four firms could have the same viewpoint. Additionally, there are many issues, and it is unlikely that media outlet viewpoints are perfectly correlated across all of them.

<sup>97</sup> The dual network rule, 47 C.F.R. § 73.658(g), which prohibits ownership of two top-four-ranked television networks, relies on ranking, but the ranking is national in nature and is not subject to change over time; it is fixed based on a date certain. The local radio rule does not consider the in-market rank of the commonly owned stations to which it applies, nor do the cross-ownership provisions of the radio-television and newspaper-broadcast rules.

<sup>98</sup> 47 C.F.R. § 73.3555(b)(1)(i).

<sup>99</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, Report and Order, 14 FCC Rcd 12903, 12933, ¶ 64 (1999) ("1999 Ownership Order").

<sup>100</sup> *Id.* at 12933-34, ¶¶ 64-66.

controls two top-four-ranked stations in the market, but no application has been filed and none was required. How, if at all, should the Commission address such circumstances? Should we amend the top-four prohibition to apply to these types of transactions? Should we focus on instances where licensees swap network affiliations, regardless of whether other types of agreements that impact station operation are also executed? How, if at all, should we address situations where a network offers an existing duopoly owner (one top-four station and one station ranked outside the top four) a top-four-rated affiliation for the lower-rated station, perhaps because the network is no longer satisfied with the existing affiliate station and the duopoly owner has demonstrated superior station operation (*i.e.*, earned the affiliation on merit)? Does such a transaction undermine our local ownership rules or goals? If so, how would we craft a rule to address such circumstances, while at the same time not unduly constraining beneficial commercial activities?

46. *Eight-Voices Test.* Under the eight-voices test, a merger between two in-market stations will not be permitted unless there are at least eight independently owned commercial and noncommercial television stations remaining in the market post merger, subject also to the top-four prohibition.<sup>101</sup> The Commission, in the previous media ownership proceeding, determined that it was necessary to retain the eight-voices test in order to promote competition.<sup>102</sup> Specifically, the Commission determined that maintaining a minimum of eight independently owned-and-operated television stations in a market would ensure that each market includes the four major networks (*i.e.*, ABC, NBC, CBS, and Fox) and four independent competitors, and thus would spur competition in program offerings, including local news and public affairs programming.<sup>103</sup> The Commission found that maintaining four independent competitors was necessary to offset the competitive advantage generally held by the top four stations in a market.<sup>104</sup> In addition, the Commission continued to count only full-power television stations as voices “because the local television ownership rule is designed to preserve competition in the local television market.”<sup>105</sup> We propose to retain the eight-voices test for the reasons set forth in the *2006 Quadrennial Review Order* and seek comment on this proposal.<sup>106</sup> Do any changes in the television marketplace warrant modification of the eight-voices test? For example, would adopting a six- or seven-voices test better promote our competition goal while allowing for additional common ownership?

47. Though we propose to retain the eight-voices test, including the decision to exclude nonbroadcast television media from the voice count, in the event we determine it is appropriate to consider alternative sources of video programming in the local television ownership rule, we seek comment specifically on whether market conditions have changed since the 2006 quadrennial proceeding such that we should consider alternative sources of video programming in the voice count. If we should consider additional sources of video programming, how should we account for those sources in the local market? Should noncommercial stations be included in figuring out the number of voices in the market? Or should we consider as an additional voice video programming delivered via MVPDs or Internet video

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<sup>101</sup> We note that neither the top-four prohibition nor the eight-voices test would apply under the existing rule if there is no Grade B contour overlap between the stations in the proposed duopoly. See 47 C.F.R. § 73.3555(b).

<sup>102</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2065, ¶ 99.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2057, ¶ 80 n.259.

<sup>106</sup> *Id.* at 2065, ¶ 99. We note that the current eight-voices test relies on Grade B contour overlap to determine whether a voice is counted. Consistent with our decision to eliminate the Grade B contour overlap provision from the local television ownership rule, we propose to also eliminate the Grade B contour overlap criterion from the eight-voices test and rely instead on stations’ inclusion in the same DMA as a basis for applying the rule. We seek comment on this proposal.

programming if such programming is available to a certain portion of the local market? If so, what should the threshold be and what source or sources of data should we rely on in determining whether the threshold is met? Should we consider adoption rates? Should we consider, and if so how, the local or non-local nature of the voice?

48. As an alternative to the eight-voices test, we seek comment on whether to adopt a different framework for determining whether to permit common ownership in a local market. For example, we could adopt a tiered approach, similar to the local radio ownership rule, in which numerical ownership limits are based on market rankings, such as the number of full-power television stations in the DMA or the Nielsen DMA rank (based on television households). As discussed below, we tentatively propose to retain the duopoly rule; therefore, any tiered approach we may adopt would be limited to two tiers (*i.e.*, markets where an entity could own up to two stations and markets where an entity could own only one station). Under such a tiered approach, how should we determine the number of stations/Nielsen DMA rank associated with each tier? Do markets with similar numbers of television stations share particular characteristics and, if so, what are those characteristics? Do DMAs of a similar Nielsen rank share certain characteristics even though there may be a significant difference in the number of television stations? For example, the Commission has previously determined that the top 20 DMAs are more vibrant and have more media outlets than lower-ranked DMAs.<sup>107</sup> What would be the benefits and/or drawbacks of such an approach in the television ownership rule?

49. If we were to adopt an approach other than the eight-voices test and determine that it is appropriate to consider alternative sources of video programming, should we include alternative sources of video programming in the new test, and, if so, how? For example, could video programming delivered via MVPDs or the Internet be considered an additional market participant (*i.e.*, the same as an additional broadcast television station) so long as a certain portion of the market has access to one or more of these services? In that case, what should that threshold be and what source or sources of data should we rely on in determining whether the threshold is met? Should adoption also be considered? If we were to rely on Nielsen DMA rank, how would we incorporate these alternative sources into our rule, as Nielsen's ranking system does not take such sources into account? Do DMAs of a certain size share certain characteristics with respect to deployment and adoption of MVPDs and broadband Internet service?

50. *Numerical Limits.* Under the current rule, a licensee can own up to two stations (*i.e.*, a duopoly) in a market, subject to the requirements discussed above. The Commission concluded in the *2006 Quadrennial Review Order* that the duopoly rule remained necessary in the public interest to protect competition despite the increase in media outlets within the last decade.<sup>108</sup> The Commission also declined to tighten the ownership limits, finding that the potential significant benefits from joint ownership permitted under the current rule outweighed claims of harm to diversity and competition.<sup>109</sup>

51. We propose to retain the current numerical limits. Based on the record in this proceeding, we have not observed sufficient changes in the marketplace to allow an entity to own more than two television stations in a local market. Moreover, we note that not every licensee owns the maximum number of stations permissible under the existing duopoly rule. Therefore, if the owner of a single station (or, singleton) believes the potential benefits of common ownership are necessary to compete effectively in a market where additional duopolies are permitted; there are opportunities to combine with other singletons under the existing rule. In addition, we do not believe that the record in this proceeding

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<sup>107</sup> *Id.* at 2041, 2064, ¶¶ 55, 64. For additional discussion of our findings regarding the top 20 DMAs in the context of the Newspaper/Broadcast Cross-Ownership Rule, see *infra* ¶ 105.

<sup>108</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2064, ¶ 97.

<sup>109</sup> *Id.* at 2064-65, ¶ 98.

supports limiting ownership to a single station in all local television markets.<sup>110</sup> We seek comment on these tentative conclusions. For example, is there evidence that the current rule has produced actual harms to our policy goals such that tightening the numerical ownership limits would be justified? Alternatively, is there evidence that existing duopolies in the largest markets require additional common ownership to compete effectively, or that there are additional benefits in allowing existing duopolies to acquire additional stations?

52. *Market Size Waivers.* Commenters have raised concerns that prohibiting all mergers in small markets could prevent broadcasters in these markets that may be facing severe competitive pressures from realizing potential efficiencies that could be achieved through allowing common ownership, even of top-rated stations, which could in turn promote our fundamental policy goals.<sup>111</sup> Therefore, we seek comment on whether we should adopt a waiver standard for stations in markets where our proposed rule would limit station ownership to a single station for all licensees in the market and how such a standard would affect our policy goals. In the event we determine such a waiver standard is appropriate, we seek comment below on how such a standard should be structured.

53. We seek comment specifically on whether allowing certain combinations in small markets, even between top-four stations, would promote additional local news. The Local TV Coalition asserts that outside of the largest markets often only a few dominant stations can afford an independent news operation because stations in these markets earn less revenue than stations in large markets.<sup>112</sup> Sainte Sepulveda, which owns one station in a small market and entered into sharing agreements with another in-market station, asserts that the savings generated by these sharing agreements are insufficient to implement a local newsgathering and production facility.<sup>113</sup> According to NAB, stations in small markets are earning less profit than stations in large markets.<sup>114</sup> In addition, NAB provides data that stations in small- and medium- sized markets spend less on their news operations than stations in large markets both in absolute terms and as a percentage of total station budget.<sup>115</sup> NAB also submits data demonstrating that these stations provide less local news content and devote less station staff to news production than stations in large markets.<sup>116</sup> We seek comment on whether adopting a waiver standard for small markets would

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<sup>110</sup> However, as discussed in greater detail below in paragraph 57 we seek comment on whether the ability to multicast supports tightening of the numerical ownership limits.

<sup>111</sup> See NAB Comments at 79-80; Coalition to Preserve Local TV Broadcasting (“Local TV Coalition”) Reply at 7-9, 24; Small Market Coalition Comments at 1-2.

<sup>112</sup> Local TV Coalition Reply at 9-10 (stating that in the Springfield, Missouri market (DMA 74), two of the big four affiliates would likely lose money if they maintained independent news operations).

<sup>113</sup> Sainte Sepulveda Comments at 5. Sainte Sepulveda is the licensee of KBVU-TV, Eureka, California. *Id.* at 1.

<sup>114</sup> For instance, NAB states that the average pre-tax profits for stations in small- and medium-sized markets (DMAs 50-210) declined 63.7 percent from 1998-2008; by contrast, according to NAB, average pre-tax profits declined 50.8 percent in DMAs 1-49, though the most significant declines were sustained in DMAs 50-99 (67.1 percent) and DMAs 150-210 (62.9 percent), with DMAs 100-149 fairsing better, relatively speaking, with average declines of 39.7 percent. NAB Comments Att. C at 5, 8, 11, 14, 17.

<sup>115</sup> NAB data indicate that stations in DMAs 1-25 spend an average of \$10,830,833 (36.7 percent of total budget) on news operations, while stations in DMAs 26-50 spend an average of \$6,476,046 (28.3 percent of total budget). NAB Comments Att. B, Mark J. Prak *et al.*, The Economic Realities of Local Television News 2010 at 13 (“NAB Comments Att. B”).

<sup>116</sup> According to NAB data, in DMAs 1-25, stations on average provide 35.8 hours per week of local news programming and devote 58 percent of station staff to news production; stations in DMAs 26-50 provide an average of 29.3 hours per week of local news programming and 53 percent of station staff is involved in news production. *Id.* at 11, 14. The data show a continuing decline in DMAs 51-100 (26.6 hours per week and 52 percent of station staff), DMAs 101-150 (20.5 hours per week and 49 percent of station staff), and DMAs 151-210 (19.5 hours per

promote more news offerings in these markets. In particular, we note that there is some evidence to suggest that markets with six or fewer stations may be less able to support four local television news operations.<sup>117</sup> Should a market size waiver standard take this information into account? Would allowing mergers under this proposed standard result in a loss of viewpoint diversity in those markets? If so, would such mergers produce sufficient gains in competition and/or localism to overcome the reduction in viewpoint diversity?

54. We request comment also on the criteria we should adopt for any market size waiver standard. Should we adopt some or all of our current failed/failing station waiver policy?<sup>118</sup> What financial documentation should we require? Alternatively, should we adopt a standard based simply on structural considerations – the size of the market and the number of outlets? For example, should we permit a combination if the number of independent media owners in the market post merger would be at least two or three? If so, what independent media owners should we consider? Would this approach create a race to merge that would reward the first to do so and foreclose other market stations from achieving similar competitive advantages? Should we consider the combined market share of the stations seeking to combine ownership? For example, should one of the criteria for a waiver be that the proposed station combination would not exceed a certain percent of the audience or revenue share in the local market? Should we require the applicants to make affirmative commitments to initiate/increase local news offerings? If so, should we require the station owner to demonstrate compliance with that commitment and for how long? Should we adopt specific penalties for noncompliance? What other factors should we consider?

55. Finally, should we consider alternative definitions of the markets in which this waiver approach would apply? For example, should we adopt a less restrictive definition of those “small markets” in which the rule would apply, perhaps by including those markets where a single duopoly would be permitted under the proposed rule? We invite comment on whether these markets might benefit if top-four combinations were permitted, with some restrictions, so that sufficient critical mass could be achieved to support more and/or better local news and public affairs programming. For example, it may be that in such markets the top four stations do not all produce local news and that only two or three news operations could be supported by the market. In these circumstances, should we consider permitting mergers among top-four stations but not between the number one and number two stations, or some variant thereof, if such an outcome would increase the quantity and quality of local programming provided? We seek comment on this approach and on the practical components of any rules to govern such situations.

56. *Multicasting.* The digital television transition was completed on June 12, 2009.<sup>119</sup> As a result, all full-power television stations are now broadcasting in digital and have the ability to use their

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week and 40 percent of station staff). *Id.* According to NAB data, in terms of actual staff size, stations in DMAs 1-25 have an average news staff of 95 employees and stations in DMAs 26-50 have on average 74 news employees. *Id.* at 14. The data also show a significant reduction in the average news staff in small and medium sized markets (45 employees in DMAs 51-100; 36 employees in DMAs 101-150; and 20 employees in DMAs 151-210). *Id.*

<sup>117</sup> For instance, according to FCC staff analysis of scheduling data from TMS, four or more stations each provide at least 30 minutes of local news per day in 89.3 percent of markets with seven or more stations, as compared to only 22.5 percent of markets with six or fewer stations.

<sup>118</sup> 47 C.F.R. § 73.3555, Note 7.

<sup>119</sup> The court in *Prometheus II* rejected Citizen Petitioners’ claim that the Commission’s decision not to consider the digital transition in the 2006 quadrennial proceeding was arbitrary and capricious. *Prometheus II*, 652 F.3d at 461. The court noted that the transition was not complete at the issuance of the 2006 *Quadrennial Review Order* and that the Commission based its decision to retain the duopoly rule on a finding that the rule has not harmed competition in local markets. *Id.* The court also noted that Citizen Petitioners were free to raise the issue in the 2010 quadrennial proceeding, when the transition was complete. *Id.*

available spectrum to broadcast not only their main program stream but also, if they choose, additional program streams, an activity commonly referred to as multicasting. UCC *et al.* argue that the ability to multicast justifies a return to the Commission's previous single-station rule.<sup>120</sup> According to UCC *et al.*, multicasting allows broadcast stations to provide multiple program streams without acquiring an additional in-market station.<sup>121</sup> Furthermore, Time Warner Cable ("TWC") argues that multicasting permits stations to create "virtual duopolies" by affiliating with multiple networks and multicasting their programming.<sup>122</sup> TWC identified a report asserting that 68 instances of dual affiliation exist that involve the Big Four networks.<sup>123</sup> On the other hand, Belo and NAB argue that multicasting is not a substitute for duopoly ownership and does not justify retaining or tightening the local television ownership rule.<sup>124</sup> They note that multicast channels have difficulty attracting advertisers because these channels are not entitled to must-carry rights and typically lack established programming line-ups.<sup>125</sup> Furthermore, not all stations will elect to air multiple program streams, instead using the available spectrum to provide mobile video, high-quality, high-definition ("HD") programming, or other innovative services.<sup>126</sup>

57. With the digital transition complete, we seek comment on whether the transition has eliminated the need for the local television ownership rule to permit common ownership in local television markets. Specifically, does multicasting replicate the potential benefits to station owners and viewers associated with owning a second in-market station (*e.g.*, efficiency gains and improved programming) or are there benefits unique to common ownership that cannot be replicated by multicasting? If we find that multicasting does replicate the potential benefits of common ownership, both to station owners and viewers, should we continue to permit common ownership? Should we limit the ability of station owners to form dual affiliations involving certain networks? We seek comment on specific instances of dual affiliation and on how such situations have impacted the markets where they occur. We note that broadcasters are not required to use their additional spectrum to multicast, and that some stations will instead elect to use their additional spectrum to offer other services (*e.g.*, mobile video). How, if at all, should that affect our decision regarding whether multicasting justifies a tightening of the duopoly rule? We also seek comment on how multicasting is affecting stations in small markets, including specifically whether stations in small markets have been successful in negotiating for MVPD carriage of their subchannels and what revenue and viewer benefits these channels generate. We seek comment on whether and how to consider multicasting with regard to any waiver standard in small markets.

58. We note that Media Ownership Study 10, which studies the impact of the ownership rules on multicasting, found some evidence to suggest that variations in ownership structure have little effect on the extent of multicasting.<sup>127</sup> Media Ownership Study 10 finds that other market characteristics, such as

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<sup>120</sup> UCC *et al.* Comments at 7 (referring to the pre-1999 local television ownership rule that limited ownership to a single full-power television station in all television markets).

<sup>121</sup> *Id.* at 7-8.

<sup>122</sup> Letter from Mathew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable ("TWC"), to Marlene H. Dortch, Secretary, FCC, at 4 (Aug. 3, 2011).

<sup>123</sup> *Id.* at n.15 (citing Price Colman, *D2 Offers A1 Opportunity for Big Four Nets*, TVNewsCheck, Apr. 20, 2011, available at <http://www.tvnewscheck.com/article/2011/04/20/50699/d2-offer-a1-opportunity-for-big-four-nets>.)

<sup>124</sup> Belo Comments at 9-10; NAB Reply at 17-18; *but see* Hearst Comments at 1 (asserting that multicast channels should be considered voices).

<sup>125</sup> Belo Comments at 10; NAB Reply at 17-18.

<sup>126</sup> Belo Comments at 10-12; NAB Reply at 18.

<sup>127</sup> Media Ownership Study 10, Broadcast Ownership Rules and Innovation 54, by Andrew S. Wise ("Media Ownership Study 10").

market size and the number of television stations operating in a market, may have a greater impact on the extent of multicasting than ownership structure.<sup>128</sup> We seek comment on the findings of Media Ownership Study 10.

59. *Minority and Female Ownership.* According to DCS, there are still significant barriers to entry by minority owners in both the traditional and new media industries; DCS supports measures to facilitate minority media ownership.<sup>129</sup> DCS states that minority-owned stations are more likely to provide programming geared toward minority audiences and that minority communities are underserved as a result of the lack of minority media ownership.<sup>130</sup> We seek comment on how the proposed local television rule would affect minority and female ownership opportunities. We seek comment on how promotion of diverse television ownership promotes viewpoint diversity. We request commenters to provide additional data supporting their positions.

## B. Local Radio Ownership Rule

### 1. Introduction

60. The Commission has intended the local radio ownership rule to promote competition, diversity, and to some degree localism.<sup>131</sup> The current local radio ownership rule, retained without modification in the previous media ownership proceeding, allows an entity to own: (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM), (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which can be in the same service (AM or FM), (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which can be in the same service (AM or FM), and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination.<sup>132</sup> In *Prometheus II*, the Court upheld the Commission's decision in the last media ownership proceeding to retain the local radio ownership rule, specifically concluding that the Commission was justified in retaining the existing numerical limits and the AM/FM subcaps.<sup>133</sup>

61. Based on the record in this proceeding, we tentatively conclude that the current local radio ownership rule remains necessary in the public interest as a result of competition.<sup>134</sup> We tentatively agree with the Commission's previous determination that competition-based radio ownership limits promote viewpoint diversity "by ensuring a sufficient number of independent radio voices and by preserving a

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<sup>128</sup> *Id.*

<sup>129</sup> DCS Comments at 3-5, 7-9, 18-20.

<sup>130</sup> *Id.* at 11-14; *see also id.* at 12 (citing Sandoval *et al.* Minority Commercial Radio Ownership in 2009) ("A study published in 2009 shows that approximately 73 percent of minority-owned stations serve the community by broadcasting minority oriented programming . . .").

<sup>131</sup> 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2072, 2075, 2077 ¶¶ 117, 124, 127; *see also NOI*, 25 FCC Rcd at 6094, ¶ 21.

<sup>132</sup> 47 C.F.R. § 73.3555(a).

<sup>133</sup> *Prometheus II*, 652 F.3d at 462-63. With respect to the AM/FM subcaps, the Court also concluded that the Commission was "justified in declining to rely on [the transition to digital radio] in evaluating the [subcaps]." *Id.* at 463.

<sup>134</sup> Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note.

market structure that facilitates and encourages new entry into the local media market.”<sup>135</sup> We also tentatively agree with the Commission’s previous determination that a competitive local radio market helps to promote localism, as a competitive marketplace will lead to the selection of programming that is responsive to the needs and interests of the local community.<sup>136</sup> We seek comment on these tentative conclusions.

62. As discussed in greater detail below, we tentatively conclude that we should retain the existing numerical ownership limits and market tiers, but still seek comment on whether to change the existing numerical limits and/or market tiers. We also propose to retain the AM/FM subcaps, but seek comment on the impact of the ongoing digital radio transition on the differences between AM and FM stations. In addition, we seek comment on whether to adopt a specific waiver standard and, if so, what criteria to apply. Finally, we seek comment on the impact of our local radio ownership rule on minority and female ownership.

## 2. Background

63. In the *NOI*, we sought comment on whether the current local radio numerical ownership limits are appropriate to achieve our policy goals and whether to account for other sources of audio programming in the rule.<sup>137</sup>

64. Broadcasters generally support loosening the ownership limits, contending that common ownership of radio stations in the same market does not harm competition, as consolidation has been shown to have no effect on advertising rates.<sup>138</sup> In addition, broadcasters assert that radio stations can, and do, change formats with ease, which they claim should make the possibility of coordinated behavior among owners an insignificant concern to the Commission.<sup>139</sup> Moreover, broadcasters argue that radio ownership limits are not necessary to foster program diversity or localism.<sup>140</sup> According to Clear Channel, econometric analysis from the 2006 quadrennial review shows that group ownership of radio stations has enhanced diversity of programs and music formats and substantially increased radio broadcasters’ ability to serve the local needs and interests of their communities.<sup>141</sup> Clear Channel states that the company’s experience demonstrates that group owners have natural incentives to counter-

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<sup>135</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2077, ¶ 127 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13739, ¶¶ 305-06).

<sup>136</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2075, ¶ 124; *2002 Biennial Review Order*, 18 FCC Rcd at 13738, ¶ 304 (citing generally *Revision of Radio Rules and Policies*, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755 (1992) (“*1992 Radio Ownership Order*”); *Amendment of Section 73.3555 of the Commission’s Rules, the Broadcast Multiple Ownership Rules*, MM Docket No. 87-7, First Report and Order, 4 FCC Rcd 1723 (1989)).

<sup>137</sup> *NOI*, 25 FCC Rcd at 6112, ¶ 86.

<sup>138</sup> See, e.g., NAB Comments at 86-90; NAB Reply at 20-22.

<sup>139</sup> See Clear Channel Comments at 14-18.

<sup>140</sup> See *id.* at 21; NAB Comments at 30.

<sup>141</sup> Clear Channel Comments at 21-22; see also NAB Comments at 31-34, 87; NAB Reply at 22. Clear Channel’s econometric analysis relates to the impact of common ownership on format diversity. The Commission has previously “declined to rely on format diversity to justify the local radio ownership rule.” *2006 Quadrennial Review Order*, 23 FCC Rcd at 2077, 2078, ¶¶ 127, 129; see also *2002 Biennial Review Order*, 18 FCC Rcd at 13742, ¶ 315. In this proceeding, we tentatively conclude that we should focus our analysis on viewpoint diversity. We seek comment on this tentative conclusion.

program their stations and that there are efficiencies and economies associated with higher levels of common ownership.<sup>142</sup>

65. Public interest groups urge the Commission to retain the local radio ownership rule and argue that radio station ownership caps are key to preventing the concentration of economic, social, and political power.<sup>143</sup> Communications Workers of America (“CWA”) states that “in 1996, there were 10,257 commercial radio stations and 5,133 radio owners.”<sup>144</sup> In 2010, “there [were] 11,202 commercial radio stations and 3,143 owners, representing a 39 percent decrease in the number of owners since 1996.”<sup>145</sup> Future of Media Coalition (“FMC”) argues that consolidation in the radio industry “has no demonstrable public benefit” and that “[r]adio programming from the largest station groups remains focused on just a few formats — many of which overlap with each other, creating further homogenization.”<sup>146</sup>

66. In our studies we sought data to help us determine how best to structure a local radio ownership rule to satisfy our policy goals. Particularly relevant to the local radio rule, Media Ownership Study 5 analyzes the quantity of radio stations that are classified as news-formatted stations in the top 300 Arbitron metro areas.<sup>147</sup> Media Ownership Study 7 addresses radio station ownership structure and minority-targeted programming using data on radio station formats.<sup>148</sup>

### 3. Discussion

67. *Market.* Broadcasters generally assert that they are facing increased competition from new audio platforms and that this increased competition has led, at least in part, to a reduction in advertising revenues, which could threaten the continued viability of the broadcast radio industry.<sup>149</sup> Broadcasters contend that Internet-based audio platforms such as Pandora and Apple’s iTunes have “transitioned — in just a few years — from new market entrants to full-fledged competitors of terrestrial radio broadcasters.”<sup>150</sup> Broadcasters assert that none of the new competitors to free, over-the-air radio broadcasting are constrained by government-imposed limits on the number of outlets that can be owned, and therefore, limiting ownership of broadcast stations places broadcasters at a disadvantage.<sup>151</sup> For this reason, according to broadcasters, we should modify our local radio ownership rule to permit increased common ownership in local markets.<sup>152</sup>

68. We tentatively conclude that broadcast radio stations compete in the radio listening market and that it is not appropriate, at this time, to expand the relevant market to include nonbroadcast sources

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<sup>142</sup> Clear Channel Comments at 21.

<sup>143</sup> FMC Comments at 15-17; *see also* CWA Comments at 35-36; UCC *et al.* Comments at 9.

<sup>144</sup> CWA Comments at 35.

<sup>145</sup> *Id.* at 35-36.

<sup>146</sup> FMC Comments at 5.

<sup>147</sup> Media Ownership Study 5, *Station Ownership and the Provision and Consumption of Radio News*, by Joel Waldfogel (“Media Ownership Study 5”).

<sup>148</sup> Media Ownership Study 7, *Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009*, by Joel Waldfogel (“Media Ownership Study 7”).

<sup>149</sup> *See* Clear Channel Comments at 8-11, 35-37; NAB Comments at 63-64, 90.

<sup>150</sup> Clear Channel Comments at 9.

<sup>151</sup> *See, e.g.*, NAB Comments at 5.

<sup>152</sup> *See* Clear Channel Comments at 1; NAB Comments at 90.

of audio programming.<sup>153</sup> We note that the current record suggests that the audio marketplace has changed since the last media ownership review in terms of the number of choices consumers have to access audio programming, the number of audio programming providers, and audio programming choices. For instance, satellite radio subscribership has grown significantly, and millions of listeners now access audio content via the Internet.<sup>154</sup> However, satellite radio still only serves a small portion of all radio listeners and millions of listeners do not have broadband Internet access. Moreover, these audio programming alternatives are national platforms that are not likely to respond to conditions in local markets. Therefore, we propose that our local radio ownership rule continue to focus on promoting competition among broadcast radio stations in local radio listening markets. We seek comment on these tentative conclusions.

69. These tentative conclusions notwithstanding, we seek additional comment on the impact of new audio technologies on the continued viability of broadcast radio stations. Broadcast radio audiences appear stable, the recent decline in advertising has been replaced by gains in 2010, and overall advertising revenue share is predicted to decline only slightly through 2019.<sup>155</sup> Does the apparent resiliency of the broadcast radio industry despite the growth of new technologies suggest that broadcast radio is unique? If so, what characteristics of broadcast radio make it unique, and is it appropriate to consider other technologies in our local radio ownership rule? How, if at all, do nonbroadcast sources of audio programming contribute to our policy goals? For example, do these alternatives to broadcast radio make programming and/or business decisions based on competitive considerations in local markets? Should we determine that, contrary to our tentative conclusion, our local radio ownership rule should focus on promoting competition among broadcast radio stations and alternatives to broadcast radio stations in local radio markets, we seek comment below on whether and how to include these sources in the rule, either in determining market size or in setting the numerical limits.

70. *Market Size Tiers.* We propose to retain the current approach of numerical ownership limits based on market size tiers. Based on the Commission's years of experience in applying the rule, we believe that the existing framework best ensures that the local radio ownership rule serves our policy goals and that limiting common ownership helps to prevent the formation of market power in local markets by ensuring that a few owners cannot "lock up" the available—limited—radio spectrum in a local market. Moreover, this bright-line approach provides transaction participants with a clear understanding

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<sup>153</sup> This tentative conclusion is consistent with previous Commission decisions to not expand the relevant market to include satellite radio and Internet audio streaming. See *2006 Quadrennial Review Order*, 23 FCC Rcd at 2071, ¶ 114; *2002 Biennial Review Order*, 18 FCC Rcd at 13715, ¶ 245. The Commission has also found previously that radio broadcasters compete in the radio advertising and radio program production markets. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2071, ¶ 114; *2002 Biennial Review Order*, 18 FCC Rcd at 13713-15, 13716, ¶¶ 243-244, 247. We tentatively conclude that these markets do not have a direct impact on consumers and should not be the focus of our inquiry. We seek comment on these tentative conclusions.

<sup>154</sup> ARBITRON & EDISON RESEARCH, *THE INFINITE DIAL 2010: DIGITAL PLATFORMS AND THE FUTURE OF RADIO 18-19* (2010), available at [http://www.edisonresearch.com/infinite\\_dial\\_presentation\\_2010\\_revb.pdf](http://www.edisonresearch.com/infinite_dial_presentation_2010_revb.pdf) (finding that as of February 2010, over half the population had listened to online radio, with a weekly online radio audience of approximately 43 million people); Sirius XM Radio Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 34 (stating that as of December 31, 2010, there were 20,190,964 satellite radio subscribers, of which 13,104,972 were automobile subscribers).

<sup>155</sup> See PEW CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2011: AN ANNUAL REPORT ON AMERICAN JOURNALISM, Key Findings (2011)* ("STATE OF THE NEWS MEDIA 2011"), available at <http://stateofthemediamedia.org> (stating that 93 percent of Americans listened to at least some radio in an average week in 2010, only a 3 percent drop in the last decade); Radio Advertising Bureau, *Radio Revenue Trends*, <http://www.rab.com/public/pr/yearly.cfm> (showing a 6 percent increase in broadcast radio revenue in 2010) (visited Oct. 19, 2011); SNL KAGAN ADVERTISING FORECASTS 2010 at 21, 126 (predicting revenue growth in 2010 and small loss in total market share through 2019).