Dated: December 4, 2001.

Robert W. Varney,

Regional Administrator, EPA New England.

[FR Doc. 01–30584 Filed 12–10–01; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 01–317 and 00–244; FCC 01–329]

RIN 4217

Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes changes to local ownership rules and policies concerning multiple ownership of radio broadcasting stations. The Commission examines the effect our current rules has had on the public and seeks comment to better serve our communities. This action is intended to consider possible changes to our current local market radio ownership rules and policies in accordance with the Commissions Telecommunications Act of 1996.

DATES: Comments are due February 11, 2002; Reply comments are due March 11, 2002.

ADDRESSES: Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Joshi Nandan, Office of General Counsel, (202) 418–1755.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Notice of Proposed Rule Making* (''*NPRM*'') in MM Docket No. 01–317, and Docket No. 00–244; FCC 01–329, adopted November 8, 2001, and released November 9, 2001. The complete text of this *NPRM* is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, S.W., Washington, D.C. and may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street SW, Room CY–B–402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via email *qualexint@aol.com.* This document is also available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Martha Contee at (202) 4810–0260, TTY (202) 418–2555, or *mcontee@fcc.gov.* The *NPRM* can be found on the Internet at the Commission's website: *http://www.fcc.gov.*

I. Introduction

1. In accordance with sections 309(a) and 310(d) of the Communications Act of 1934 (''the 1934 Act''), the Commission issues new radio broadcast licenses and approves the assignment and transfer of those licenses only when those actions are consistent with the public interest, convenience, and necessity. Pursuant to its public interest authority, the Commission historically has sought to promote diversity and competition in broadcasting by limiting by rule the number of radio stations a single party could own or acquire in a local market. In section 202(b) of the Telecommunications Act of 1996 (''the 1996 Act''), Congress directed the Commission to revise its local radio ownership rule to relax the numerical station limits in the ownership rules. In the almost six years since the Commission implemented this congressional directive, the local radio market has been significantly transformed as many communities throughout the country have experienced increased consolidation of radio station ownership. In this proceeding, we seek to examine the effect that this consolidation has had on the public and to consider possible changes to our local radio ownership rules and policies to reflect the current radio marketplace.

II. Background

2. To guide our evaluation of the regulatory policies that we should adopt in light of the current radio marketplace, we review the background of the local radio ownership rule and the traditional interests that the rule was intended to advance.

A. Rules and Policies before 1992

3. The Commission first limited local radio ownership in 1938, when it denied an application for a new AM station on the ground that the parties that controlled the applicant also controlled another AM station in the same community. The Commission found that the commonly owned, same service stations would not compete with each other and that granting the application could preclude a competitive station from entering the market. Accordingly, ''to assure a substantial equality of service to all interests in a community'' and ''to assure diversification of service and advancements in quality and effectiveness of service,'' the Commission held that it would allow commonly owned ''duplicate facilities'' only where it would fulfill a community need that otherwise could not be fulfilled. Based on this policy, the Commission found that the ''public convenience, interest or necessity'' would not be served by grant of the application.

4. In the early 1940s, this policy was codified in the Commission's rules. AM licensees were prohibited from owning another AM station that would provide ''primary service'' to a ''substantial portion'' of the ''primary service area'' of a commonly owned AM station, except where the public interest would be served by multiple ownership. FM licensees were prohibited from owning another FM station that served ''substantially the same service area.'' Between 1940 and 1964, the Commission determined on a case-by-case basis whether two commonly owned, same service radio stations served substantially the same area.

5. In 1964, the Commission replaced its case-by-case analysis with a ''fixed standard'' consisting of a contour-based test that looked solely to the overlap of the radio stations' signals. The new rule prohibited common ownership of same service stations when *any* overlap of contours occurred, not just the situation where there was a ''substantial'' overlap. The Commission explained that the purpose of the multiple ownership rules was ''to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest.'' The Commission found that the local radio ownership rule in particular was based on two principles: first, that ''it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group;'' and second, that ''the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.'' The Commission cited, as support for the local ownership limits, the principle that the First Amendment ''rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.''

6. In the early 1970s, the Commission briefly restricted local radio ownership further by prohibiting, with certain

exceptions, common ownership of different service broadcast stations in the same market. These limits were designed to advance diversity by maximizing the number of independent owners of broadcast media in a market, and the Commission rejected arguments that common ownership of local broadcast stations would enhance the ability of station owners to provide better quality, more responsive programming. The Commission also found that common ownership of local broadcast stations could ''lessen the degree of competition for advertising among the alternative media'' and that common owners could ''use practices [such as special discounts] which exploit [their] advantage over the single station owner.'' On reconsideration, however, the Commission relaxed its new ownership restrictions to allow again, in all circumstances, a party to hold a single AM–FM combination.

7. In 1989, the Commission relaxed certain technical aspects of the contour overlap test, which decreased the likelihood of contour overlap between closely located stations and thereby increased the ability of a single party to own those stations. In making this change, the Commission determined that ownership diversity was not an end in itself, but a means of ''promoting diversity of program sources and viewpoints.'' The Commission determined that its rule change would not adversely affect programming and viewpoint diversity because the number of media outlets had increased since the contour overlap test was developed in 1964 and because the efficiencies that common ownership would generate could lead to programming benefits. The Commission also cited the increase in media outlets and the competition that radio stations faced in the advertising market from television stations, cable systems, and newspapers to support its conclusion that relaxing the contour-based test would not harm competition.

B. The 1992 Radio Ownership Proceeding

8. In a 1992 proceeding, the Commission found that increases in the number and types of media outlets warranted further relaxation of the rule. Citing greater numbers of radio and television stations and the growth of cable, particularly cable radio networks, the Commission determined that relaxing the local radio ownership rule would not harm diversity or competition. Specifically with respect to competition, the Commission found that the radio industry's share of the local advertising market, in which the Commission included television stations and cable systems, had remained flat. The Commission found that the inability of radio stations to realize the efficiencies arising from common ownership harmed diversity and competition by making it more difficult for radio stations to compete and to provide valuable programming services. Accordingly, the Commission decided to relax its ownership rules to permit greater consolidation of radio stations in the local market.

9. The Commission initially adopted a tiered approach, similar to the approach that would be adopted in the 1996 Act. Under the Commission's framework, although common ownership of stations with overlapping signals technically remained prohibited, an exception was created to allow common ownership of a specified number of radio stations based on the number of radio stations in the market. To determine the number of stations that could be commonly owned, radio markets were divided into four tiers, and the maximum number of radio stations that a single party could own was 3 AM and 3 FM stations in the top tier, *i.e.,* markets having 40 or more radio stations. In markets with more than 15 radio stations (the top 3 tiers), the numerical limits were also subject to an audience share cap of 25 percent. Although the Commission recognized that the 25 percent limit was ''substantially more restrictive than ordinary antitrust concerns would mandate,'' the Commission ''decline[d] to base [the] common ownership restrictions solely on economic concentration considerations'' because the restrictions also were ''designed to protect and promote a diversity of voices—a concern distinct from antitrust objectives.'' Both the market size and the audience share were calculated based on the relevant Arbitron market. In adopting this framework, the Commission reserved the right to ''implement a full range of remedies'' where ''ownership levels in a particular market might threaten the public interest.''

10. On reconsideration, the Commission again modified its local radio ownership rule. The rule still generally prohibited common ownership of overlapping stations, but the Commission revised the exception to allow common ownership of up to only 2 AM and 2 FM stations in all markets with 15 or more radio stations. In smaller markets, a single party could own up to 3 stations, of which no more than 2 could be in the same service. The Commission also replaced the audience share cap with a provision that, in markets with 15 or more radio stations, ''evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered *prima facie* inconsistent with the public interest.'' The Commission explained that this provision was designed to prevent ''excessive concentration'' even if the combination complied with the 2 AM–2 FM limit. The language of the rule indicated that the excessive concentration determination would be made under the public interest standard.

11. The Commission also altered the market definition for calculating the numerical caps; instead of Arbitron markets, the Commission adopted a contour overlap market definition. To determine audience share, the Commission retained use of Arbitron markets, or, if Arbitron data was unavailable, the market created by the counties covered by the contours of the stations to be combined. In certain cases, the Commission permitted applicants to make alternative showings to demonstrate that the proposed combination would not lead to excessive concentration.

C. The 1996 Act

12. In the 1996 Act, Congress directed the Commission to revise its local ownership rule. Specifically, section 202(b)(1) of the 1996 Act, entitled ''Local Radio Diversity—Applicable Caps,'' required the Commission to revise its local radio ownership rule to provide that:

(a) In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(b) In a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(c) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(d) In a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

The Conference Report provides little additional detail concerning section 202(b), stating merely that ''[n]ew

paragraph *NPRM* 202](b) directs the Commission to further modify its rules with respect to the number of radio stations a party may own, operate or control in a local market.'' In particular, neither the 1996 Act nor the legislative history elaborates on the intended interplay between section 202(b) and the public interest standard contained in sections 309(a) and 310(d) of the 1934 Act.

13. In addition to section 202(b), Congress enacted section 202(h) in the 1996 Act. Section 202(h) directs the Commission to ''review its rules adopted pursuant to this section and all of its ownership rules biennially * * * and [to] determine whether any of such rules are necessary in the public interest as the result of competition.'' Section 202(h) further directs the Commission to ''repeal or modify'' any ownership rules that it finds to be ''no longer in the public interest.'' The legislative history provides little additional discussion concerning the implementation of section 202(h).

D. The Commission's Implementation of Section 202(b) and Subsequent Decisions

14. The Commission responded to Congress's directive in section 202(b) by issuing an order in March, 1996 replacing a portion of the local radio ownership rule, including both the numerical station limits and the presumption that an audience share of greater than 25% was *prima facie* inconsistent with the public interest, with the language set forth in section 202(b). The Commission found that prior notice and an opportunity for public comment were unnecessary because the ''rule changes [did] not involve discretionary action on the part of the Commission, [but] simply implement[ed] provisions of the Telecom Act that direct the Commission to revise its rules according to the specific terms set forth in the legislation.''

15. In 1998, the Commission commenced a biennial review to examine whether the local radio ownership rule was ''necessary in the public interest as a result of competition (NOI, 63 FR 15353, March 31, 1998).'' In its biennial review final report, the Commission concluded that the rule continued to serve the public interest. Although the Commission noted that consolidation had produced financial benefits for the radio broadcast industry, the Commission expressed concern that consolidation could be having an adverse affect on local advertising rates. The Commission also expressed concern that consolidation could reduce diversity of viewpoint and source diversity. Accordingly, the Commission decided to retain the local radio ownership rule without modification.

16. In the 1998 biennial review proceeding, the Commission also decided to examine the method by which it defined the relevant geographic market and counted the number of commonly owned and independent commercial radio stations for purposes of applying the rule. The Commission expressed concern that its current method of defining radio markets might be achieving results that frustrate the Congress' intent and that, together with its method of counting stations in a market for various purposes, might be undermining legitimate expectations of broadcasters, advertisers and the public as to the size of the market and the number of stations in it. The Commission accordingly initiated a rulemaking proceeding in December 2000 to examine possible revisions to its methodology for defining the market and counting the number of commonly owned and independent radio stations.

17. The 1996 revisions to the local radio ownership rule enabled greater consolidation of radio station ownership at the local level, and, since 1996, thousands of assignment and transfer of control applications have been filed to effectuate this consolidation. Although most of these applications were granted summarily, the Commission in certain instances faced concerns regarding the competitive impact of proposed transactions. In response to these concerns, the Commission concluded in a written decision that it had ''an independent obligation [under the statute] to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest.'' In several written decisions since 1996, the Commission engaged in public interest analyses that considered the potential competitive impact of the proposed transaction.

18. In addition to competitive analyses, in August 1998 the Commission began ''flagging'' public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition. Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market. Most of these flagged applications that proposed radio concentration levels that were consistent with Commission precedent were granted on delegated authority. A number of applications that remain pending propose concentration levels that would exceed the levels previously approved in Commission-level decisions.

III. Discussion

19. We propose to undertake a comprehensive examination of our rules and policies concerning local radio ownership. The radio industry has undergone substantial changes since 1996, and we are concerned that our current policies on local radio ownership do not adequately reflect current industry conditions. Our framework for analyzing proposed radio combinations particularly has led to unfortunate delays that do not serve well the interests of the agency, the parties, or the public. Our goal in this proceeding is to develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition.

20. We start with a review of the statutory framework from which we derive our regulatory authority and under which we implement our radio ownership policy. We next consider the traditional goals that have supported the local radio ownership rule—diversity and competition—and possible ways to measure and promote those goals in the modern media environment. After discussion of these subjects, we lay out possible changes to our radio ownership rules and policies. Our goal here is to consider the public interest advantages and disadvantages of various potential rule and policy changes as well as questions surrounding their implementation. In the final substantive section of this *NPRM,* we adopt an interim policy to provide guidance on the processing of radio applications pending completion of this rulemaking.

A. Statutory Framework

21. Before 1996, Commission regulation of local radio ownership was governed primarily by the statutory mandate of sections 309(a) and 310(d) that the Commission regulate the granting and transfer of radio licenses consistent with the public interest, convenience, and necessity. This public interest authority has long been held to authorize regulations, such as the local radio ownership rule, that are designed

to promote the goals of diversity and competition.

22. As a result of the 1996 Act, the broad public interest standards of Title III are no longer the sole congressional statement bearing on the question of local radio ownership. We also must consider the impact of section 202(b) and the rule changes it mandated. In deciding prior cases, the Commission expressed the view that the numerical limits mandated by section 202(b) were important tools for promoting our public interest concerns in local radio markets, but that competitive analyses were appropriate in particular cases where compliance with those limits did not fully address those concerns. Because that view developed out of decisions issued in specific cases, the Commission never received the benefit of public input that a rulemaking proceeding would have afforded. This proceeding will provide us with that opportunity. We propose alternative views on the interplay between section 202(b) and our public interest mandate. We seek comment on these views and invite comment on other possible interpretations of the relevant statutory provisions and the impact any such interpretation would have on our diversity and competition goals if adopted.

23. Commenters should explain the relevance, if any, of section 202(h)'s directive that the Commission review its ownership rules biennially to determine if they are no longer in the public interest as a result of competition. Aside from modifying or eliminating the local radio ownership rule if it is no longer in the public interest as a result of competition, are we permitted to revise or replace the current rule with another framework to address our public interest goals?

24. Commenters also are encouraged to explain how their interpretation of the relevant statutory provisions comports with traditional principles of statutory construction and the specific rule of construction set forth in section 601(c)(1) of the 1996 Act.

25. *Numerical limits are definitive.* One interpretation of the statutory framework is that Congress conclusively determined that the numerical limits specified in section 202(b) establish radio station concentration levels that are consistent with the public interest in diversity and competition.

26. *Numerical limits address diversity only.* Another possible interpretation of the statutory framework is that section 202(b) addresses the diversity prong of our public interest analysis, while leaving competition concerns to be addressed by the general public interest standard.

27. *Numerical limits presumptively consistent with public interest.* A third possible interpretation of the statutory framework is that section 202(b) established presumptively permissible levels of radio station ownership and that, therefore, the Commission should rely on section 202(b)'s numerical limits absent a specific reason to conclude that the rule is ineffective in addressing diversity or competition issues with respect to a particular proposed combination.

B. Promoting Diversity and Competition

28. If we determine that section 202(b) permits us to exercise our public interest authority to promote diversity and competition in radio broadcasting, we seek to explore the contours of these public interest goals, which have been the touchstone of our rules and policies on local radio ownership. We undertake this analysis to guide us as we consider, in accordance with the statutory framework, revisions to those rules and policies to reflect the rapidly changing media marketplace. In that regard, we are especially interested in receiving comments that provide not only the theoretical justifications for adopting a particular regulatory framework, but also relevant empirical data on the effect that consolidation in the radio industry since 1996 has had on diversity and competition in local markets.

1. Diversity

29. Diversity is one of the guiding principles of the Commission's local radio ownership rule. This principle is intended to advance the values of the First Amendment, which, as the Supreme Court stated, ''rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.''

30. In this proceeding, we intend to consider how our rules and polices concerning local radio ownership affect our goal of promoting diversity. To do this, we first must define the types of diversity we seek to ensure. Viewpoint diversity ensures that the public has access to ''a wide range of diverse and antagonistic opinions and interpretations.'' Outlet diversity ensures that the public has access to multiple distribution channels (*e.g.,* radio, broadcast television, and newspapers) from which it can access information and programming. Source diversity ensures that the public has access to information and programming from multiple content providers. We seek comment on which one or more of these three types of diversity should guide our public interest considerations. Are there other aspects of diversity that we should consider? Parties commenting on this issue should explain in detail how the public will be affected if we decide to emphasize one or more of these various aspects of diversity. We especially seek empirical data in support of parties' positions.

31. We also seek comment on how we should measure the success or failure of our diversity goal, however that goal is defined. We seek comment on the advantages and disadvantages of measuring diversity by looking, in whole or in part, to the number of independent station owners. What other measures of diversity, quantitative or qualitative, should we consider, and what tools do we have that enable us to measure diversity with a reasonable degree of accuracy? Are audience demographics an appropriate measure of diversity? Is competition an appropriate proxy for diversity, such that the presence of a competitive local market will assuage our concerns about diversity? Should we take a radio owner's market share, audience share, or subscribership into account in measuring diversity, and if so, how? In considering the various potential ways to measure diversity, we also seek comment on how their use comports with the values and principles embodied in the First Amendment of the Constitution.

32. In searching for ways to define and measure diversity, we are especially interested in the particular impact of our analysis on the radio broadcast industry and radio listeners. We seek comment on whether there are attributes of radio broadcasting that should lead us to define and measure diversity in radio differently from other media. Two attributes of radio broadcasting—its ability to reach mobile users and its audio-only programming—may give radio stations singular access to the public in certain situations, most notably when listeners are in their cars or at their offices or other places of employment. Are those or other attributes of radio broadcasting sufficiently unique that we should look at radio separately for diversity purposes, or do consumers consider other outlets as substitutes for radio? Are there other attributes we should consider, and how does any particular attribute affect how we define and measure diversity in conducting our public interest analysis?

33. We also must consider the appropriate geographic area over which to measure diversity as it relates to radio broadcasting. The current local radio

ownership rule contemplates that diversity in radio will be measured at the local level. This appears to be an appropriate result if diversity analysis is restricted to radio since radio stations that do not serve the local community do not contribute to media diversity in that community. Would the appropriate geographic area change if we consider other media, in particular Internet-related media such as Internet radio, as significant contributors of diversity? Does the appropriate geographic area for measuring diversity differ based on the type of information or programming involved, for example, local news and sports versus nationwide entertainment programming? Even if some aspects of diversity are not local in nature, should we nonetheless evaluate diversity at the local level in light of the value we traditionally have placed on ''localism'' in the broadcasting industry? Should the appropriate geographic area for measuring diversity be coextensive with the relevant geographic market for competition purposes? We seek comment responding to these questions.

34. We also seek comment on whether the level of diversity that the public enjoys varies among different demographic or income groups. Does this or other differences between broadcasting and other media reduce the level of diversity that certain demographic or income groups enjoy? What is the extent of any disparity in access to diversity, and how should we factor in that disparity in our diversity analysis? Parties commenting on this issue are encouraged to submit empirical data to support their positions.

35. As we have found previously, the current media marketplace appears robust in terms of the aggregate number of media outlets. As of June 30, 2001, the Commission had licensed 12,932 radio stations, 1,678 full power television stations, 2,396 low power TV stations, and 232 Class A TV stations. Today, there are seven national commercial television broadcast networks. The nation was served in 2000 by 1,422 daily newspapers with a total circulation of 55.8 million, and in 1996 by 7,915 weekly newspapers with a total circulation of approximately 81.6 million. As of June 2000, cable television systems served 67.4% of TV households, or 67.7 million people. These systems offered in the aggregate over 200 video programming services. Direct broadcast satellite (DBS) providers now serve nearly 13 million subscribers, or over 15% of all households served by multichannel video programming distributors (MVPDs), and other MVPDs serve another nearly 4 million subscribers. As of November 2000, 56% of Americans had access to the Internet from their homes. We accordingly seek comment on the significance of these figures and any other information about marketplace conditions that would inform our analysis.

36. The Commission has had both local and national ownership limits for radio broadcast stations. Pursuant to the 1996 Act, the Commission eliminated the national ownership limit on radio stations, in addition to relaxing its local radio ownership rules. As a result, significant consolidation occurred in the national and local radio markets. At approximately the same time that the 1996 Act became law, there were approximately 5,100 owners of commercial radio stations nationwide, while now there are only approximately 3,800 owners, a decrease of 25%. In March 1996, an Arbitron metro market had an average of 13.5 owners; in March 2001, the average was 10.3, a decrease of 22%. Other media also appear to have undergone similar consolidation. For example, in 1995 there were 543 entities nationwide that owned commercial TV stations, while today there are only 360. Does this consolidation in ownership offset the increases in media outlets? What is the relevance of this consolidation to our local radio ownership policies and to diversity in particular? Commenters are encouraged to submit empirical data on the impact of consolidation on diversity.

37. In examining the impact of greater media outlets and increased media consolidation, we note that there is considerable debate concerning the relationship between consolidation and viewpoint and source diversity. The Commission has noted the contrary theory that ''the greater the increase in concentration of ownership, the greater the opportunity for diversity of content.'' Under that theory, competing parties in a market have a commercial incentive to air ''greatest common denominator'' programming, while a single party that owns all stations in a market has a commercial incentive to air more diverse programming to appeal to all substantial interests.

38. We seek comment on these competing theories and on any relevant empirical analysis of these theories. Should commonly-owned media outlets be considered a single media ''voice'' in evaluating diversity? Does the answer depend on the type of programming involved, for example, entertainment programming versus news or public affairs programming, or on the type of media outlet involved? Does it make sense to treat increased media consolidation as contributing to diversity if the common owner exercises editorial discretion over news and programming? Even if some consolidation of media outlets does lead to greater diversity, is there a level of consolidation at which the maximum amount of diversity is achieved? How do we determine what that level is? In considering these questions, we are particularly interested in the actual experience of the radio industry. Has consolidation in local radio markets since 1996 lead to greater diversity? Commenters responding in the affirmative are encouraged to submit empirical data and analysis demonstrating both the increase in diversity and the causal link, as opposed to mere correlation, between the increase and greater consolidation in local markets. Commenters arguing that greater consolidation harms diversity also are encouraged to submit empirical data and analysis supporting their view. Evidence comparing the levels of diversity in local communities with different levels of radio concentration would be especially useful.

2. Competition

39. Radio station groups compete with each other in two ways: they compete to attract listeners, and they compete to attract advertising dollars. These two forms of competition are interrelated since advertising revenue is used to finance the production of programming, which in turn helps attract listeners, which then enables radio stations to charge advertisers. Between 1992 and 1996, the local radio ownership rule included, along with numerical limits, a presumption that a combination that created a station group with a greater than 25% audience share resulted in ''excessive concentration'' that was *prima facie* inconsistent with the public interest. As consolidation in local radio markets increased as a result of the 1996 Act, the Commission began to examine in assignment and transfer cases the potential competitive effect of proposed transactions in the local radio advertising market. Because advertisers provide the financial support for programming on commercial stations and have an incentive to prefer programming with widespread appeal, the Commission has considered competition in advertising markets to enhance the welfare of consumers.

40. As Americans increasingly are willing to pay for information and programming by subscribing to programming services, like satellite radio services, for example, it is incumbent on us to define more precisely the goals of our competition

analysis. Should we be interested in competition for listeners, competition for advertisers, or a combination of the two? With respect to advertising, does our authority to regulate the radio market justify our basing regulation on the level of competition in the radio advertising market? Are we interested in competition as a proxy for ensuring an appropriate level of diversity in a local community? If we conclude that section 202(b) definitively establishes the levels of radio station concentration that are consistent with our diversity interest, how would this affect the role of our competition analysis, if at all? Is one objective of competitive analysis to ensure a healthy radio advertising market so that radio stations not affiliated with larger station groups in a community will be able to attract sufficient advertising dollars to support their operations and their ability to provide valuable news and programming services to the public? Is one objective to protect radio advertisers from any anticompetitive pricing or conduct that could occur if a single party achieved market power or monopoly using the public airways? What precisely are the harms consumers suffer as advertising prices rise, and what empirical evidence of these harms is available? One of the objectives of our competition analysis must be to guide our biennial review examination. We seek comment on these objectives and on any other objectives that should guide the competition aspect of our public interest analysis.

41. Competition analysis requires us to define the relevant product and geographic markets in which radio stations compete, as well as the market share of the participants within the relevant market, and then weigh the competitive benefits of consolidation (*e.g.,* economies of scale and scope that may lead to lower costs and prices or superior products) against the harms (*e.g.,* the exercise of market power or reduction in output). We seek information that would help us conduct our analysis.

42. We seek comment on the relevant product market. If we look at advertising, does radio advertising constitute a separate market from other forms of media advertising? First, radio is exclusively sound-based. Second, radio allows advertisers to focus narrowly on specific demographic groups (*e.g.,* women age 18–49). Third, radio allows an advertiser to build repetition or frequency by advertising at a reasonable price. Fourth, the cost of producing a radio commercial is much lower than producing a television commercial. Fifth, radio allows for fast turnaround of advertising copy. Sixth, radio can reach people driving in their cars. We seek pertinent data that will help us determine the relevant product market.

43. We also seek comment on the relevant geographic market. We tentatively conclude that the relevant geographic market is local in nature, but we seek comment on the precise parameters of that market. What would be the appropriate market if we focused on listenership rather than advertising? With respect to advertising, is there a distinct regional or national market we also should consider in our analysis? If so, what are the relative sizes, in terms of radio station revenue and media revenue, of those markets vis-a-vis each other and local advertising markets? Do some radio stations rely more on national or regional advertising than on local advertising, and, if so, what characteristics lead to that result?

44. Under the Commission's current local radio ownership rule, the geographic market is defined based on a system of mutually overlapping signal contours, which makes the geographic market endogenous to a common owner's particular station holdings. Is this the appropriate basis for defining a relevant geographic market for purposes of a competition analysis? If so, why, and what are the benefits of this market definition? If not, what other geographic market definition should we use? Are Arbitron markets the relevant geographic market for purposes of our competition analysis? Can Arbitron radio markets be manipulated to make a particular market or transaction appear less troublesome. If so, how should we deal with this issue? If we adopt the Arbitron market as the relevant geographic market, how should we treat ''below-the-line'' stations that Arbitron reports as having audience shares or reportable revenues in the relevant market? Commenters advocating use of the Arbitron market should propose a relevant geographic market definition for radio stations not located in an Arbitron radio market. We also seek comment on any other potential geographic market definitions we should consider.

45. Once we define the relevant product and geographic markets, how should we measure the market share of those that compete in the market? The Commission has flagged proposed transactions based on market share. We seek comment on other sources of available data that we could use to determine market share and concentration levels. Although we have focused on advertising revenue and audience share as the principal potential measures of concentration, there may be other approaches we should consider.

46. Although a large market share in itself does not demonstrate market power, market power may be inferred when a party's market share is protected by high barriers to entry. We seek comment on barriers to entry into the relevant product and geographic markets.

47. Although we believe that entry by new stations is unlikely, we seek comment on whether the mere existence of other stations in the market negates market power, even where the current market shares of those stations are low. Should we consider the number of other stations in the market and their signal strength, either as an alternative to or in addition to market share? Is it easier to increase market share in the radio industry than it is in other industries? Or do market shares tend to remain static, with only small shifts in listening audiences? Further, does the amount of concentration in the market have an impact on the ability of stations to increase their market share? Is it easier for a station with a low audience share to increase its listenership in markets with low concentrations than it is in markets where one or two owners control a majority of the stations? What has been the experience of the radio industry since 1996?

48. After identifying and defining key market characteristics, we next consider the economic benefits and harms of permitting greater horizontal consolidation of local radio stations under common ownership. What are the benefits of these combinations, not only to the radio stations, but also to advertisers, and the public? We seek information on the nature and scope of efficiencies combinations might realize, and the nature and magnitude of benefits that flow through to advertisers and ultimately to consumers. We seek evidence that horizontal radio combinations produce efficiencies that flow through to advertisers and consumers. What economic harms might radio station consolidation bring? We seek additional information on the nature and scope of the economic harms that radio station combinations might bring. Studies and other evidence showing that advertising rates for radio station combinations are significantly higher after a consolidation than before a consolidation would be particularly useful. We also seek comment on associated harm to consumers. For example, if the existence of market power would prevent any efficiencies that otherwise would arise out of consolidation from flowing to the

public, or would harm the incentive of radio stations to produce quality programming responsive to community tastes and needs, that may be a harm we should consider. Similarly, if a certain level of consolidation causes the market to ''tip'' such that independently owned radio stations could not obtain sufficient revenue to remain on the air or fulfill their public interest obligations, the public interest also may be harmed.

49. We are also concerned about the possibility that coordinated behavior would increase as the number of independently owned competitors in a local market declines. Three factors could provide incentives for coordinated behavior in highly concentrated local radio markets: the ability to price discriminate, the ease of monitoring a collusive agreement, and the existence of barriers to entry. We seek comment on the relationship between radio concentration and coordinated behavior, and the adverse effects such behavior would have on listeners and advertisers.

C. Specific Case Studies

50. To assist us in formulating our radio rules and policies, we seek not only theoretical arguments but specific interest. We examine in detail particular local markets that have empirical data on the effect that consolidation will have on the public undergone substantial consolidation since 1996. We seek data on the public interest harms, if any, that have been caused by this consolidation. Has the public in these markets suffered from an unacceptable reduction in diversity? Have advertising rates increased? What has been the financial impact on independently owned radio stations? We also seek data on the specific benefits that consolidation has produced in those markets. Have the listeners received better quality radio programming, or greater diversity? Have efficiencies produced more radio voices than would otherwise have been possible? Has news and local affairs programming improved? We seek information that addresses these questions and any other public interest factors that we should consider in this proceeding.

51. Parties are encouraged to file information on any local market that they feel is relevant or helpful. In addition we would appreciate comments on three specific local markets that have experienced consolidation. The Arbitron metros that we seek information on are Syracuse, New York; Rockford, Illinois; and Florence, South Carolina.

52. The Syracuse radio metro consists of three New York counties: Madison, Onondaga and Oswego. The population of the Syracuse metro is estimated to be 650,100. This metro is the 75th largest metropolitan area by population and ranks 67th in terms of radio advertising revenue. The three Syracuse counties generated $7.2 billion in retail sales in 2000. Local advertising accounts for approximately 73 percent of station revenues.

53. The Rockford radio metro consists of two Illinois counties: Boone and Winnebago . The population of the Rockford metro is estimated to be 308,500. This metro is the 150th largest metropolitan area by population and ranks 139th in terms of radio advertising revenue. The three Rockford counties generated $3.9 billion in retail sales in 2000. Local advertising accounts for approximately 93 percent of station revenues.

54. The Florence radio metro consists of two South Carolina counties: Darlington and Florence. The population of the Florence metro is estimated to be 192,400. This metro is the 204th largest metropolitan area by population and ranks 181st in terms of radio advertising revenue. The three Florence counties generated $2.4 billion in retail sales in 2000. Local advertising accounts for approximately 80 percent of station revenues.

D. Options

55. We explore the potential ways we could use the results of the preceding diversity and competition analyses to formulate a concrete framework for addressing proposed combinations of radio stations in local markets.

1. Bright-line Rules or Case-by-Case Analysis

56. We first seek comment on the general advantages and disadvantages of relying on numerical limits or other bright-line rules to guide our public interest determination versus conducting a case-by-case public interest analysis. We see several advantages to the use of bright-line rules rather than case-by-case analysis.

57. We also see several advantages to conducting case-by-case analyses. A case-specific analysis, would allow the Commission to take into account the nuances of the particular case, and to adapt more readily to changing market (and other regulatory) conditions.

58. We seek comment on the various trade-offs between bright-line rules and case-by-case analysis. We seek comment whether the characteristics of the radio industry make it more susceptible to bright line strictures or case-by-case review or proposed radio combinations. What are the common characteristics of various radio combinations, and what differences do they have that would be difficult to encapsulate in a rule? Are there other characteristics that weigh in favor of relying on either predetermined rules or case-specific review in conducting a public interest review of a proposed combination? Are diversity concerns more amenable to being encapsulated in a bright-line rule than competition concerns?

59. We also seek comment on whether the advantages of both bright-line rules and case-by-case analysis be obtained by other regulatory tools, such as presumptions, processing guidelines, and screens. To what extent has the 50/70 screen been helpful, and what are its disadvantages? If appropriate, we could adopt a combination of rules, fact-specific analysis, and other formal and informal regulatory tools. We seek comment on the appropriate regulatory ''mix'' that would provide the greatest benefit to the agency, the industry, and the public.

2. Implementation of Radio Rules and Policies

60. We examine a number of possible frameworks that we could adopt to implement our policies on local radio ownership. We discuss several and seek comment on their advantages, disadvantages, and possible ramifications on our diversity and competition goals. We also invite suggestions for other possible frameworks that we should consider.

61. *Rely exclusively on current numerical limits.* To the extent we have the authority under the statutory framework to consider public interest factors other than compliance with the numerical limits of the local radio ownership rule, should we nonetheless rely on those limits to address our competition and diversity concerns? We seek comment on the advantages and disadvantages of relying exclusively on numerical limits. If we decide to rely exclusively on numerical limits, should we change the market definition we use to apply the rule to reflect more accurately the relevant geographic market? We seek any additional comments that would be useful in light of the broader policy issues raised in this proceeding.

62. *Rely exclusively on modified rule.* Another possibility we may consider is modifying the local radio ownership rule to revise the numerical limits or adopt a new framework entirely. We seek comment on whether our authority to tighten or loosen the numerical limits in the local radio ownership rule, or

otherwise to alter the rule, is limited by the statutory framework. To the extent we have the authority to make such changes, we seek comment on what changes we should make. Aside from revising the numerical limits, are there other standards we could adopt? For example, between 1992 and 1996, the rule provided for consideration of excessive market concentration, which was presumed to exist if a proposed radio combination would have had an audience share exceeding 25% in the Arbitron market. Do we have the authority to adopt an audience share limit, and, if so, should we adopt a similar presumption or bright-line rule? Should such a limit replace or accompany a numerical limit? Would such a rule be beneficial in promoting diversity even if the relevant market is competitive, or would numerical limit best meet our concerns regarding diversity and a market share limit best meet our concerns regarding undue market power?

63. Commenters who propose a market share limit should discuss the following issues: Should we examine audience share, share of the advertising revenue, or some other measure? If we adopt a presumption instead of a rule, what evidence would be sufficient to overcome the presumption? What percentage limit should we adopt, and why should we adopt it? For example, we could adopt limits that attempt to ensure the presence of at least three competitive firms. Commenters supporting this approach should explain how many firms should we seek to ensure remain in the market (counting all commonly controlled stations as one firm) and what maximum market share limit should we impose. Commenters should provide economic, other theoretical, and actual evidentiary support for such limits.

64. Commenters proposing that we modify the local radio ownership rule to change the numerical limits or to include new standards or presumptions should also propose what action we should take with respect to existing combinations that would not comply with the revised rule? Should we require divestiture? Should we grandfather those station groupings? Should we permit assignment and transfer of potentially non-compliant station groups to third parties? What are the benefits and harms of adopting these various approaches?

65. *Case-by-case competition analysis.* Rather than attempting to establish a bright-line rule that would address competition issues, we could examine the public interest concerns of any proposed radio combination on a case-by-case basis. We could adopt an entirely case-by-case approach or conduct a case-by-case analysis within the context of specific rules or presumptions. We could limit our case-by-case approach to competition issues, while using a bright-line rule to protect diversity. We seek comment on these alternatives.

66. To the extent, we are required to conduct a competition analysis of a proposed assignment or transfer control of a radio broadcast license, we nevertheless may have some latitude to consider the actions of the antitrust enforcement agencies.

E. Framework for Possible Case-by-Case Competitive Analysis

67. We consider what the framework for a case-by-case competitive analysis should be if we decide to adopt that approach. We lay out certain possible frameworks and competitive factors we could take into account in evaluating a proposed radio station combination. We seek comment on these factors and on our framework generally.

1. General Framework

68. In evaluating the competitive impact of a proposed license transfer, we could adopt the framework that we have used for assessing market power in other contexts, which is also embodied in the antitrust laws. We would first analyze each proposed radio combination by defining the relevant markets. Next, we would evaluate the effects of the transaction on competition in the relevant market. We seek comment on this approach.

69. One alternative of the approach is to develop certain assumptions that would apply to all proposed radio station combinations. Earlier in this *NPRM,* we sought comment about the relevant product and geographic markets to which radio belongs, barriers to entry, and the benefits and costs of consolidation. We seek comment concerning the assumptions that we could consistently apply in evaluating applications proposing radio station combinations and the advantages or disadvantages of those assumptions. If we adopt certain assumptions, we propose that the party seeking to demonstrate that an assumption is not true in a particular case bears the burden of proof as to that fact. We seek comment on this proposal.

70. Another possible alternative to the basic analytical framework is to examine not only whether a proposed transaction could lead to the exercise of market power, but to take the additional step of considering whether that market power would harm consumers, as opposed to advertisers, of radio broadcasting services. Are there certain situations in which the exercise of market power would not harm consumers? Are there situations in which consumers would affirmatively benefit if we permitted a certain degree of market power in the relevant market? For example, would permitting some degree of market power in smaller geographic markets generate more diverse or better quality programming for the people living in those markets? If so, how do we draw the line between acceptable levels of market power and unacceptable levels of control over local media, and what are the relevant considerations we should examine to help us determine on which side of the line a particular transaction falls? We seek comment on these issues.

2. Specific Factors

71. We seek comment on the specific factors we should consider within our general framework. We seek comment on how we should evaluate these factors in the context of a particular case. In addition, are there other factors we should consider?

72. We seek comment on how we should review applications proposing to assign or transfer control of existing station groups to a new owner.

73. We invite comment on how to treat under our proposed guidelines claims that a station is failing. Highly concentrated radio markets often contain stations with small revenue share that are independent of the one or two largest radio groups.

74. In our decision revising the television ownership rules, we adopted several criteria to evaluate whether a failing station showing would justify waiver of the television duopoly rule in a particular case. We stated that we would presume a waiver would serve the public interest if each of the following criteria were satisfied:

(a) One of the merging stations has had low all-day audience share.

(b) The financial condition of one of the merging stations is poor. A waiver is more likely to be granted where one or both of the stations has had a negative cash flow for the previous three years. We required the applicant to submit data, such as detailed income statements and balance sheets, to demonstrate this and stated that the Commission staff will assess the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.

(c) The transaction will produce public interest benefits. A waiver will be granted where the applicant

demonstrates that the tangible and verifiable benefits of the transaction outweigh any harm to competition and diversity. At the end of the stations' license terms, the owner of the combined stations must certify to the Commission that the public interest benefits of the transaction are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

(d) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed station waiver applicants, one way to satisfy this fourth criterion is to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.

We further provided that a combination formed as a result of a failing station waiver could be transferred only if the combination met the revised duopoly rule or the waiver standards (including the failing standard just described) at the time of the transfer.

75. We invite comment as to whether to use a similar approach in our competitive analysis. Third, we seek comment on how we should analyze applications proposing the granting of a new license or the acquisition of an unbuilt facility or a ''dark'' station. Competitive analysis focusing on concentration in the advertising market or audience shares would be insufficient to analyze these transactions because new licenses, unbuilt stations, and dark stations generally will not have an associated radio advertising business or audience share. In the absence of this data, what should we consider in determining the effect of a proposed transaction on competition? And how should we weigh the relevant public interest benefits and harms?

3. Treatment of Brokerage and Sales Agreements

76. *Local Marketing Agreements and Time Brokerage Agreements.* A local marketing agreement (LMA) and time brokerage agreement (TBA) is ''a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming.'' As we consider whether and how to conduct case-by-case competitive analyses of radio transactions, we seek comment on the appropriate regulatory treatment of LMAs and TBAs.

77. To the extent we decide to conduct a case-by-case analysis of proposed radio transactions, how should we evaluate LMAs or TBAs? Should we continue the practice of treating the merging parties as independent economic actors regardless of the economic realities of the relevant market? If we ignore economic realities, what purpose would our competitive analysis serve? On the other hand, if we treat the merging parties as a single economic unit because of a pre-existing LMA or TBA, what potential competitive harm would our analysis ever uncover? We could address this problem by requiring prior Commission approval of LMAs and TBAs, in some if not all circumstances. If so, what would those circumstances be? What are the costs and benefits of these various procedures? If we adopt new policies towards LMAs or TBAs, how should we apply those policies towards pre-existing agreements? We seek comment on these proposals and on any other proposals that we should consider with regard to the regulatory treatment of LMAs and TBAs?

78. *Joint Sales Agreement.* Joint sales agreements (JSAs) involve primarily the sale of advertising time and not decisions concerning programming.

79. We seek comment on the appropriate regulatory treatment of JSAs. Even if we adopt a bright line rule, JSAs would not be attributable to the sales agent. Should we reconsider this blanket exemption to attribution in light of the new local radio ownership policy we intend to adopt? If so, what should our new rule be? To the extent we decide to conduct a case-by-case analysis of proposed radio transactions, how should we evaluate JSAs? Should we distinguish between JSAs and LMAs or TBAs in a case-by-case review of proposed transactions or in other contexts? What are the reasons for and against affording similar treatment to all three types of agreements?

IV. Interim Policy

80. We set forth in this section the interim policy that the Commission will apply to guide its actions on radio assignment and transfer of control applications pending a decision in this proceeding. We recognize that certain guidelines need to be established both to handle currently pending radio assignment and transfer applications and to address any future applications filed while this proceeding is pending. At the same time, we are mindful of the concern that our policy not expressly or implicitly prejudge, or be viewed as prejudging, our ultimate decision in this proceeding. In that regard, we believe that any fundamental changes we make to our policy and procedures governing radio station combinations should be the result of the record in this rulemaking proceeding, and should not be implemented as an interim measure. We believe that the interim policy we are adopting today strikes a fair balance that addresses our statutory responsibilities while providing guidance to applicants and the public on the process the Commission will use to resolve pending applications during this interim period.

81. Consistent with our precedent and the principles, we will continue to examine the potential competitive effects of proposed radio station combinations, and, and to that end, we will continue to rely on the 50/70 screen to bring to our attention proposed radio transactions that may raise competitive concerns. While we are aware that the utility and appropriateness of 50/70 screen has been the subject of disagreement, we are concerned that adopting another screen or set of processing guidelines on an interim basis would create significant confusion and uncertainty to applicants and could be seen as prejudging the rulemaking proceeding.

82. We will presume that an application that falls below the screen will not raise competition concerns, and the staff will not conduct a further competitive analysis of those proposed transactions absent the filing of a petition to deny raising competitive issues. We establish the following generic categories of information that may be requested or received by the staff in conducting its competitive analysis:

(a) *Product market definition.* During the interim period, the Commission will presume that the relevant product market is radio advertising. The staff nevertheless should consider evidence from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising.

(b) *Geographic market definition.* During the interim period, the Commission will presume that the relevant geographic market is the Arbitron metro market. The staff nevertheless may ask for or receive evidence from the parties that the relevant geographic market in a specific case is larger, smaller, or otherwise

different from the Arbitron metro market.

(c) *Market participants.* The staff may ask for or receive evidence concerning the firms that participate in the relevant product and geographic markets. The list of market participants should include firms that could enter the relevant product and geographic markets within one year without expending significant sunk costs of entry and exit in response to a small but significant and non-transitory increase in price. If the presumptive product and geographic market definitions are used, the list of market participants should include operating commercial radio stations and any ''dark'' station that might be expected to become operational in response to such an increase in price.

(d) *Market shares and market concentration.* The staff may ask for or receive evidence concerning the market shares of the market participants. If the presumptive product and geographic market definitions are used, the radio advertising revenues reported in the BIA Master Access Database will be presumed to be an accurate reflection of actual market shares, absent persuasive evidence that another measure of market share should be used.

(e) *Barriers to entry.* The staff may ask for or receive evidence concerning the barriers to entry into the relevant product and geographic markets, including the timeliness, likelihood, and sufficiency of entry to counter any potential market power.

(f) *Potential adverse competitive effects.* The staff may ask for or receive evidence concerning the potential adverse competitive effects of a proposed transaction. Relevant evidence may include direct proof of adverse competitive effects or facts that demonstrate that structural conditions (*e.g.,* a high market share and significant barriers to entry) will facilitate the exercise of market power.

(g) *Efficiencies and other public interest benefits.* The staff may ask for or receive evidence concerning any economic efficiencies that the proposed transaction would produce. In addition, the staff may ask for or receive evidence concerning other public interest benefits the proposed transaction would provide listeners or advertisers, such as improvements in the quality, scope, and quantity of community responsive programming, improved community service, and the furtherance of localism. Parties asserting that a proposed transaction will produce efficiencies or other public interest benefits should show both how the transaction will produce those benefits and how those benefits will flow through to listeners or advertisers.

83. After completing its preliminary competitive analysis of the proposed transaction, the staff may grant any application that is consistent with the public interest and that may be granted on delegated authority. For applications that the staff cannot grant, we establish the following timetable to ensure that they are resolved expeditiously. For each application that, as of the date of adoption of this *NPRM*, has been pending for over one year, within 90 days of the date of adoption of this *NPRM*, the staff will distribute to the Commission a draft order recommending that the application either be granted or designated for hearing. For all other currently pending applications, within six months of the date of adoption of this *NPRM*, the staff will distribute to the Commission a draft order recommending that the application either be granted or designated for hearing. For all applications filed after the date of adoption of this *NPRM*, within six months of the date after such application is filed, the staff will distribute to the Commission a draft order recommending that such application either be granted or be designated for hearing. In all of these cases, the draft order shall include the relevant facts of the proposed transaction, and the staff's competitive analysis and recommendation, including any issues to be resolved at hearing (if the staff recommends a hearing). After receiving the draft order, the Commission shall then decide whether the relevant factors support grant (with or without conditions) of an application or whether the application should be designated for hearing.

84. For applications that the Commission decides to designate for hearing, the hearing designation order shall afford the applicants with the opportunity to elect instead to have their applications held pending completion of this rulemaking proceeding and having the outcome of this proceeding apply to their application. We provide this election because we believe it is appropriate to provide applicants with the ability to have their applications evaluated under our permanent radio rules and policies rather than our interim policy. We caution, however, that our provision of this election will not in any way prejudice or limit the range of actions we could take in processing pending applications, including designation for hearing, upon completion of this rulemaking.

85. The interim policy will apply to currently pending applications to assign or transfer control of radio broadcast stations. This interim policy also will apply to radio assignment or transfer applications filed on or after the date we adopt this *NPRM* until we adopt a decision in this proceeding.

V. Administrative Matters

86. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before 60 days after publication of the item in the **Federal Register**, and reply comments on or before 90 days after publication of the item in the **Federal Register**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

87. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW–A325, Washington, D.C. 20554.

88. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room, 2–C207, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for

Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case, MM Docket Nos. 01–317, 00–244, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, S.W., Room CY–B402, Washington, DC 20554.

89. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY–A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418–0270, (202) 418–2555 TTY, or *bcline@fcc.gov.* Comments and reply comments also will be available electronically at the Commission's Disabilities Issues Task Force web site: *www.fcc.gov/dtf.* Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat.

90. *Ex Parte Rules.* This is a permit-but-disclose notice and comment proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* sections 1.1202, 1.1203, and 1.1206(a).

91. *Initial Regulatory Flexibility Analysis* (''IRFA''). As required by section 603 of the Regulatory Flexibility Act (''RFA''), the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this *NPRM.* Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the radio broadcasting industry. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *NPRM,* but they must have a distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'') in accordance with section 603(a) of the RFA, Public Law 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981), as amended.

92. *Authority.* This *NPRM* is issued pursuant to authority contained in sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 307.

VI. Ordering Clauses

93. Pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310 this NPRM are adopted.

94. The Interim Policy set forth herein *is adopted.*

95. The Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of this *NPRM* , including the IRFA, to the Chief Counsel for Advocacy of the SBA.

VII. Initial Regulatory Flexibility Analysis

96. As required by the Regulatory Flexibility Act of 1980, as amended, the Commission has prepared this present IRFA of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *NPRM* . Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM.* The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of SBA. See 5 U.S.C. 603(a). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

97. Application to and consent by the Commission are required under section 310 of the Communications Act before the sale of any licensed radio broadcast station may be consummated. The Commission may grant its consent only if it determines that ''the public interest, convenience and necessity will be served thereby.'' 47 U.S.C. 310(d). The effects of a proposed transaction on the diversity of voices and economic competition in a given market have long been core considerations in making this public interest determination. The Commission's concern for diversity and competition in broadcast markets has prompted us to adopt and maintain structural ownership rules intended to vindicate these interests. Until recently, these ownership rules have been sufficiently strict that we have not been presented with proposed transactions that comply with the ownership rules but nonetheless present economic concentration issues. The Telecommunications Act of 1996, however, substantially relaxed the Commission's local radio ownership rules. Heretofore, the Commission's radio ownership rules have been based strictly on the number of stations proposed for common ownership, without regard to the power or dominance of the stations that are being combined. This was not a problem under the former Commission rules which strictly circumscribed the number of radio stations that could be commonly owned in a local market. Now, however, under the new rules, which allow greater numbers of radio stations to be commonly owned in local markets, the Commission has encountered sales applications that propose transactions which comply with the numerical station limits but which result in substantial economic concentration in the relevant economic markets. In such cases, the Commission ''has an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local ownership limits would otherwise have an adverse competitive effect in a particular radio market and thus, would be inconsistent with the public interest. 47 U.S.C. 309(a) (requiring the Commission to make a determination that the transfer or assignment of a broadcast license would be in the public interest).'' Accordingly, we are adopting this *NPRM* to consider possible changes to our local radio ownership rules and policies.

Legal Basis

98. This *NPRM* is adopted pursuant to sections 1, 2(a), 4(i), 303, 307, 309, and 310, of the Communications Act, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310.

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

99. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction. In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the

Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

100. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 1992, there were approximately 275,801 small organizations. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.'' As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

101. The SBA defines a radio broadcasting station that has $5 million or less in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Radio broadcasting stations, which primarily are engaged in radio broadcasting and which produce radio program materials, are similarly included. However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS code. The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. As of June 30, 2001, Commission records indicate that 12,932 radio stations (both commercial and noncommercial) were operating of which 2,216 were noncommercial educational FM radio stations. Applying the 1992 percentage of station establishments producing less than $5 million in revenue (*i.e.,* 96 percent) to the number of commercial radio stations in operation, (*i.e.,* 10,716) indicates that 10,287 of these radio stations would be considered ''small businesses'' or ''small organizations.'' These estimates may overstate the number of small entities because the revenue figures on which they are based do not include or aggregate revenues from non-radio affiliated companies.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

102. The *NPRM* proposes no new recordkeeping or other compliance requirements associated with the subject rules and policies. These rules amend the Commission's procedures and review processes and do not change existing documentation and application requirements.

Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

103. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

104. In this *NPRM*, the Commission explores the underpinnings of two principles underlying the regulation of the radio broadcast industry, namely diversity and competition. The principles of diversity and competition are of particular import to small entities. Thus we seek comment on the general advantages and disadvantages of relying on numerical limits or other bright-line rules to guide our public interest determination versus conducting a case-by-case competitive analysis. The framework minimizes the impact on small entities by not subjecting to further competitive analysis transactions below a threshold level.

105. This *NPRM* invites comment on a number of alternative interpretations of the relationship between the revision of local radio ownership rules, embodied in section 202(b) of the Telecommunications Act of 1996 and the Commission's public interest mandate. Specifically, we propose alternative views on that relationship in the *NPRM* seek comment on these proposals, and invite additional possible interpretations of the relevant statutory provisions. Further, the *NPRM* seeks comment on how the Commission's rules and policies concerning local radio ownership affect our goal of promoting diversity. In light of the fact that a majority of the radio broadcasting stations likely to be affected are small, we seek comment on the impact of industry consolidation on both viewpoint and source diversity.

106. In addition to the principle of diversity, this *NPRM* seeks comment on the principle of competition in the radio broadcast industry, with regard to the definitions of the marketplace and measurement of market share.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

107. None.

List of Subjects in 47 CFR Part 73.

Radio broadcasting.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–30526 Filed 12–10–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 01–317 and 00–244; FCC 01–329]

RIN 4217

Definition of Radio Markets

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes changes to local ownership rules and policies concerning multiple ownership of radio broadcasting stations. The Commission examines the effect our current rules has had on the public and seeks comment to better serve our communities. This action is also intended to consider possible changes to our current local market radio ownership rules and policies in accordance with the Telecommunications Act of 1996. Because of the similarity of the issues presented in Multiple Ownership of Radio Broadcast Stations in Local Markets to those in the Matter of Definition of Radio Markets, the two actions were, in effect, consolidated.