

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MB Docket Nos. 09–182 and 07–294; FCC 11–186]

### 2010 Quadrennial Regulatory Review

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its broadcast ownership rules quadrennially to determine whether these rules are necessary in the public interest as a result of competition. This document solicits comment on proposed changes to the broadcast ownership rules in compliance with this requirement. In addition, this document solicits comment on certain aspects of the Commission's 2008 *Diversity Order* that the U.S. Court of Appeals for the Third Circuit remanded and directed the Commission to address in this proceeding. This document solicits comment also on potential changes to the Commission's broadcast attribution rules.

**DATES:** The Commission must receive written comments on or before March 5, 2012 and reply comments on or before April 3, 2012. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before March 19, 2012.

**ADDRESSES:** Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via email to [PRA@fcc.gov](mailto:PRA@fcc.gov) and to Nicholas A. Fraser, Office of Management and Budget, via email to [Nicholas\\_A\\_Fraser@omb.eop.gov](mailto:Nicholas_A_Fraser@omb.eop.gov) or via fax at (202) 395–5167.

**FOR FURTHER INFORMATION CONTACT:** Hillary DeNigro, Industry Analysis Division, Media Bureau, FCC, (202) 418–2330. For additional information concerning the PRA proposed information collection requirements contained in the *Notice of Proposed Rulemaking*, contact Cathy Williams at (202) 418–2918, or via the Internet at [PRA@fcc.gov](mailto:PRA@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This *Notice of Proposed Rulemaking*, in MB Docket Nos. 09–182; 07–294, FCC 11–186, was adopted and released on December 22, 2011. The complete text of the document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 12th Street SW., Washington, DC 20054. Customers may contact BCPI, Inc. at their Web site <http://www.bcpi.com> or call 1–(800) 378–3160.

### Initial Paperwork Reduction Act of 1995 Analysis

This *Notice of Proposed Rule Making* may result in a new or revised information collection requirement. If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the **Federal Register** inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501–3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

### I. Synopsis of the Notice of Proposed Rulemaking

#### A. Introduction

1. Pursuant to a statutory mandate under the Telecommunications Act of 1996, the Commission seeks comment in this *Notice of Proposed Rulemaking* on the Commission's media ownership rules and proposed changes thereto. The Commission is required by statute to review its media ownership rules every four years to determine whether they “are necessary in the public interest as the result of competition.” A challenge in this proceeding is to take account of new technologies and changing marketplace conditions while ensuring that the media ownership rules continue to serve the Commission's public interest goals of competition, localism, and diversity. The Commission is also 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, the Commission seeks comment in this proceeding on the aspects of the

Commission's 2008 *Diversity Order* (73 FR 28361, May 16, 2008, FCC 07–217, rel. Mar. 5, 2008) that the Third Circuit remanded in *Prometheus Radio Project v. FCC (Prometheus II)*.

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 reported growth in subscribership. 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.

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. The 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.

Some parts of the population, including minorities, people with disabilities, and low-income Americans, have much lower rates of broadband adoption. 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. Much of the content available by streaming and downloads requires minimum broadband speeds. The Commission is 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 process. Thereafter the Commission released a *Notice of Inquiry* (75 FR 33227, June 11, 2010, FCC 10–92, rel. May 25, 2010) (*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 the Commission's policy goals. The *NOI* sought input on developments in the marketplace since the last review and on whether the Commission should adopt alternatives to bright-line, sector-specific rules. It also sought comment on the Commission's 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, which were conducted by outside researchers and Commission staff. The Commission previously released the studies to allow parties additional time to review the data and analyses and now is seeking formal comment on them herein. As discussed herein, 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 the Commission invites 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 Commission's review of the media ownership rules in the *2006 Quadrennial Review Order* (73 FR 9481, February 21, 2008, FCC 07–216, rel. Feb. 4, 2008). 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. 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. 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. 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. 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 the Commission now addresses in this proceeding.

8. As discussed in detail herein, 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. The Commission believes that the public interest is best served by these modest, incremental changes to the Commission's rules. Recognizing current market realities, the Commission seek comment on the following proposals:

- **Local Television Ownership Rule.** The Commission tentatively concludes that it should retain the current local television ownership rule with minor modifications. Specifically, the Commission proposes to eliminate the Grade B contour overlap provision of the current rule. The Commission tentatively concludes that it should retain the prohibition against mergers among the top-four-rated stations, the eight-voices test, and the existing numerical limits. In addition, the Commission seeks comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, the Commission seeks comment on whether multicasting should be a factor in

determining the television ownership limits.

- **Local Radio Ownership Rule.** The Commission proposes to retain the current local radio ownership rule. The Commission also seeks comment on modifications to the rule and whether and how the rule should account for other audio platforms. The Commission proposes to also retain the AM/FM subcaps, and seeks comment on the impact of the introduction of digital radio. The Commission seeks comment on whether to adopt a waiver standard and on specific criteria to adopt.

- **Newspaper/Broadcast Cross-Ownership Rule.** The Commission tentatively concludes that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. The Commission proposes 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. The Commission proposes to adopt a rule that includes elements of the 2006 rule, including the top 20 DMA demarcation point, the top-four television station restriction, and the eight remaining voices test. The Commission seeks comment on these proposals and whether to incorporate other specific elements and factors of the 2006 rule.

- **Radio/Television Cross-Ownership Rule.** The Commission proposes to eliminate the radio/television cross-ownership rule in favor of reliance on the local radio rule and local television rule. The Commission believes that the local radio and television ownership rules adequately protect the Commission's localism and diversity goals and seeks comment on this proposal.

- **Dual Network Rule.** The Commission tentatively concludes 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, the Commission seeks 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. 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.

### B. Policy Goals

10. The Commission reaffirms 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 the Commission should consider. The Commission did not receive many specific comments on defining, measuring, and evaluating the performance of the Commission's policy goals, and the Commission invites such comment again. In particular, the Commission describes and seeks comment below on the Commission's 11 Media Ownership studies that evaluate the impact of local media market structure on the Commission's policy goals. In addition, the Commission invites parties to submit their own studies evaluating the impact of particular market structures on the Commission's goals. Below, the Commission discusses its competition, localism, diversity, and other policy goals. The Commission also discusses how it should evaluate the costs and benefits of the 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. Accordingly, the Commission sought comment on a variety of potential ways to assess competition in the media marketplace. The Commission discussed whether competition among broadcast outlets is likely to benefit consumers by making available programming that satisfies consumer preferences.

12. The Commission reaffirms its longstanding commitment to ensure that media markets are competitive. The Commission strives to set ownership rules that create a marketplace in which broadcast programming meets the needs of consumers, and the Commission believes competition is a key means to

that end. Moreover, the Commission reaffirms the Commission's previous findings that the local ownership rules should be analyzed in the context of local markets. The Commission finds 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 its traditional localism goal needs to be redefined in light of today's media marketplace.

14. The Commission reaffirms its commitment to promote localism through the media ownership rules. 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." The 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." The Commission continues to evaluate the extent of localism in broadcasting markets by determining whether programming is responsive to local needs and interests. The Commission's focus continues to be on news and public information programming. The Commission continues to believe that these types of programming are relevant to evaluating the extent of localism as it exists in local markets. While the Commission's core commitment to promoting localism in media remains undiminished, the Commission also recognizes that changes in the marketplace and changes in consumer preferences may impact aspects of localism in today's marketplace. Thus, the Commission believes 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 Web sites 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, the

Commission seeks 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 diversity in today's marketplace to determine whether the current media ownership rules are meeting the Commission's 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. 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." The Commission historically has approached the diversity goal from five perspectives: viewpoint, outlet, program, source, and minority and female ownership diversity. In the *2002 Biennial Review Order* (68 FR 46286, August 5, 2003, FCC 03-127, rel. July 2, 2003), the Commission concluded that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation and that the media ownership rules ensure competition in local markets. In addition, the Commission concluded that source diversity was not one of the diversity goal objectives of the media ownership rules. The Commission reaffirms those conclusions. 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. 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. 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. It can be questioned whether the latter approach is as likely to provide the public with information from "diverse and

antagonistic sources.” The Commission seeks comment on this issue and on how the Commission should account for this aspect of its diversity goal in any rules the Commission might adopt.

17. The Commission reaffirms its belief that media ownership limits are necessary to preserve and promote viewpoint diversity. Furthermore, the Commission also reaffirms its conclusion that viewpoint diversity is generally promoted by competition among independently owned media outlets. The Commission believes that a key measure of how well the Commission’s current rules promote the Commission’s overall diversity goal is the availability of local news and information, and the Commission examines that availability herein as it relates to local ownership structure and the level of civil engagement.

18. *Minority and Female Ownership.* In the *NOI*, the Commission sought comment on a variety of questions regarding the impact of the ownership rules on minorities and females, including minority and female ownership of broadcast stations. The Commission asked how its localism goal should be defined and measured as applied to historically underserved minority communities. 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 their ownership shares in companies that are content providers or in other aspects of media production aside from station ownership.

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. 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. DCS supports measures that facilitate minority media ownership.

20. The Commission tentatively concludes that its 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 the media ownership rules. The Commission seeks comment on this tentative conclusion. The Commission

also seeks additional comment on how the proposed framework for each of the 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 it should consider any other formal policy goals, in addition to the Commission’s competition, diversity, and localism goals, in determining ownership limits in this proceeding. Specifically, the Commission sought comment on whether to consider the impact of the media ownership rules on the availability to all Americans of news and information, including national news and information. The Commission also sought comment on whether it should consider the impact of its rules on investigative journalism, and whether any specific aspects of the National Broadband Plan, including issues related to broadband access, are relevant to the media ownership rules. The Commission tentatively concludes not to adopt any other formal policy goals in this proceeding. As described above, the Commission’s longstanding policy goals of competition, localism, and diversity are broadly defined to promote the core responsibilities of broadcast licensees. The Commission notes that its 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. The Commission seeks comment on its 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.* The Commission seeks information that will help it balance the positive benefits of the ownership limits in promoting the Commission’s policy goals against the costs that specific limits may impose on consumers and firms. The Commission has discussed in broad terms in this section the policy goals it seeks to promote. Section V of the *Notice of Proposed Rulemaking* presents the studies that the Commission commissioned to quantify the influence of the Commission’s rules on the policy goals. In particular, Media Ownership Study 2 quantifies the benefits and costs of particular media market structures on consumers. The Commission seeks comment on the appropriate use of this study in quantifying the impact of the media ownership rules on consumers and balancing the positive effects on consumers with any adverse effects on firms.

23. The Commission’s studies do not address the direct impact ownership limits have on media outlets. The Commission seeks 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? The Commission seeks 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 the Commission balance the effects of its rules on consumers with those on firms, in particular, media outlets? Should each receive equal weight? How should the Commission account for situations in which the costs and the benefits of a change in the rules occur at different points in time? The Commission encourages commenters to provide examples of the suggested balancing of the Commission’s rules.

### C. Media Ownership Rule Proposals

#### 1. Local Television Ownership Rule

##### a. 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. 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.

26. Based on the record in this proceeding, the Commission tentatively concludes that the local television ownership rule, with certain modifications discussed below, remains necessary in the public interest as a result of competition. The Commission tentatively agrees with the Commission's previous determination that the local television ownership rule is necessary to promote competition. While the Commission proposes to adopt a local television ownership rule to advance its competition goal, the Commission seeks comment on whether the proposed rule also is necessary to promote the Commission's localism and viewpoint diversity goals.

27. As discussed in greater detail below, the Commission proposes to eliminate the Grade B contour overlap provision of the current rule and seek comment on this proposal. The Commission tentatively concludes that it should retain the prohibition against mergers among the top-four-rated stations. The Commission proposes to also retain the 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, the Commission seeks comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, the Commission seeks comment on whether and how the digital transition and multicasting may impact television ownership limitations. Finally, the Commission seeks comment on the impact of the proposed rule on minority and female ownership.

#### b. 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. 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.

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. 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. In addition, they contend that the cost savings generated by common ownership allow stations to add local newscasts and other locally oriented programming.

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. *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. 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. 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. 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 would not serve the Commission's localism goal.

31. In the media ownership studies, the Commission sought data to help determine how best to structure a local television ownership rule to satisfy the Commission's 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. The study does not find significant evidence that common ownership affects local media usage or programming. 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. 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. 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.

#### c. 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. Broadcasters contend, therefore, that the Commission should modify the local television ownership rule to permit increased common ownership in local markets.

33. The Commission proposes that the local television ownership rule continue to focus on promoting competition among broadcast television stations in local television viewing markets. The Commission tentatively concludes that the video programming market is distinct from the radio listening market. The Commission finds 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. The Commission previously has determined that the video programming market includes both broadcast television stations and cable networks. Moreover, the Commission recognizes that viewers are increasingly able to 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. 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. The Commission seeks comment on whether the development of local and hyperlocal Web sites should alter this analysis. The Commission seeks 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. The Commission also seeks 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. 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 the Commission determine that, contrary to its tentative conclusion, the local television ownership rule should focus on promoting competition among broadcast television stations and alternatives to broadcast television stations in local markets, the Commission seeks comment below on whether and how to include these alternatives in the rule, either in the eight-voices test or any alternate framework the Commission may adopt for determining whether to permit common ownership in a local market.

35. Moreover, the Commission seeks 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 Web sites 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? The Commission tentatively concludes 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 Web sites provide only a small amount of local news content. The Commission has not seen evidence that non-video information sources modify programming decisions based on the actions of local television stations or vice versa. The Commission seeks 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 digital transition and ceased broadcasting in analog. The Commission 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 the Commission should rely on

geographic areas, such as a television DMAs. NAB asserts that the Commission should, to the extent feasible, maintain a contour-based approach for the local television ownership rule. 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.

37. The Commission believes that eliminating the contour approach is necessary to be consistent with today's marketplace realities. Therefore, the Commission tentatively concludes that it will eliminate the Grade B contour approach and rely solely on Nielsen DMAs. Because of the Commission's mandatory carriage requirements, 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, the 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, the Commission tentatively concludes that eliminating the contour-overlap requirement in favor of the DMA-based approach would result in a more consistent application of the local television ownership rule. Moreover, the Commission believes 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. The Commission seeks comment on these tentative conclusions.

38. 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. 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. The Commission has long recognized in the television ownership rule that DMAs are the relevant geographic market in which television stations compete, and the Commission expects that a DMA-based approach here will achieve benefits similar to those found in adopting the Arbitron Metro market standard in the radio context. 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. 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.

39. The Commission recognizes, 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, the Commission seeks 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. The Commission seeks comment on how frequently such situations arise. The Commission tentatively concludes 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 the Commission's policy goals would likely be outweighed by these countervailing considerations. Consistent with the Commission's previous decisions, the Commission seeks 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. The Commission would continue to allow *pro-forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. Are the Commission's 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? 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? The Commission seeks 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." 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. The Commission also found that a significant "cushion" of audience share continued to separate the top-four stations from the fifth-ranked station. The Commission also found that mergers involving two top-four stations would harm competition in the local broadcast television advertising market. The Commission tentatively concludes that this market does not have a direct impact on consumers and should not be a focus of the Commission's inquiry. The Commission seeks comment on these tentative conclusions. The Commission tentatively concludes that retaining the top-four prohibition is necessary to promote competition for the reasons set forth in the *2006 Quadrennial Review Order*. The Commission continues to believe that this rationale supports retention of the top-four prohibition, and the Commission seeks comment on these tentative conclusions.

41. The Commission seeks comment also on the impact of the top-four prohibition on its 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. Allowing these stations to combine, they argue, could lead to increased news offerings. The Commission notes, however, that

evidence suggests that the majority of top-four stations are already originating substantial amounts of local news. Moreover, there is generally a drop off between the fourth- and fifth-rated station in the market in the amount of local news broadcast. 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. The Commission seeks comment on these issues. The Commission also seeks 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. As discussed in greater detail below, with respect to a potential waiver standard applicable to small markets, the Commission seeks comment on whether permitting common ownership in small markets, even between top-four stations, would promote additional local news.

42. In addition, the Commission seeks comment on whether it should retain the top-four prohibition to also promote the Commission's 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 viewpoints. Although the Commission recognizes the limitations of this finding for the Commission's analysis, since a top-four prohibition does not guarantee the theoretical result, Media Ownership Study 9 provides some support for maintaining at least four strong independent outlets. Furthermore, the Commission recognizes 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 the Commission's viewpoint diversity goal. The Commission seeks comment on Media Ownership Study 9's findings, as well as how the top-four prohibition impacts the Commission's viewpoint diversity goal.

43. Furthermore, the Commission invites 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 discussed 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. 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. 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." 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.

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, the Commission seeks comment on whether and, if so, how it 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 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 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 the Commission amend the top-four prohibition to apply to these types of transactions? Should the Commission 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 the Commission 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 the Commission's local ownership rules or goals? If so, how would the Commission 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. The Commission, in the previous media ownership proceeding, determined that it was necessary to retain the eight-voices test in order to promote competition. 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. 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. 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." The Commission proposes to retain the eight-voices test for the reasons set forth in the 2006 *Quadrennial Review Order* and seeks comment on this proposal. The Commission notes that the current eight-voices test relies on Grade B contour overlap to determine whether a voice is counted. Consistent with the Commission's decision to eliminate the Grade B contour overlap provision from the local television ownership rule, the Commission proposes 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. The Commission seeks comment on this proposal. 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 the Commission's competition goal while allowing for additional common ownership?

47. Though the Commission proposes to retain the eight-voices test, including the decision to exclude nonbroadcast television media from the voice count, in the event the Commission determines it is appropriate to consider alternative sources of video programming in the local television ownership rule, the Commission seeks comment specifically on whether market conditions have changed since the 2006 quadrennial proceeding such that the Commission should consider alternative sources of video programming in the voice count. If the Commission should consider additional sources of video programming, how should the Commission 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 the Commission consider as an additional voice video programming delivered via MVPDs or Internet video 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 the Commission rely on in determining whether the threshold is met? Should the Commission consider adoption rates? Should the Commission consider, and if so how, the local or non-local nature of the voice?

48. As an alternative to the eight-voices test, the Commission seeks comment on whether to adopt a different framework for determining whether to permit common ownership in a local market. For example, the Commission 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, the Commission tentatively proposes to retain the duopoly rule; therefore, any tiered approach the Commission 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 the Commission 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. What would be the benefits and/or drawbacks of such an approach in the television ownership rule?

49. If the Commission 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 the Commission 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 the Commission rely on in determining whether the threshold is met? Should adoption also be considered? If the Commission were to rely on Nielsen DMA rank, how would the Commission incorporate these alternative sources into the 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. 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.

51. The Commission proposes to retain the current numerical limits. Based on the record in this proceeding, the Commission has not observed

sufficient changes in the marketplace to allow an entity to own more than two television stations in a local market. Moreover, the Commission notes 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, the Commission does not believe that the record in this proceeding supports limiting ownership to a single station in all local television markets. The Commission seeks comment on these tentative conclusions. For example, is there evidence that the current rule has produced actual harms to the Commission's 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 the Commission's fundamental policy goals. Therefore, the Commission seeks comment on whether it should adopt a waiver standard for stations in markets where the proposed rule would limit station ownership to a single station for all licensees in the market and how such a standard would affect the Commission's policy goals. In the event the Commission determines such a waiver standard is appropriate, the Commission seeks comment below on how such a standard should be structured.

53. The Commission seeks 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. 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. According to NAB, stations in small markets are earning less profit than stations in large markets. 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. 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. The Commission seeks comment on whether adopting a waiver standard for small markets would promote more news offerings in these markets. In particular, the Commission notes 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. 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. The Commission requests comment also on the criteria it should adopt for any market size waiver standard. Should the Commission adopt some or all of the current failed/failing station waiver policy? What financial documentation should the Commission require? Alternatively, should the Commission adopt a standard based simply on structural considerations—the size of the market and the number of outlets? For example, should the Commission 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 the Commission 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 the Commission 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 the Commission require the applicants to make affirmative commitments to initiate/increase local

news offerings? If so, should the Commission require the station owner to demonstrate compliance with that commitment and for how long? Should the Commission adopt specific penalties for noncompliance? What other factors should the Commission consider?

55. Finally, should the Commission consider alternative definitions of the markets in which this waiver approach would apply? For example, should the Commission 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? The Commission invites 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 the Commission 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? The Commission seeks 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. As a result, all full-power television stations are now broadcasting in digital and have the ability to use their 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. According to UCC *et al.*, multicasting allows broadcast stations to provide multiple program streams without acquiring an additional in-market station. Furthermore, Time Warner Cable (TWC) argues that multicasting permits stations to create "virtual duopolies" by affiliating with multiple networks and multicasting their programming. TWC identified a report asserting that 68 instance of dual affiliation exist that involve the Big Four networks. 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.

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. 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.

57. With the digital transition complete, the Commission seeks 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 the Commission finds that multicasting does replicate the potential benefits of common ownership, both to station owners and viewers, should the Commission continue to permit common ownership? Should the Commission limit the ability of station owners to form dual affiliations involving certain networks? The Commission seeks comment on specific instances of dual affiliation and on how such situations have impacted the markets where they occur. The Commission notes 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 the Commission's decision regarding whether multicasting justifies a tightening of the duopoly rule? The Commission also seeks 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. The Commission seeks comment on whether and how to consider multicasting with regard to any waiver standard in small markets.

58. The Commission notes 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. Media Ownership Study 10 finds that other market characteristics, such as 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. The Commission seeks 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. 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. The Commission seeks comment on how the proposed local television rule would affect minority and female ownership opportunities. The Commission seeks comment on how promotion of diverse television ownership promotes viewpoint diversity. The Commission requests commenters to provide additional data supporting their positions.

## 2. Local Radio Ownership Rule

### a. Introduction

60. The Commission has intended the local radio ownership rule to promote competition, diversity, and to some degree localism. 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. 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.

61. Based on the record in this proceeding, the Commission tentatively

concludes that the current local radio ownership rule remains necessary in the public interest as a result of competition. The Commission tentatively agrees with the previous determination that competition-based radio ownership limits promote viewpoint diversity "by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market." The Commission also tentatively agrees with the 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. The Commission seeks comment on these tentative conclusions.

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

### b. Background

63. In the *NOI*, the Commission sought comment on whether the current local radio numerical ownership limits are appropriate to achieve the Commission's policy goals and whether to account for other sources of audio programming in the rule.

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. 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. Moreover, broadcasters argue that radio ownership limits are not necessary to foster program diversity or localism. 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. 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." In this proceeding, the Commission tentatively concludes that it should focus the Commission's analysis on viewpoint diversity. The Commission seeks comment on this tentative conclusion. Clear Channel states that the company's experience demonstrates that group owners have natural incentives to counter-program their stations and that there are efficiencies and economies associated with higher levels of common ownership.

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. Communications Workers of America (CWA) states that "in 1996, there were 10,257 commercial radio stations and 5,133 radio owners." 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." 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."

66. In the Commission's studies it sought data to help it determine how best to structure a local radio ownership rule to satisfy the Commission's 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. Media Ownership Study 7 addresses radio station ownership structure and minority-targeted programming using data on radio station formats.

#### c. 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. 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." 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. For this reason, according to broadcasters, the Commission should modify the local radio ownership rule to permit increased common ownership in local markets.

68. The Commission tentatively concludes 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 of audio programming. This tentative conclusion is consistent with previous Commission decisions to not expand the relevant market to include satellite radio and Internet audio streaming. The Commission has also found previously that radio broadcasters compete in the radio advertising and radio program production markets. The Commission tentatively concludes that these markets do not have a direct impact on consumers and should not be the focus of the Commission's inquiry. The Commission seeks comment on these tentative conclusions. The Commission notes 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. 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, the Commission proposes that the local radio ownership rule continue to focus on promoting competition among broadcast radio stations in local radio listening markets. The Commission seeks comment on these tentative conclusions.

69. These tentative conclusions notwithstanding, the Commission seeks 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. 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 the local radio ownership rule? How, if at all, do nonbroadcast sources of audio programming contribute to the Commission's policy goals? For example, do these alternatives to broadcast radio make programming and/or business decisions based on competitive considerations in local markets? Should the Commission determine that, contrary to its tentative conclusion, the local radio ownership rule should focus on promoting competition among broadcast radio stations and alternatives to broadcast radio stations in local radio markets, the Commission seeks 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.* The Commission proposes 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, the Commission believes that the existing framework best ensures that the local radio ownership rule serves the Commission's 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 of which transactions comply with the ownership limitations and allows for timely processing of assignment/transfer applications. The Commission seeks comment on these tentative conclusions.

71. The Commission tentatively concludes that it will continue to determine market size based on the number of commercial and noncommercial radio stations in the relevant local market. This tentative conclusion is consistent with the Commission's goal of promoting competition among local broadcast radio stations and the Commission's

decisions in the previous two media ownership proceedings not to consider nonbroadcast programming in the rule itself. However, to the extent the Commission determines it is appropriate to consider these alternative sources in the rule, the Commission seeks comment on whether to count these alternative sources in defining market size to determine how many stations an entity may own, and, if so, how. To what extent does the presence of these alternatives vary by market (e.g., Internet-based audio services) or remain constant across markets (e.g., satellite radio)? Should the Commission consider broadband deployment and/or adoption in a particular local market when determining whether to count Internet-based audio services? Should the Commission consider fixed or wireless broadband, or both? How much online radio listening is devoted to streams of broadcast radio stations, and how should this amount impact the weight of the impact of internet audio streaming in local markets? Should the Commission consider availability and/or adoption of satellite radio in local markets?

72. *Numerical Limits.* The Commission tentatively concludes that it should retain the existing numerical ownership limits for each existing market size tier. The Commission retained these numerical limits in the last media ownership proceeding, finding that public interest would not be served either by relaxing the numerical limits or by making the numerical limits more restrictive. In light of the degree of consolidation in the broadcast radio market following the relaxation of the local radio ownership limits in the 1996 Act, the Commission continues to believe that further relaxation of the numerical limits is not appropriate. Furthermore, the Commission continues to believe that making the limits more restrictive would be inconsistent with Congress's decision to relax the ownership limits and too disruptive to the radio marketplace. In light of these considerations, the Commission tentatively concludes that it is appropriate to continue to retain the numerical ownership limits adopted by Congress in the 1996 Act.

73. The Commission seeks comment, however, on whether to adopt any changes to the numerical ownership limits. Is there evidence that the existing limits no longer serve the Commission's policy goals or have caused specific harm to the radio broadcast industry? Do changes in the marketplace require modification of these limits, or do the characteristics of certain markets justify increasing the ownership limits in those

markets? For example, should the Commission allow additional common ownership in markets with substantially more than 45 stations, now the top tier? Some larger radio markets may contain more than 100 stations, yet the ownership limit is the same—eight stations—in each. Should the Commission, as Clear Channel suggests, allow for increased common ownership in larger markets by creating additional tiers? Clear Channel suggests an increase from eight to ten in the number of stations a single entity may own in markets with between 55 and 64 stations and from eight to twelve the number of stations that a single entity may own in markets with 65 or more stations.

74. As an alternative to considering nonbroadcast audio programming in determining the size of a radio market, to the extent the Commission determines it is appropriate to consider these sources in the rule, the Commission seeks comment on whether to include these sources when setting the numerical limits and, if so, how it would do so. For example, the Commission could allow for ownership of an additional station in markets where alternative sources of audio programming are available, even though the market tier was established solely by the number of broadcast radio stations in the market. If the Commission does so, how should it determine whether such sources are available? For example, are Internet-based audio services consistently available across markets of similar sizes? Should the Commission take adoption rates into account? For example, satellite radio is generally consistently available across a local market, but the number of subscribers remains low compared to the total number of radio listeners. How should this factor into the Commission's consideration of the impact of satellite radio in local markets?

75. *AM/FM Subcaps.* In the *NOI*, the Commission sought comment on whether to retain the AM/FM subcaps. The Commission previously concluded that retaining the subcaps serves the public interest by promoting new entry into broadcast radio ownership, particularly by small businesses, including minority- and women-owned businesses. The Commission also concluded that technical and marketplace differences between AM and FM stations supported retention of the subcaps, consistent with the Commission's goal to protect competition in local radio markets.

76. Those advocating elimination of the subcaps argue that recent advances in technology, including online

streaming, HD radio technology, and the use of FM translators to augment AM station broadcast signals, have improved the ability of AM radio to compete in the marketplace. In addition, they assert that many of the top stations in large and small markets are AM stations, which undercuts any argument that AM radio will flounder if the subcaps are removed. Some broadcasters also assert that lifting the subcaps will create new ownership opportunities of divested station for entities, which include minorities, women, and small businesses, because broadcasters will buy and sell certain in-market stations to strengthen existing station clusters. In addition, they state that the owners of these station clusters would then be in better financial positions to devote additional resources to local programming. Mt. Wilson, however, asserts that subcaps remain necessary to promote competition in local radio markets.

77. The Commission proposes to retain the current AM/FM subcaps for the reasons set forth in the *2006 Quadrennial Review Order*. The Commission continues to believe that this rationale supports retention of the subcaps and seeks comment on this proposal.

78. In addition, the Commission seeks comment on the impact, if any, of the ongoing introduction of digital radio on the AM/FM subcaps. AM stations face unique technical limitations with respect to FM stations, such as lesser bandwidth and inferior audio signal fidelity. In addition, unlike FM signals, AM signal propagation varies with the time of day (i.e., AM signals travel much farther at night than during the day), and many AM stations are required to cease operation at sunset. As a result, FM stations tend to have greater listenership and revenues than AM stations, though this is not necessarily true of all stations in all markets. The Commission has previously stated that digital radio may help AM stations to even the playing field with FM stations.

79. What is the impact of digital radio on the technological and economic differences between AM and FM stations? The Commission notes that, unlike the digital television transition, radio stations have no obligation to operate in digital mode. At present, far more FM stations have provided the Commission with a notice of commencement of digital operations than AM stations, though the vast majority of stations in both services have not provided such notice. How, if at all, should these facts inform the Commission's analysis of the impact of digital operations on the AM/FM

subcaps? At this stage, has digital radio helped address the technical disadvantages of AM stations, such as fidelity and signal propagation, and led to a more balanced competition between AM and FM stations generally? Is it premature to consider the impact of digital radio, given the lack of widespread digital radio options (both AM and FM)? How, if at all, should the lack of a deadline to operate in digital affect this decision? Should the Commission also consider the level of consumer adoption when determining the impact of digital operations on the subcaps? What are the current levels of commercial availability and consumer adoption of radios capable of receiving digital signals?

80. Some broadcasters support elimination of the subcaps so they can acquire additional AM stations in order to aggregate AM stations to provide full signal coverage in large geographic areas or in areas with mountainous terrain. The Commission notes that it recently changed the FM translator rules "to allow AM stations to use currently authorized FM translator stations to retransmit their AM service within their AM stations' current coverage areas." Approximately 500 a.m. stations are currently retransmitting their signals via FM translators, which has allowed some AM stations to operate at night for the first time and—according to anecdotal reports—has allowed certain AM stations to more effectively serve their communities. In light of this success, the Commission recently sought comment on whether to extend this rebroadcast authority to new FM translators with applications for authorization on file as of May 1, 2009. What has been the impact of the revised FM translator rule on the ability of AM stations to provide expanded coverage in their service areas without the need to acquire additional AM stations? If these stations are now able to provide expanded coverage in their service areas without acquiring additional AM stations, is elimination of the AM/FM subcaps also necessary to address signal coverage concerns? Why or why not? How, if at all, has this rule change impacted other AM technical/competition concerns, aside from the signal coverage issue raised by some broadcasters?

81. *Market Size Waivers.* The Commission has previously declined to adopt a specific waiver standard for the local radio ownership rule; instead, parties "may seek a waiver under the 'good cause' waiver standard in [the Commission's] rules." Given the significant amount of common ownership currently permitted, is a

specific waiver standard warranted, or should applicants continue to be required to justify a waiver of the rule under the Commission's general waiver standard? If the Commission determines that a specific waiver standard is warranted, what are appropriate waiver criteria? Should such a waiver standard apply equally to all markets, regardless of size, or should the Commission adopt different standards based on market size? Should the Commission limit the waiver standard to smaller markets? If so, what characteristics of those markets establish the need for a specific waiver standard (to the exclusion of larger markets)?

82. *Minority and Female Ownership.* As noted above, DCS suggests that significant barriers to entry for minority ownership remain in both the traditional and new media industries. The Commission seeks comment on DCS' assertion that minority communities are underserved as a result of the lack of minority media ownership, specifically as it relates to the radio market. Moreover, the Commission seeks comment on how the local radio rule affects minority and female ownership opportunities. The Commission asks that commenters be as specific as possible when identifying particular aspects of the rule that may impact the opportunity for minority and female entry into the radio business and ownership of broadcast stations. How is any such impact relevant to the Commission's goals, in particular promoting viewpoint diversity?

83. *Media Ownership Study 7* analyzes the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences. Acknowledging that Black and Hispanic listeners have different viewing preferences from the majority White population, the data suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority radio programming available in the market. The data do not indicate a clear relationship between ownership concentration and programming variety, although the cross-sectional analysis does suggest that concentration promotes variety. A minority-owned radio station may not be more popular with minority audiences than a non-minority-owned radio station providing the same minority-targeted format. If minority-owned stations have smaller coverage areas they will necessarily have lower ratings and therefore appear less popular even though they may be more popular among those consumers that can receive the signal. The

Commission seeks comment on the methodology and conclusions of Media Ownership Study 7 and how its conclusions should influence the Commission's decisions on the proposed local radio rule. The Commission requests commenters to provide additional data supporting their positions.

### 3. Newspaper/Broadcast Cross-Ownership Rule

#### a. Introduction

84. Newspaper/broadcast cross-ownership was first prohibited in 1975 to preserve viewpoint diversity in local markets. In the 2006 Quadrennial proceeding, the Commission concluded that some limitations on newspaper/broadcast cross-ownership continued to be necessary to promote viewpoint diversity. The Commission recognized, however, that certain newspaper/broadcast combinations may promote its localism goal. It found that the opportunity for sharing newsgathering resources and for realizing other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information. In the *2002 Biennial Review Order*, the Commission determined that a ban on newspaper/broadcast cross-ownership was not necessary to promote its competition goal. The Commission concluded that most advertisers do not consider newspapers, television stations, and radio stations to be close substitutes for each other, and that therefore newspapers and broadcast stations do not compete in the same product market.

85. The newspaper/broadcast cross-ownership rule prohibits common ownership of a full-service broadcast station and a daily newspaper if: (1) A television station's Grade A service contour completely encompasses the newspaper's city of publication; (2) the predicted or measured 2 mV/m contour of an AM station completely encompasses the newspaper's city of publication; or (3) the predicted 1 mV/m contour for an FM station completely encompasses the newspaper's city of publication. In the 2006 Quadrennial proceeding, the Commission concluded that an absolute prohibition on newspaper/broadcast combinations is overly broad. It added waiver provisions to the rule whereby a waiver would be presumed to be not inconsistent with the public interest if a daily newspaper in a top 20 DMA sought to combine with: (1) A radio station or (2) a television station, and (a) the television station was not ranked among the top

four stations in the DMA and (b) at least eight independently owned and operated "major media voices" would remain in the DMA after the combination. For purposes of the newspaper/television combinations, major media voices would include full-power commercial and noncommercial television stations and major newspapers. For markets below the top 20 DMAs, the Commission would presume a waiver of the newspaper/broadcast cross-ownership rule to be inconsistent with the public interest.

86. Under the 2006 rule, a waiver applicant could overcome this negative presumption by demonstrating, with clear and convincing evidence, that the merged entity would increase the diversity of independent news outlets and the level of competition among independent news sources in the relevant market. The Commission would reverse the negative presumption in two limited circumstances: (1) When the proposed combination involved a failed/failing station or newspaper, or (2) when the proposed combination was with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news after the combination.

87. Under both presumptions, the following four factors would inform the Commission's review of a proposed combination: (1) The extent to which cross-ownership would serve to increase the amount of local news disseminated through the affected media outlets in the combination; (2) the ability of each affected media outlet in the combination to employ its own staff exercise its own independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station was in financial distress, the owner's commitment to invest significantly in newsroom operations.

88. In *Prometheus II*, the Third Circuit vacated and remanded the newspaper/broadcast cross-ownership rule as modified by the Commission in the 2006 Quadrennial proceeding. The court based its decision on its conclusion that the Commission failed to comply with the notice and comment provisions of the Administrative Procedures Act. The court did not address the Commission's substantive modifications to the rule. Because the court reinstated the former rule, the absolute ban on newspaper/broadcast cross-ownership remains in effect, with no specific provision for waivers.

89. Consistent with previous Commission findings, the Commission

tentatively concludes that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. Research shows that newspapers and local television stations, and their affiliated Web sites, are the primary sources that consumers rely on for local news. The Commission continues to believe, however, that a blanket prohibition on newspaper/broadcast combinations is overly broad and does not allow for certain cross-ownership that may carry public interest benefits. The Commission tentatively affirms its earlier findings that the opportunity to share newsgathering resources and realize other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information, and the Commission seeks comment on how cross-ownership may promote the Commission's localism goal. The Commission notes here the observations of the Information Needs of Communities Report with regard to newspaper/broadcast cross-ownership. The report was written by an ongoing, informal working group that consisted of Commission staff, industry scholars, and consultants. As noted in the report, the views expressed in the report "do not necessarily represent the views of the Federal Communications Commission, its Commissioners or any individual Bureaus or Offices." The report observes that newspaper/television cross-ownership "could lead to efficiencies and improved business models that might result in more reporting resources," thereby promoting the Commission's localism goal. The report cautioned, however, that cross-ownership may instead "simply improve the bottom line of a combined company without actually increasing the resources devoted to local newsgathering." In addition, the Commission tentatively concludes, as the Commission found in previous ownership reviews, that newspapers and broadcast stations do not compete in the same product market and, therefore, that the rule is not necessary to promote the Commission's competition goal.

90. The Commission continues to believe that the nation's largest markets can accommodate some cross-ownership without unduly harming viewpoint diversity. For reasons set forth below, the Commission proposes to adopt a rule that includes elements of the 2006 rule, including the top 20 DMA demarcation point, the top-four television station restriction, and the

eight remaining voices test. The Commission tentatively concludes that viewpoint diversity is best achieved by analyzing these elements for proposed newspaper/broadcast combinations on a case-by-case basis. The Commission seeks comment on whether alternative approaches or different demarcations and restrictions would promote the Commission's diversity goal more effectively. For newspaper/television combinations, the Commission proposes to use Nielsen DMA definitions to determine when the rule is triggered, given the lack of a digital equivalent to the analog Grade A service contour.

91. The 2006 rule contained some elements that may not be necessary to promote the public interest. Specifically, as explained below, the Commission seeks comment on whether the detailed elements describing what showings are required to overcome the rule's stated presumptions and the showings required of all applicants unnecessarily increased the rule's subjectivity and complexity. The Commission also seeks comment on whether to retain some or all of the factors the Commission adopted under the 2006 rule to consider in cross-ownership transactions. The Commission also solicits input on whether to formulate a specific waiver provision that relies on clear, objective, and enforceable standards and a burden of proof standard for waiver requests. Finally, the Commission seeks comment on the impact of the newspaper/broadcast cross-ownership proposals on minority and female ownership opportunities.

#### b. Background

92. In the *NOI*, the Commission asked whether newspaper/television combinations should be treated differently from newspaper/radio combinations, as they are in the 2006 rule. The Commission sought comment on the impact of marketplace changes in the newspaper industry, which has seen increased competition for audiences and declining revenues. The Commission elicited input on the extent to which relaxing the rule could benefit newspapers and result in a net gain of local news and information. In the *NOI*, the Commission noted that consumers are increasingly getting their news from online and mobile platforms and asked about the significance of this trend for the newspaper industry. The Commission sought comment on whether relief from the 2006 rule, if any, should be provided through a revised rule or a waiver standard, and the factors that should apply under either approach. For example, the Commission

asked whether distinctions should be drawn based on market size and the number of voices remaining post-transaction. The Commission sought comment also on how to evaluate the efficacy of the rule in terms of the Commission's goals and the effects on the market participants.

93. Among the commenters responding to the *NOI*, newspaper and broadcast owners recommend repeal or relaxation of the rule, and public advocacy groups support the rule's retention. Supporters of repeal or relaxation of the rule argue that cross-ownership enhances localism and supports diverse points of view. They describe an evolution of the marketplace, including introduction of the Internet and other non-traditional media, such as iPhone applications, that they assert provide local and diverse content. They describe serious economic challenges faced by newspapers and suggest that the only way for them to survive is by entering combinations and creating economies of scale. Commenters state that: Newspaper circulation is in a downward spiral since 2008, reaching its lowest point in nearly 70 years in October 2009; advertising revenues, which traditionally make up 80 percent of overall newspaper revenues, have dropped 43 percent from 2007 through 2009; and several newspaper publishers have sought bankruptcy protection, while others have ended their print editions. They state that the newspapers that remain in business have closed domestic and foreign bureaus, laying off thousands of journalists. Newspaper Association of America (NAA) cites to Project for Excellence in Journalism's (PEJ) recent estimate that newspapers will devote \$1.6 billion less annually to news reporting in 2010 than they were able to do just three years ago.

94. Supporters of the 2006 rule—or a strengthened rule—assert that restrictions remain necessary to protect against further concentration in an industry already characterized by concentrated vertical ownership and consolidated local ownership. They argue that the 2006 rule provides flexibility where cross-ownership efficiencies might benefit the public interest and permit combinations in failing business situations, while requiring maintenance of separate newsrooms for the purpose of diversity. They argue that the only benefits of cross-ownership are financial benefits for the owners, which they assert arise at the cost of diversity and localism for citizens. In the Commission's studies, the Commission sought data to help it analyze questions related to the

relevance of the newspaper/broadcast cross-ownership rule to the Commission's policy goals. Particularly, the Commission measured whether the presence of cross-owned stations affects the amount of local news provided at the local market level and at the individual station level. The Commission also measured localism by analyzing consumer satisfaction with the amount of local news available in markets. In addition, the Commission studied the impact of cross-ownership on viewpoint diversity in media markets. The Commission seeks comment on the extent to which its proposed approaches for newspaper/television combinations are supported by data from the Commission's studies or other available data.

#### c. Discussion

95. The Commission tentatively concludes that some restrictions on newspaper/broadcast combinations continue to be necessary to promote viewpoint diversity within local markets. The Commission seeks comment on this tentative conclusion. There is evidence that Americans continue to rely on local television stations and newspapers for the majority of their local news, despite the rising popularity of the Internet as a platform for access to news. Studies have found that approximately three-quarters of Americans obtain news from a local television station. In addition, although newspaper readership has declined in recent years, in 2010, 37 percent of Americans reported reading a newspaper the preceding day.

96. Although consumers are turning increasingly to the Internet for news and information generally and seeking new platforms on which to access local news, the Web sites most frequently viewed for news and information are affiliated with legacy media. In the fall of 2009, among the top roughly 200 news Web sites based on traffic, 67 percent were associated with legacy media, and 48 percent were associated with newspapers in particular. More recently, the Information Needs of Communities Report concluded that “from a traffic perspective, newspapers have come to dominate the Internet on the local level.” Along with newspaper Web sites, local television news Web sites rank among the most popular news Web sites. Indeed, Media Ownership Study 6 looks at online local news content and finds very little that is not affiliated with a newspaper or television or radio station. Other Web sites offering local news presently receive little traffic. Even where there are Internet-only local news outlets, the study

suggests that the aggregate weekly quantity of such content is about equal to a single page of a full-size daily newspaper. The PEW Research Center's Baltimore Study similarly finds that the majority of local news content on Web sites unaffiliated with newspapers or broadcast stations contains only commentary on the stories and features that originated from traditional media outlets. Given the continuing prevalence of broadcast stations and newspapers as news sources consumers rely on the most, the Commission tentatively finds that some newspaper/broadcast restrictions remain necessary to protect viewpoint diversity. The Commission will continue to monitor and assess the Internet's role in the marketplace for local news and information in this regard. The Commission seeks comment on these tentative conclusions.

97. The Commission has found evidence previously that some newspaper/broadcast cross-ownership may produce increased local news. What benefits and efficiencies accrue from cross ownership? Media Ownership Study 4 examines the impact of newspaper/television cross-ownership on the amount of local television news at both the station and the market level. The study finds that, other things being equal, a station that is cross-owned with a daily newspaper produces more local news than a stand alone station. However, when the analysis is done at the market level, other things being equal, a market with a cross-owned station offers somewhat less local news than a market without a cross-owned station. Because there was little variation in the extent of newspaper-television cross-ownership during the period studied, the author recognizes that the conclusions of the statistical analysis must be treated with caution. The Commission seeks comment on how to weigh the Media Ownership Study 4 findings and how those findings should affect the Commission's analysis. Has this rule resulted in the reduction of local news, the loss of journalism positions, and the failure of newspapers? What challenges have newspapers faced because of the current economy and the changing marketplace?

98. *Nielsen DMAs*. As an initial matter, for television stations, the Commission proposes to apply any ownership combination restrictions to daily newspapers and stations within the same DMA. The Commission seeks comment on its tentative conclusion that the Commission will use Nielsen DMA definitions to determine when the cross-ownership rule is triggered, as there is no digital equivalent contour for

the analog Grade A contour specified by the current rule. The Commission seeks comment on the impact of changing from a contour-based rule to a DMA-based rule. For any proposed rule, would many more newspaper/television station combinations be implicated by the cross-ownership rule under a DMA-based approach as compared to a contour-based approach? Are there negative consequences to switching to a DMA-based rule? What are the benefits? The Commission's preliminary view is that DMA market definitions would reflect circulation and viewing areas more accurately than the current approach. However, given the large size of some DMAs, the Commission seeks comment on whether the rule instead should be triggered only if the newspaper's circulation extends to the community of license of the television station.

99. To the extent the rule relies on DMAs, the Commission proposes to grandfather ownership of existing combinations of television stations and newspapers that would conflict with the newspaper/broadcast cross-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 the Commission's policy goals would likely be outweighed by these countervailing considerations. The Commission seeks comment on these tentative conclusions. Are the Commission's policy goals served by allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with the newspaper/broadcast cross-ownership rule? What is the effect on the entities if they are sold separately? Is it possible that such a rule could have the unintended consequence of causing a station or newspaper to close?

100. *Proposed Rule.* In taking a fresh look at the rule, the Commission tentatively finds that a blanket rule prohibiting all newspaper/broadcast cross-ownership within the same service area is unnecessarily broad. The Commission tentatively concludes that the top 20 DMA demarcation point, the top-four television station restriction, and the eight remaining major media voices test for television/newspaper combinations contained in the 2006 rule are the fundamental elements of a rule that will protect and promote viewpoint diversity while also properly supporting localism most effectively. The Commission notes that these criteria are objective standards that can be applied and enforced consistently and fairly, with low cost to the applicants and

Commission. The Commission seeks comment generally on the benefits of adopting these criteria and specifically on their individual aspects, as detailed below.

101. The Commission proposes a rule that prohibits common ownership of a daily newspaper and (1) a full-power commercial television station within the same DMA, (2) an AM station with a predicted or measured 2 mV/m contour service area that encompasses the newspaper's city of publication; or (3) an FM station with a predicted 1 mV/m contour service area that encompasses the newspaper's city of publication. The proposed rule would presume a waiver to be consistent with the public interest if: (1) A daily newspaper in a top 20 DMA sought to combine with a radio station, or (2) a daily newspaper sought to combine with a full-power commercial television station in the same top 20 DMA, and: (a) The television station is not ranked among the top four television stations in the DMA and (b) at least eight independently owned and operated "major media voices" would remain in the DMA after the combination. For purposes of the waiver, major media voices would include full-power commercial and noncommercial television stations and major newspapers. The rule would presume a waiver to be inconsistent with the public interest in all other circumstances. Below the Commission seeks comment on alternative demarcation points for these three key elements of the proposed rule (top-four television station restriction, eight remaining major media voices criterion, top 20 DMA cutoff) and on how in practice these three constraints interact with one another.

102. The Commission tentatively concludes that the case-by-case approach adopted as part of the 2006 rule to consider requests for waivers of the newspaper/broadcast cross-ownership rule would best serve the Commission's goal of promoting viewpoint diversity. This approach should provide an appropriate amount of flexibility to allow the Commission to consider specific, individual circumstances. Presumptions either in favor of or against a waiver can be overcome when specific facts so warrant. Under this approach, opponents to a waiver request, even in the largest markets, maintain the ability to argue that specific circumstances overcome a favorable presumption. In addition, parties requesting a waiver in smaller markets are not precluded from demonstrating the benefits of that particular combination in the individual

market. The Commission seeks comment on these tentative conclusions.

103. Alternatively, the Commission seeks comment on whether a bright-line rule addressing newspaper/broadcast cross-ownership would be preferable. Such a rule would allow common ownership of (1) one daily newspaper in a top 20 DMA and one commercial radio station, or (2) one daily newspaper and one full-power commercial television station in a top 20 DMA under the circumstances in which the case-by-case approach proposed above would establish a favorable presumption. For purposes of the rule, major media voices would include full-power commercial and noncommercial television stations and major newspapers. Other combinations would be prohibited. The purpose of a bright-line rule is to create a clear-cut, readily enforceable standard that provides consistency and certainty to the marketplace. The Commission seeks comment on whether this approach would result in a simplified rule that would preserve essentially the same levels of local viewpoint diversity as a case-by-case approach but reduce applicants' costs and make the Commission's review of transfer and assignment applications more objective, predictable, and expeditious. Is a bright-line formula too blunt a tool to account for variable conditions that may exist when considering newspaper/broadcast cross-ownership waivers, even in similarly sized markets? The Commission notes that even utilizing a bright-line rule, petitions to deny an application would not be precluded even for a newspaper/broadcast combination within a top 20 DMA or a waiver request in other markets. Would including the determinative criteria in a governing rule alleviate the need to undergo a potentially lengthy and expensive waiver process for applications presumed to be in the public interest? If the results are likely to be the same in most cases, is the flexibility of a tailored review process worth the additional time and expense? The Commission seeks comment on the extent to which the structure of the bright-line approach would diminish the likelihood of successfully opposing such a merger. Under a bright line approach, should the Commission adopt specific standards for waivers or rely on the Commission's generally applicable waiver standards?

104. *Market Tiers.* The Commission proposes to differentiate between markets in the top 20 DMAs and markets below the top 20 DMAs. In the last review of this rule, the Commission found a "notable difference between the

top 20 markets and all other DMAs," citing the range of media outlets available in the top 20 DMAs and concluding that "[t]he diversity in the number and types of traditional media outlets in the largest markets ensures that the public is well served by antagonistic viewpoints. Markets outside of the top 20 DMAs do not feature diversity to such an extent." The Commission continues to believe that the top 20 DMAs are notably different from other markets, both in terms of voices and in terms of television and radio households. Based on the range of media outlets available in the top 20 DMAs, the Commission tentatively concludes that diversity in those largest markets is healthy and vibrant in comparison to other DMAs. For example, while there are at least 10 independently owned, commercial television stations in 15 of the top 20 DMAs, none of the DMAs ranked 21 through 25 has even eight independently owned, commercial television stations. Additionally, while 15 of the top 20 DMAs have at least two newspapers with a circulation of at least five percent of the households in that DMA, four of the five DMAs ranked 21 through 25 have only one such newspaper. Moreover, the top 20 markets, on average, have 16 independently owned television stations and major newspapers and approximately 2.5 million television households. By comparison, DMAs 21 through 30 have on average nine major voices and fewer than 1.2 million television households, representing drops of 44 percent and 52 percent from the top 20 markets, respectively. DMAs 31 through 50 have average numbers of voices for each category similar to markets 21 through 30, but even fewer television households on average, 856,700 and 694,500, respectively. DMAs 51 through 210 show even more dramatic drops, with, on average, seven major voices and approximately 236,000 television households, representing drops of 56 percent and 91 percent from the top 20 DMAs, respectively. The diversity in the number and types of traditional media outlets in the largest markets ensures that the public is well served by a variety of viewpoints. Markets outside of the top 20 DMAs do not feature diversity to such an extent.

105. The Commission seeks comment on this analysis of the distinction between the top 20 DMAs and others and on the Commission's tentative conclusion that the viewpoint diversity level in the 20 largest DMAs is sufficient to consider adopting a regulatory framework that would accommodate a

limited amount of newspaper/broadcast cross-ownership in those markets. The Commission also seeks comment on its continued belief that markets below the top 20 DMAs cannot accommodate any such cross-ownership, absent particular circumstances warranting a waiver. The Commission asks commenters to address separately market structure characteristics, such as the number of independent media voices, and market size characteristics, e.g., the number of television households in the market. Market structure characteristics are directly and separately addressed by the proposed top four television station restriction and the proposed eight remaining major media voices criterion. Due to the high fixed costs of television program production (including local programming in general and local news programming in particular), the number of television households in the market affects the revenue base available to support local programming and hence affects the quantity, quality, and diversity of local programming produced in the market, independent of the number of media voices.

106. In addition, the Commission seeks comment on whether a different demarcation point would more effectively protect and promote the Commission's viewpoint diversity and localism goals. For example, would differential treatment be warranted for newspaper/broadcast combinations in the top 30 DMAs, top 40 DMAs, top 50 DMAs, or at a different market size? Please provide specific market data to support the proposed demarcation point. If the Commission were to maintain the prohibition on combinations involving the top four television stations and the requirement to retain eight major media voices in the market, what is the impact on permitted combinations of varying the demarcation point?

107. *Newspaper/Television Station Combinations: Top-Four Restriction.* The Commission proposes to prevent a daily newspaper from combining with a television station that is ranked among the top four television stations in the DMA. The Commission proposes that the current criteria would continue to apply when determining what qualifies as a daily newspaper and what qualifies as a television station ranked among the top four stations. The Commission believes that allowing a top-four station to merge with a daily newspaper would create the greatest risk of losing an independent voice in that market. The Commission's analysis shows that there is a decrease in the amount of local news broadcast between the fourth and fifth ranked stations. In larger markets,

the fifth ranked station generally provides no more than half the amount of local news of the fourth ranked station. The Commission seeks comment on this analysis and on its application to the proposed approaches.

108. Furthermore, the Commission notes the dominance of the four major television networks in most local television markets. How commonly are the top four stations in a market affiliated with the four major broadcast networks? The Commission seeks comment on the findings in Media Ownership Study 4 that television stations affiliated with one of the four major broadcast networks tend to air more local news than other stations and that there are about 35 additional minutes of local news programming in the market for each additional station in the market that is affiliated with one of the four major broadcast networks. The Commission seeks comment on the presumption that, therefore, the top four television stations generally contribute the most local news and information among the television stations within a market.

109. Alternatively, the Commission seeks comment on whether a different limit is appropriate. For example, is there evidence to support a cross-ownership restriction between newspapers and the top-five or the top-six television stations in some markets? If so, why? Is there support to prevent combinations between newspapers and stations affiliated with one of the four major broadcast networks? If so, why? Could such combinations potentially harm diversity more than other combinations? Is there evidence that these stations provide more diversity in local markets?

110. *Newspaper/Television Station Combinations: Eight Major Media Voices Restriction.* The Commission tentatively proposes to prohibit transactions where less than eight independently owned and operated "major media voices" would remain in the DMA after a transaction. The Commission seeks comment, however, on the potential impact of eliminating this voices test. The Commission's examination of the top 20 DMAs indicates there would be no impact in these markets. Under the existing ownership patterns in the top 20 markets, even if all daily newspapers combined with television stations, at least eight major media voices would remain in the market. The existence of the eight voices test in the local television ownership rule also helps retain independent major media voices by limiting commercial consolidation once only eight independent television

stations remain in the market. As long as these eight independent television voices remain in the market, consolidation between newspapers and television stations will not reduce the number of major media voices below eight. Is the Commission's assessment accurate, and if so, is there any reason to incorporate the eight voices test into a new rule or waiver provision? Is there a reason to require a different number of voices to remain in the DMA, and if so, how would that number better protect the Commission's diversity goal? Should the Commission's analysis change if the Commission does not distinguish the top 20 DMAs but adopt a different demarcation point? For example, would there be an impact on the market if the Commission eliminates the eight voices test and creates a separate tier for the top 30 DMAs?

111. *Newspaper/Radio Station Combinations.* As an alternative to the Commission's proposal above to retain the restriction on newspaper/radio combinations, the Commission also seeks comment on whether it should eliminate the newspaper/radio restriction in all markets or otherwise relax the restriction. The Commission tentatively concludes that radio stations are not the primary outlets that contribute to local viewpoint diversity. Media Ownership Study 5 finds that at least one commercial radio station with a news and talk format serves most markets and that a public news radio station serves about 40 percent of markets. Research shows, nevertheless, that consumers' main sources for local news and information are television stations, newspapers, and their affiliated Web sites. Moreover, the Commission tentatively concludes that a substantial amount of news and talk show programming on radio stations is nationally syndicated. The Commission seeks comment on its tentative conclusion that radio stations generally are not the dominant source consumers turn to for local news and information, as compared to newspapers and television stations. The Commission seeks comment on whether, to the extent radio stations serve as sources of local news and information, viewpoint diversity would be adequately protected by the proposed local radio limits. Because consumers in markets of all sizes rely most heavily on other types of news outlets for local news and information, is there any reason to distinguish between markets in the top 20 DMAs and those below the top 20 DMAs for purposes of newspaper/radio combinations? Would the removal of prohibitions against newspaper/radio

combinations have any impact on the ownership, or contribution to local viewpoint diversity, of noncommercial educational FM broadcast stations, given the restriction that they may be licensed only to nonprofit educational organizations? Would common ownership between a radio station and a newspaper increase the quality and quantity of local news programming available on radio stations due to shared newsgathering expertise and resources? Could such combinations provide an opportunity for both radio stations and newspapers that are struggling financially to become more vital participants in the news and information marketplace and what is the likelihood of this outcome? Should the Commission consider a rule that prohibits newspaper-radio combinations in certain markets only when the radio station is among the largest four in the market by audience share?

112. The proposed newspaper/broadcast cross-ownership rule retains the use of radio contours to determine when the rule is triggered. As discussed below, Arbitron market definitions are used to delineate a market's geographic boundaries for purposes of the local radio limits and the Commission proposes to use DMAs for purposes of triggering the local TV ownership rule and the newspaper/television aspect of the cross-ownership rule. Should the Commission continue to use contours to determine whether the newspaper/broadcast cross-ownership rule is triggered for newspaper/radio combinations? What are the benefits of continuing to rely on contours only for this portion of the rule? Can retaining a contour approach to newspaper/radio combinations be reconciled with the Commission's proposed use of geographic market definitions for newspaper/television combinations? Alternatively, should the Commission replace radio contours with Arbitron market definitions for purposes of determining whether the newspaper/broadcast cross-ownership rule is triggered for newspaper/radio combinations? Are there any specific concerns about moving to an Arbitron market definition for this rule? Would more or fewer newspaper/radio station combinations be implicated by the cross-ownership rule under an Arbitron-based approach as compared to a contour-based approach? How would the Commission handle non-Arbitron radio markets? The Commission seeks comment.

113. To the extent the rule relies on a different market area, the Commission proposes to grandfather ownership of existing combinations of radio stations

and newspapers that would conflict with the newspaper/broadcast cross-ownership rule by virtue of the change. Compulsory divestiture is disruptive to the industry and a hardship for individual owners, and any benefits to the Commission's policy goals would likely be outweighed by these countervailing considerations. The Commission seeks comment on these tentative conclusions. Are the Commission's policy goals served by allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with the newspaper/radio cross-ownership rule? 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 or newspaper to close?

114. *Factor Tests.* The 2006 rule included a list of four factors for the Commission to analyze when deciding whether a specific newspaper/broadcast ownership combination was in the public interest. The Commission seeks comment on whether it should retain those factors. In 2006, the Commission stated that the factors were intended to address "the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity." Specifically, the 2006 rule required applicants to make showings regarding: (1) The amount of local news that would be produced post-transaction; (2) the extent to which the affected media outlets would exercise independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the applicant, and if financially distressed, the applicant's commitment to invest in newsroom operations. Do the factors provide useful predictability or clarity for applicants applying for a waiver of the newspaper/broadcast cross-ownership rule? Do factors provide specific benefits to the Commission staff reviewing applications and waiver requests? Alternatively, are any of the factors, such as the first two factors, too subjective, or focused on future behavior that may be too difficult to predict or enforce? Do specific factors create unnecessary delay in the application and review process? Should the Commission exclude all of these elements from the new rule and consider applications on a more case by case basis? If so, should the presumptions included in the rule be interpreted as establishing a *prima facie* case in favor of or against a transaction and, once established, shifting the

burden of proof regarding the Commission's treatment of an application to those that may seek to overcome the presumption? If so, what should that burden of proof be? Would a well defined exception or waiver standard, as discussed below, sufficiently support the Commission's consideration of specific factual scenarios related to a proposed transaction, including for instance, the financial condition of the entities involved and/or the availability of local news, such that the specification of these additional factors is not necessary? The Commission seeks comment.

115. *Exception or Waiver.* The Commission also seeks comment on whether to retain or abolish the factors adopted in 2006 to overcome or reverse a negative presumption. Is it better to remove all factors from the rule and rely on the Commission's general waiver standard? Under the 2006 rule, a waiver applicant could overcome a negative presumption by demonstrating, with clear and convincing evidence, that the merged entity would increase the diversity of independent news outlets and the level of competition among independent news sources in the relevant market. Is such a standard sufficiently objective and quantifiable? The 2006 rule further stated that the Commission would reverse the negative presumption in two limited circumstances: (1) When the proposed combination involved a failed/failing station or newspaper, or (2) when the proposed combination was with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news after the combination. Is such a standard sufficiently objective and quantifiable? Should the give special consideration to a transaction that involves a station or newspaper that is failed or failing? If so, what showing should an applicant be required to make to qualify as failed or failing? Is a requirement that a waiver applicant show that a proposed combination would increase the number of hours of local news programming overly focused on future behavior that may be too difficult to predict or enforce? Are there other factors that the Commission should adopt that would be more objective or easier to enforce than those adopted in 2006? If so, what would be the benefits of adopting any other proposed factors and what would be the harms? The Commission also seeks comment on whether it may be appropriate to adopt specific factors to

consider in instance in which an applicant is seeking a waiver of the restriction on combinations involving a top-four television station or the eight voice test. Finally, the Commission seeks comment on whether and why such provisions are needed given that filing a waiver petition is always an option under § 1.3 of the Commission's rules?

116. *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. DCS states that minority-owned stations are more likely to provide programming geared towards minority audiences and that minority communities are underserved as a result of the lack of minority media ownership. The Commission seeks comment on how the proposed newspaper/broadcast cross-ownership rule could affect minority and female ownership opportunities. The Commission seeks comment on how promotion of diverse ownership promotes viewpoint diversity. The Commission requests that commenters provide additional data supporting their positions.

#### 4. Radio/Television Cross-Ownership Rule

##### a. Introduction

117. The current radio/television cross-ownership rule limits the number of commercial radio and television stations an entity may own in the same market, with the degree of common ownership permitted varying depending on the size of the relevant market. The rule allows common ownership of at least two television stations and one radio station in the smallest markets, while in larger markets, a single entity may own additional stations depending on the number of media owners in the market. The Commission retained the radio/television cross-ownership rule in the *2006 Quadrennial Review Order* to ensure diversity in local markets. In *Prometheus II*, the Third Circuit upheld the Commission's decision to retain the rule, based in part on the Commission's assertion in the *2006 Quadrennial Review Order* that the rule benefited viewpoint diversity. It noted that the Commission supported retention of the rule in the *2006 Quadrennial Review Order* proceeding with some evidence that commonly owned stations can share the same viewpoint.

118. Pursuant to a statutory mandate, the Commission considers whether the radio/television cross-ownership rule

continues to be necessary to promote the public interest. The Commission tentatively concludes that it does not. The Commission believes that repeal of the radio/television cross-ownership rule is not likely to increase significantly consolidation of broadcast facilities. To the extent that repeal does allow additional consolidation, the Commission seeks comment on whether such consolidation would result in greater efficiencies, to be passed through to consumers in the form of enhanced programming choices or other consumer welfare benefits. Moreover, as discussed further below, data suggest that radio/television cross-ownership does not negatively impact the amount of local news available to consumers or the diversity of such programming. Finally, the Commission is persuaded by the evidence from its studies and the changes in the marketplace that the rule is not necessary to ensure sufficient diversity in local markets. Accordingly, the Commission tentatively concludes that in the current media market, the Commission's goals of localism and diversity will be adequately protected by the local radio and television ownership rules without this additional limitation. The Commission seeks comment on these tentative conclusions. The Commission also seeks comment on whether there are any reasons to retain the rule.

##### b. Background

119. The Commission first restricted combined ownership of radio and television stations in local markets in 1970 to foster competition and promote diversification of programming sources and viewpoints. As discussed in the *NOI*, in 1999 the Commission relaxed the rule to balance diversity and competition concerns against the desire to permit broadcasters and the public to realize the benefits of common ownership. In the *2006 Quadrennial Review Order*, the Commission retained the radio/television cross-ownership rule, based in part on the concern that the local television and radio rules were not sufficient to protect diversity in the media marketplace. After reviewing the record, the Commission determined that radio and television both contributed to the "marketplace of ideas" and thus competed in providing diversity. At the same time, the Commission acknowledged that newspapers and television were "far and away the most important sources" of news and information, with radio "a distant third." On review, the Third Circuit upheld the Commission's decision to retain the rule finding that the rule

continues “to ensure that viewpoint diversity is adequately protected.”

120. In the *NOI*, the Commission sought comment on whether the current rule continues to be necessary in the public interest. NAB supports repeal of the radio/television cross-ownership rule because it believes that additional cross-ownership will allow broadcasters to better compete for advertising and viewers with the new media sources entering the market and will allow them to invest more in local news and information. Fox also suggests that allowing more common ownership of different types of media in a single market could enhance localism. NAB, Fox, and CBS argue that, in light of the explosion of media outlets and Internet-related media in all markets, and the resulting fragmentation of the local audience, “repeal of the [radio/television cross-ownership] rule will not adversely affect the availability of diverse audio and video programming and viewpoints.” Fox contends that in the Internet age “all outlets have an equal capacity to reach the vast majority of citizens (especially now that three-quarters of all American adults use the Internet).” In contrast, AFTRA argues that the Commission should maintain the radio/television cross-ownership rule to prevent further consolidation and promote localism and diversity. AFTRA points out that, between 1996 and 2010, “the number of commercial radio stations increased by about 10 percent \* \* \* [while] the number of station owners fell by about 40 percent.” AFTRA further asserts that, during the same period, “the number of commercial television stations increased by about 15 percent \* \* \* [while] the number of station owners fell by 33 percent.”

121. In the Commission’s economic studies, which are discussed in more detail below, the Commission sought data to help analyze questions related to the relevance of the radio/television cross-ownership rule to the Commission’s policy goals. Particularly, the Commission measured whether the presence of radio/television cross-ownership affects the amount of local news provided at the local market level and at the individual station level. The Commission also measured localism by analyzing consumer satisfaction with the amount of locally oriented programming available in markets. In addition, the Commission studied the impact of radio/television cross-ownership on the amount of diverse viewpoints available in media markets.

### c. Discussion

122. *Competition.* As the Commission has held in the past, the Commission does not believe this rule is necessary to promote competition. Previously, the Commission has concluded that most advertisers do not consider radio and television stations to be good substitutes for their advertising needs, and, therefore, combinations of radio and television stations would not harm competition in local media markets. This conclusion was based in part on Department of Justice assertions that radio advertising constitutes a separate antitrust market. The Commission continues to believe that radio and television are not good substitutes in the advertising market. The Commission seeks comment on this tentative conclusion.

123. Similarly, the Commission tentatively concludes that most consumers do not consider radio and television stations to be substitutes for one another. That is, the Commission believes that consumers are not likely to switch between television viewing and radio listening based on the program content of radio and television stations. Nor does the Commission believe it likely that radio or television stations adjust their content in response to changes in the other medium’s programming. Accordingly, the Commission believes that repealing the radio/television cross-ownership rule will not negatively impact the Commission’s competition goals and seek comment on this tentative conclusion.

124. As stated above, broadcasters argue that lifting the radio/television cross-ownership restriction will enable them to compete better in today’s marketplace. The Commission seeks comment on whether repealing the restriction would allow greater efficiencies through joint operations that can be passed on to consumers through investment in programming. In addition, the Commission seeks comment on whether allowing additional radio-television combinations would lead to consumer benefits in the form of additional investment in radio or television news rooms, increased editorial staffs, or additional local news coverage on radio stations.

125. The Commission does not anticipate, however, that eliminating the radio/television cross-ownership rule would significantly contribute to broadcast consolidation. Pursuant to the existing radio/television cross-ownership rule, in the largest markets, entities currently may own, in

combination, either two television stations and six radio stations or one television station and seven radio stations. The local radio ownership rule permits an entity to own a maximum of eight radio stations in a single market. Therefore, in the largest markets, absent the current radio/television cross-ownership rule, an entity approaching the limits of the existing cap could acquire only one additional radio station and remain in compliance with the local radio rule. Likewise, an entity with one television station already could acquire only one additional station in the largest markets under the current local television rule. Thus, the Commission believes that the effect of eliminating the radio/television cross-ownership rule will be small, and that the local radio and local television rules will continue to prevent a significant increase in the consolidation of broadcast facilities. The Commission seeks comment on these issues. What impact is the proposed action likely to have in small and mid-sized markets? Are there specific examples of markets where repeal of the rule may substantially contribute to broadcast consolidation?

126. *Localism.* As the Commission has held in the past, the Commission does not believe this rule is necessary to promote localism. The Commission tentatively concludes that repealing the radio/television cross-ownership rule will not negatively impact the Commission’s localism goal. Again, the Commission believes that the local television and local radio rules, as well as the newspaper/broadcast cross-ownership rule, will sufficiently promote and protect the Commission’s localism goals. Radio and television broadcasters would continue to have the same obligation to serve their local communities in the absence of a radio/television cross-ownership restriction. The Commission also recognizes that consumers primarily rely on television and newspapers, and their affiliated Web sites, for their local news. Moreover, audiences of traditional news sources have moved toward new media, with both Internet and cable news sources growing. The Commission recognizes that radio stations that air nationally syndicated news or talk show programming contribute to the overall amount of news and information within their local market. The Commission notes that lifting the radio/television cross-ownership rule will not impact the availability of non-commercial news radio stations. The Commission seeks comment on these tentative conclusions.

127. In the media ownership studies, the Commission sought to develop data to inform its analysis of whether the radio/television cross-ownership rule promotes localism. In particular, both Media Ownership Study 1 and Media Ownership Study 4 look at whether the level of radio/television cross-ownership in a market is associated with the amount of local television programming provided. Evidence from the studies is mixed with respect to this question.

128. Media Ownership Study 1 examines how cross-ownership is associated with localism, as measured by the amount of local news provided in the market. The study finds that cross-ownership decreases local television news hours but raises ratings, which leads to ambiguous results. The Commission seeks comment on these findings and their relevance to the Commission's analysis of whether the radio/television cross-ownership rule is necessary to promote the Commission's localism goal.

129. Media Ownership Study 4 finds that, at the station level, radio/television cross-owned stations appear to air more local news on average, though the impact is marginal. According to the study, for every additional in-market radio station a parent owns, the television station will air 3.7 more minutes of local news. The Commission seeks comment on these study findings and how they should affect the Commission's analysis. At the local market level, however, Media Ownership Study 4 finds that increases in radio/television cross-ownership correlate to decreases in the total amount of news minutes provided in the market. As the study notes, however, due to economies of scale, this negative correlation is partially mitigated as the average number of broadcast outlets per cross-owned station group in the market increases.

130. *Diversity*. The Commission tentatively concludes that the radio/television cross-ownership rule is no longer necessary to promote the Commission's goal of encouraging viewpoint diversity. The Commission seeks comment on this tentative conclusion, as well as the tentative conclusion that the proposed local television and radio rules and the newspaper/broadcast cross-ownership rule will suffice to protect and promote the Commission's diversity goal. The Commission also seeks comment on alternatives to this tentative conclusion, including whether or not it is necessary to retain the radio/television cross-ownership rule for diversity purposes. The Commission seeks data to support

retention of the rule, including any data that the cross-ownership rule is necessary to ensure diverse viewpoints in local markets.

131. Overall, the media ownership studies provide little evidence that cross-ownership, to the degree currently allowed under the radio/television cross-ownership rule, has an effect on viewpoint diversity. Media Ownership Study 8A analyzes the impact of radio/television cross-ownership on viewpoint diversity available in local markets by examining how consumers react to the content delivered to them. The study utilizes variations in viewing patterns of local television news programs as compared to local viewing patterns for national television news programs to develop a measure of diversity of content on local news programs, and relates changes in viewing patterns to changes in local media cross-ownership. The study finds that, in general, radio/television cross-ownership has a negligible effect on viewpoint diversity. Media Ownership Study 8B examines the impact of media ownership, including radio/television cross-ownership, on the amount of programming provided in television news programs in three categories: Politics, local programming, and issue diversity (diversity in coverage of news topics). Overall, the study finds little evidence that market structure influences diversity. Nonetheless, with respect to one of the three types of diversity—issue diversity—the study finds that, for the majority of topics for which cross-ownership is statistically significant, increases in cross-ownership are associated with greater diversity. The Commission seeks comment on the findings presented in Media Ownership Study 8A and Media Ownership Study 8B. Specifically, the Commission seeks comment on how these findings should inform its analysis of whether the radio/television cross-ownership rule remains necessary to promote viewpoint diversity.

132. While consumers continue to rely on television and newspapers, and their affiliated Web sites, for their local news, they increasingly turn to new media, both the Internet and cable, as news sources. The recent Information Needs of Communities Report finds that the Internet has created more diversity and choice in news and information, and that most communities have seen a rise in the number and diversity of outlets, as well as more diversity in commentary and analysis. The Commission seeks comment on whether these sources contribute significantly to the diversity of news sources available to consumers. As the Third Circuit

noted, the traditional media continue to be an important news source. Nonetheless, Internet adoption rates continue to grow, leading to changes in how consumers get their news. Because the primary marketplace for news is shifting, the Commission seeks comment on whether the shift in consumption of news supports elimination of the rule. For instance, does the increase in the diversity of news outlets provided by the Internet contribute enough to the marketplace of ideas to ensure that viewpoint diversity would be adequately protected absent this rule? The Commission also notes that the Commission previously has rejected the argument that the use of common facilities by cross-owned stations to gather news, traffic, and weather would be harmful to diversity, because such cost-cutting measures allow the vital information to be available to the public through a greater number of outlets. The Commission seeks comment on how other changes in the media marketplace affect diversity.

133. The Commission also seeks comment on how elimination of the radio/television cross-ownership rule would affect minority and female ownership opportunities. As noted, DCS asserts that significant entry barriers continue to exist for minorities and women in both the traditional and new media industries. Would elimination of the radio/television cross-ownership rule have any effect on such barriers? DCS also states that minority-owned stations are more likely to provide programming geared towards minority audiences and that minority communities are underserved as a result of the lack of minority media ownership. Would elimination of the radio/television cross-ownership rule have any effect on programming geared toward minority audiences?

134. *Digital Transition*. The Commission observes that, following the digital transition for full-power television broadcasters in 2009, the current radio/television cross-ownership rule became at least partially obsolete. The rule relies on analog broadcast television contours as one of its criteria. As broadcast television stations have completed the transition to digital television service and ceased broadcasting in analog, the analog contours are no longer relevant, and comparable digital contours do not exist for all of the analog contours previously employed in the media ownership rules. As discussed in the *NOI*, while the Commission has found the digital noise limited service contour to approximate the larger Grade B contour, the Commission has not found an

equivalent for the smaller Grade A contour, which is used to trigger the radio/television cross-ownership rule. If the Commission were to apply the larger Grade B contour, the Commission could allow entities to own more broadcast stations than was the case with the analog contours. The Commission received no suggestions in filed comments about how to address this problem. Although the Commission does not base its decision to repeal the rule on the rule's use of analog contours and the lack of digital equivalents, the difficulty of creating a consistent rule in the digital age is a factor the Commission has considered. The Commission seeks comment on how it could overcome this difficulty to the extent commenters propose to maintain restrictions on radio/television cross-ownership. In particular, if commenters favor retaining a contour-based rule, the Commission seeks comment on what contour to utilize and how the rule should be applied.

## 5. Dual Network Rule

### a. Introduction

135. Historically, the Commission has concluded that the dual network rule is necessary in the public interest to promote competition and localism. In order to promote these goals, the current dual network rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top four" networks (ABC, CBS, Fox, and NBC). The Commission concluded in the 2002 *Biennial Review Order* that, given the level of vertical integration of each of the top four networks, as well as their continued operation as a "strategic group" in the national advertising market, a top-four-network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. The Commission reasoned that these competitive harms would reduce program output, choices, quality, and innovation to the detriment of viewers. The Commission also concluded that allowing a merger of any of the top four networks would harm localism by reducing the ability of affiliates to bargain with their networks for favorable terms of affiliation, diminishing affiliates' influence on network programming, and thus harming the ability of the affiliates to serve their communities. In the 2006 *Quadrennial Review Order*, the Commission concluded that the dual network rule continued to be necessary in the public interest to promote

competition and localism. The U.S. Court of Appeals for the Third Circuit upheld the Commission's decision to retain the rule, finding that the Commission reasonably relied on several unique features of the top four broadcast networks, such as their vertical integration and their ability to reach a larger audience than other networks. The Court also found that the Commission's description of the media marketplace as "dynamic" and "competitive" was not inconsistent with its decision to retain the rule, in part, to avoid the damage to competition that a merger of the top four networks would cause.

136. The Commission notes that since its last review significant changes have taken place in the television marketplace. In particular, the number and popularity of non-broadcast sources for video programming continue to grow. Nonetheless, the Commission tentatively finds that the top four broadcast networks continue to possess characteristics that distinguish them from other broadcast and cable networks and therefore still serve a unique role in the electronic media that justifies retaining a rule specific to them. As discussed in more detail below, the top four broadcast networks, as compared to other broadcast and cable networks, achieve substantially larger primetime audiences, which can then be sold at a premium to advertisers that want to reach large, nationwide audiences. Accordingly, the Commission tentatively finds that a top-four network merger would restrict the availability, price, and quality of primetime entertainment programming to the detriment of consumers. The Commission also tentatively finds that a top-four network merger would substantially lessen competition for advertising dollars in the national advertising market, which would reduce the incentives for the networks to compete against each other for viewers by providing innovative, high quality programming. For these reasons, the Commission tentatively concludes that the dual network rule remains necessary in the public interest to promote competition and should be retained without modification. The Commission seeks comment on this tentative conclusion. The Commission also seeks comment on whether allowing a merger of any of the top four networks would harm localism by reducing the bargaining power of affiliates, which would consequently lessen their ability to influence network programming in ways that serve their local communities. The Commission also seeks comment on

whether allowing a merger of any of the top four networks would promote localism.

### b. Background

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

### c. Discussion

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

139. Primetime network programming is generally designed to attract a mass audience, and financing such programming, in turn, requires the substantial revenue that only a mass audience can provide. The top four broadcast networks supply their affiliated local stations with primetime entertainment programming intended to attract mass audiences and the advertisers that want to reach such large, nationwide audiences. By contrast, other broadcast networks target more specialized, niche audiences similar to many cable television networks. The Commission recognizes that, in general, consumers substitute between broadcast and cable networks, and that cable networks earn substantial advertising revenues. Nevertheless, the Commission tentatively finds that the primetime entertainment programming supplied by the top four broadcast networks is a distinct product, the

provision of which could be restricted if two of the four major networks were to merge.

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

141. Similarly, among individual primetime entertainment programs, the audiences for the top four broadcast networks remain substantially larger than those for other broadcast and cable networks. With the exception of certain individual sports events, cable network programs do not regularly rank among the highest rated television programs. For instance, during the first three months of 2011, the highest rated single episode of a non-sports primetime program on a cable network was an episode of *Jersey Shore*, which achieved an audience of 8.87 million when it appeared on MTV during the week of January 17–23, 2011. Despite this sizable audience, for the week, a total of 21 non-sports programs that aired on top-four broadcast networks achieved larger audiences. Primetime programs on broadcast networks outside the top

four likewise generally achieve smaller audiences than primetime programs carried on the top four networks. For instance, for the 2009–2010 television season, no program from any non-top-four broadcast network ranked among the 100 highest rated broadcast programs.

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

143. The Commission disagrees with the assertion by CBS that greater audience share in comparison to other broadcast and cable networks does not justify a rule specific to the top four networks. The Commission finds that the top four broadcast networks have a distinctive ability to attract larger primetime audiences regularly relative to other broadcast and cable networks, which enables them to earn higher rates from advertisers that are willing to pay a premium for such audiences. Thus, a combination between top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences, which could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high quality programming. The Commission therefore tentatively concludes that primetime network entertainment programming and national television

advertising are each distinctive products, the availability, price, and quality of which could be restricted, to the detriment of consumers, if two of the top four networks were to merge. Accordingly, the Commission tentatively concludes that the dual network rule remains necessary to foster competition in the provision of primetime entertainment programming and the sale of national advertising time. The Commission seeks comment on these tentative conclusions. In particular, the Commission seeks comment on whether the top four networks face competition from any other sources that are also capable of delivering a large, national audience to advertisers, such that they provide a reasonable substitute for the top four networks in the national advertising market. The Commission also seeks comment as to whether the dual network rule is necessary to promote and protect competition in the primetime network entertainment programming and national television advertising markets, or if antitrust laws and the Commission's public interest standard are sufficient for reviewing any possible merger between the four networks.

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

for national news, or whether the dual network rule remains necessary to protect against excessive concentration in this market. The Commission also seeks comment as to whether the dual network rule is necessary to promote and protect competition in a national news market and purchasing or pricing of such programming, or if antitrust laws and the Commission's public interest standard are sufficient for reviewing any possible merger between the four networks.

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

#### *D. Diversity Order Remand/Eligible Entity Definition*

146. The Commission seeks comment in this *Notice of Proposed Rulemaking* on issues that previously were being addressed in a separate rulemaking proceeding focused on enhancing the diversity of ownership in the broadcast industry, including by increasing ownership opportunities for minorities and women (the *Diversity* proceeding).

As explained below, the Third Circuit in *Prometheus II* remanded the measures adopted in the Commission's 2008 *Diversity Order* that relied on a revenue-based "eligible entity" standard and emphasized that the actions required on remand from the *Diversity Order* should be completed "within the course of the Commission's 2010 Quadrennial Review of its media ownership rules." Accordingly, the Commission seeks comment in this proceeding on how the Commission should respond to the court's remand and on other actions the Commission should consider to increase the level of broadcast station ownership by minorities and women.

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

148. Over the past several years, the Commission also has implemented recommendations from the Advisory Committee on Diversity for Communications in the Digital Age (Advisory Committee) designed to enhance opportunities for minorities, women, and other underrepresented groups to participate in the broadcast industry. For example, based on a recommendation from the Advisory Committee, the Commission's Office of Communications Business Opportunities (OCBO) hosts annual capitalization strategies workshops in order to facilitate lending to and investment in minority- and women-owned entities. Most recently, OCBO convened a Capitalization Strategies

Workshop that focused on capital acquisition for small, women- and minority-owned businesses in broadcasting, telecommunications, and related fields. In addition, as explained further below, the Commission currently is considering a recommendation from the Advisory Committee to afford bidding credits in license auctions to persons or entities that have overcome substantial disadvantage. The Commission seeks input in this *Notice of Proposed Rulemaking* on how the Commission most effectively can expand upon its diversity initiatives at the same time that the Commission addresses the Third Circuit's concerns and other legal considerations, including potential impediments to affording licensing preferences to minorities and women under current standards of constitutional law.

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

150. As defined in the *Diversity Order*, an "eligible entity" is any entity that qualifies as a small business under revenue-based standards that have been established by the Small Business Administration (SBA). In adopting measures based on this definition, the Commission concluded that it would "be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including minorities and women." The Commission also noted that adopting this "race- and gender-neutral definition" would avoid the "constitutional difficulties" associated with a race-conscious definition "that might create impediments to the timely implementation" of the measures adopted in the *Diversity Order*. In response to commenters' requests that the Commission take direct action to increase minority and female ownership of broadcast stations, however, the Commission asked for comment in the *Third Further Notice of Proposed*

*Rulemaking to the Diversity Order* (73 FR 28400, May 16, 2008, FCC 07–217, rel. Mar. 5, 2008) (the *Diversity Third FNPRM*) on whether it should adopt an alternative, race-conscious eligibility definition as well as other potential definitions. The alternative definitions proposed in the *Diversity Third FNPRM* are discussed below.

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

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

153. *Data Collection Concerning Minority and Female Ownership*. Since

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

154. The Commission's first data collection that incorporates these changes reflects ownership interests as of November 1, 2009. The deadline for filing the data with the Commission was July 8, 2010, and on February 28, 2011 the Commission released to the public a data set compiling all of the ownership reports that were filed. That release included descriptions of the data and instructions on accessing them to permit interested parties to analyze and manipulate the data. This data set represents the first "snapshot" of broadcast ownership data in a series of planned biennial reviews that collectively should provide a reliable basis for analyzing ownership trends in the industry, including ownership by minorities and women.

155. Commission staff has reviewed the 2009 biennial ownership filings of full power commercial broadcast television stations in order to determine the number of stations controlled by reported racial and ethnic categories. For purposes of this analysis, the Commission examined the race or ethnicity of owners with attributable voting interests in the entity that ultimately owns the station license and defined a controlling interest as an interest that exceeds 50 percent alone or in the aggregate. There were 1,394 full-power commercial television stations in the United States as of November 1,

2009, the information collection date. According to the Commission's review of the 2009 data, 29 of these stations, or 2.1 percent, are minority owned. Of those 29 stations, 9 have Black or African-American owners, accounting for 0.6 percent of all stations. American Indian or Alaska Native owners control 10 stations, or 0.7 percent, while Asian owners control nine stations, or 0.6 percent. Native Hawaiian or Pacific Islanders own one station, or 0.1 percent. Hispanic or Latino owners control 36 stations, or 2.6 percent. By comparison, the Commission's review showed that non-Hispanic White owners control 1,021 stations, or 73.2 percent of the total stations. In addition, the Commission was not able to categorize the race or ethnicity of the ownership for 244 stations, representing 17.5 percent of the total stations, because at least 50 percent of the ownership of these stations was not reportable via the Form 323. Information was unavailable for 64 stations, or 4.6 percent.

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

157. The Commission recognizes that the data currently in the record of this proceeding are not complete and are likely insufficient either to address the concerns raised in *Prometheus II* or to support race- or gender-based actions by the Commission. Although the Commission would prefer to be able to propose specific actions in response to the Third Circuit's remand of the measures relying on the eligible entity

definition in this *Notice of Proposed Rulemaking*, the Commission believes that making legally sound proposals would not be possible based on the record before us at this time.

Accordingly, the Commission plans to undertake the following actions in preparation for the 2014 broadcast ownership review to establish with the requisite foundation and clarity what additional policies can be implemented promoting greater broadcast ownership diversity, including female and minority ownership: (1) Continue to improve the Commission's data collection so that the Commission and the public may more easily identify the diverse range of broadcast owners, including women and minorities, in all services the Commission licenses; (2) Commission appropriately-tailored research and analysis on diversity of ownership; and (3) Conduct workshops on the opportunities and challenges facing diverse populations in broadcast ownership. In addition, the Commission asks interested parties to supplement the record and provide any and all data available that can complete a picture of the current state of ownership diversity, including minority and female ownership in the broadcast industry and to justify any prospective actions the Commission may take on remand.

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

159. As an initial matter, the Commission invites comment regarding the possibility of reinstating the preexisting eligible entity definition. Recognizing the Third Circuit's apparent skepticism that the Commission would be able to demonstrate on remand that the

revenue-based eligibility definition serves the Commission's goal of increasing broadcast ownership by minorities and women, the Commission asks commenters to address whether or not there is additional evidence available that would show a stronger connection between according licenses preferences to small businesses and promoting this goal. Is there evidence demonstrating that there are now more small businesses, particularly those that are owned by minorities or women, that own broadcast outlets than there were when the eligible entity standard was put in place? The Commission strongly encourages parties to supply any such information to the Commission. The Commission also notes the Third Circuit's statement that "it is hard to understand how measures using [the eligible entity] definition would achieve the stated goal" of increasing broadcast ownership by minorities and women in light of Commission data showing that "minorities comprise 8.5% of commercial radio station owners that qualify as small businesses, but 7.78% of the commercial radio industry as a whole. \* \* \*" The Commission seeks comment on whether this comparison of minority representation in different segments of the radio industry accurately reflects the potential impact of the eligible entity standard on minority and female ownership. In addition, the Commission invites input on whether it is possible that the preexisting definition would have a more substantial impact on minority and female station ownership if the Commission modifies the licensing preferences to which the definition applies. As discussed in more detail below, the Commission invites commenters to propose changes to these preferences and to explain how such changes would promote the Commission's minority and female ownership objectives.

160. Alternatively, should the Commission consider reinstating the eligible entity definition to support other policy objectives aside from the promotion of minority and female station ownership? For example, should increasing station ownership by small businesses be considered an independent policy goal in this proceeding and, if so, would readopting the preexisting eligibility definition be a reasonable and effective means of promoting this objective? Several provisions of the Communications Act require the Commission to promote the interests of small businesses. *See, e.g.*, 47 U.S.C. 309(j)(3)(B) (obligating the Commission to "disseminat[e] licenses

among a wide variety of applicants, including small businesses" in authorizing the Commission to award licenses via competitive bidding); *see also* 47 U.S.C. 257(a) (directing the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services \* \* \*"); 47 U.S.C. 614(a)(i) (establishing a "Telecommunications Development Fund" to, among other purposes, "promote access to capital for small businesses in order to enhance competition in the telecommunications industry"). The Commission also asks commenters to consider whether creating opportunities for small businesses to participate in the broadcast industry via the eligible entity standard would serve the Commission's traditional goals of fostering viewpoint diversity, localism, and competition. In the *Diversity Order*, the Commission suggested that the use of the eligible entity standard would "result in a wider array of programming services, including some that are responsive to local needs and interests and audiences that are underserved." In this regard, the Commission "anticipate[d] that small businesses will be more likely than large corporations to have ties to the communities that they serve, and thus be more attuned to local needs and interests." The Commission seeks comment on this prediction and on other ways in which the continued use of the eligible entity definition could serve the Commission's traditional policy objectives.

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

162. In the *Diversity Third FNPRM*, the Commission sought comment on

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

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

164. The Commission also sought comment in the *Diversity Third FNPRM* on an "individualized full-file review" approach to awarding the preferences adopted in the *Diversity Order*. Under this proposal, applicants would be

accorded licensing preferences if they could demonstrate that they have overcome "significant social and economic disadvantages." After the release of the *Diversity Third FNPRM*, the Media and Wireless Bureaus sought comment on a proposal made by the Advisory Committee to award bidding credits in licensing auctions to applicants that demonstrate that they have overcome a "substantial disadvantage." The Commission seeks comment on the use of this type of standard for purposes of the licensing preferences adopted in the *Diversity Order*. Would these standards, both of which are based on individualized reviews to determine whether applicants have overcome considerable disadvantages, be subject to strict judicial scrutiny and would they be able to survive this level of constitutional analysis? Alternatively, would it be feasible for the Commission to conduct such reviews in a race- and gender-neutral manner that would be subject to a lower level of constitutional scrutiny? If so, would the Commission be able to satisfy the Third Circuit's concern that the use of a race- and gender-neutral approach may not materially advance the Commission's minority and female ownership goals? In addition, the Commission asks commenters to consider how the Commission could ensure that the highly individualized reviews of broadcast applications that would be required under a substantial disadvantage standard could be administered in a sufficiently objective and consistent manner as well as in accordance with First Amendment values. The Commission also would like interested parties to comment on the Commission resources that would be required to conduct, as a matter of course, highly fact-specific reviews of this nature. What data would the Commission need to support the adoption of this type of standard? The Commission seeks comment as to the practicability of implementing such a standard and what information would be required by the Commission to determine potential eligibility. What privacy concerns, if any, are raised by collecting such information? Would the Commission have statutory authority to adopt it? To the extent that additional data are needed, commenters are encouraged to provide such information.

165. In addition, the Commission seeks comment on any other approaches it should consider. Commenters advocating alternative proposals should explain how the proposal would satisfy the applicable level of constitutional

scrutiny, how it would advance the Commission's policy goals, how the Commission could address any administrative burdens or practical considerations inherent in the proposed approach, and what data the Commission would need in order to justify it. Again, commenters are strongly encouraged to supply any relevant data to the Commission.

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

167. *Measures Relying on Eligible Entity Standard*. In addition to seeking comment on the eligible entity definition, the Commission also seeks comment on how the Commission should proceed with respect to the licensing preferences that previously relied on this definition, each of which was remanded in *Prometheus II*. As numbered in the *Diversity Order*, these measures include: (1) Revision of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rule; (3) Distress Sale Policy; (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity; (5) Extension of Divestiture Deadline in Certain Mergers;

and (6) Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities. The Commission seeks comment on whether or not the Commission, either in this proceeding or a separate rulemaking, should attempt to reinstate any of these measures. In particular, if the Commission decides to readopt the preexisting eligible entity definition on remand, should it also reinstate each of the measures that rely on this definition? Alternatively, if the Commission adopts a new standard to replace or supplement the eligible entity definition, should the Commission apply that revised standard to each of the above-listed measures, but otherwise reinstate them in their current form? Are there reasons why the Commission should either decline to readopt any of these measures on remand or make any changes to them if the Commission implements a new eligibility standard? The Commission also seeks comment on whether reinstating these measures, either in their current form or with proposed changes, would be an effective means of advancing the Commission's policy goals and whether such action would be consistent with applicable constitutional law standards. The Commission further invites comment on whether the Commission would need additional data in order to justify the readoption of any of these measures and, if so, the Commission requests that such data be submitted. By contrast, if the Commission decides that it is not feasible to replace the eligible entity definition and therefore declines to adopt any new definition on remand, then, absent further action by the Commission, each of the measures vacated by the court would remain void. Accordingly, these measures would be rescinded by the Commission.

168. The Commission also sought comment on a number of additional measures intended to promote diversity among broadcast licensees in the *Diversity Third FNPRM*. Several of these proposals rely on the now vacated eligible entity definition or another proposed eligibility standard. As set forth in the *Diversity Third FNPRM*, these proposals include: (1) Share-Time Proposals; (2) Retention of AM Expanded Band Owners' Station if One Station Is Sold to an Eligible Entity; (3) Structural Waivers for Creating Incubator Programs; and (4) Proposals of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition. A number of parties filed comments on these proposals in response to the *Diversity Third FNPRM*. With regard to the third proposal,

MMTC recently has urged the Commission to take action on a similar Minority Ownership Incubation Proposal. Specifically, MMTC has proposed an incubation program pursuant to which the local radio ownership rule would be waived for radio broadcasters that engage in one of six "Qualifying Activities," including (1) selling or donating a commercial radio station to a qualified entity; (2) entering into a local marketing agreement with an independent programmer for a five year period for the use of an FM HD-2 or HD-3 channel; (3) financing one year of operations and providing in-kind technical and engineering assistance or equipment that enables an eligible entity to reactivate and restore to full service a dark commercial or noncommercial broadcast station; (4) donating a commercial or noncommercial station to an Historically Black College or University, an Hispanic Serving Institution, an Asian American Serving Institution, or a Native American Serving Institution; (5) "providing loans, loan guarantees, lines of credit, equity investments or other direct financial assistance to a qualified entity to cover more than 50 [percent] of the purchase price of a radio station"; or (6) engaging in another action that is "likely to enhance radio station ownership opportunities for qualified entities." Under MMTC's proposal, the Qualifying Activity must occur in either the same market as or a larger market than the market for which the waiver is requested. Radio broadcasters that engage in Qualifying Activities would be eligible to receive an unlimited number of waivers of the AM and FM subcaps and a specified number of waivers of the local radio ownership caps based on market size. In light of the Third Circuit's remand, the Commission again seeks comment on the proposals in the *Diversity Third FNPRM*, as well as those that have been suggested more recently, in this proceeding. In particular, the Commission asks for input on how the court's remand of the provisions relying on the eligible entity definition should impact the Commission's consideration of each of these proposals. The Commission also seeks comment on whether the adoption of these measures would advance the Commission's policy objectives and on the legal implications of implementing these proposals. Further, the Commission invites parties to comment on whether the Commission would need additional data in order to justify any of these measures and encourage parties to provide any data

that may be helpful to the Commission's analysis.

169. *Additional Measures To Further the Commission's Diversity of Ownership Goals*. The Commission also seeks comment on any other measures it should consider that would advance the Commission's longstanding goal of having a wide diversity of broadcast licensees and, more specifically, of increasing the number of minority- and women-owned broadcast stations. In addition to the measures noted above, the *Diversity Third FNPRM* sought comment on several other proposals designed to increase participation in the broadcast industry by new entrants and small businesses, including minority- and women-owned businesses. These proposals include: (1) Opening FM Spectrum for New Entrants; (2) Must-Carry for New Class A Television Stations; and (3) Reallocation of TV Channels 5 and 6 for FM service. The Commission seeks to refresh the record on these proposals in this proceeding. The Commission also asks commenters to suggest any additional actions the Commission should consider to advance its important diversity objectives. For example, MMTC has suggested that the Commission seek to reinstate and expand its previous Tax Certificate Policy by coordinating with the White House on draft legislation. The Commission asks commenters specifically to explain how their proposals would serve the Commission's goals and whether they would satisfy relevant constitutional law standards.

#### *E. Media Ownership Studies*

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

171. As discussed below, each of these studies defines a relevant performance metric with respect to one or more of the three policy goals and examines how results vary across markets with differing ownership

structures. Generally, the research was designed to relate relevant performance metrics directly to changes in ownership of broadcast facilities in local markets, the attribute of the market that the Commission's rules directly affect. In some cases the studies found useful and important correlations. In other cases variations were found across markets but with little correlation to local market ownership structure. The Commission seeks comment on how to interpret and apply these results. Are there other statistical studies available that the Commission should consider that relate relevant performance metrics to market structure using statistical analysis of a reasonably large sample of markets? Are there individual market case studies available that are relevant and, if so, what role should they have in the Commission's deliberations?

#### 1. Studies Relating to Competition

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

173. Media Ownership Study 1 examines television audience ratings during parts of the day when programming is locally selected (in particular, dayparts other than prime time, because most prime time programming is network selected). The study found no significant relationship between variations in viewing and variations in market structure across markets. The Commission seeks

comment on the use of these metrics to measure competition, as well as the results of Media Ownership Study 1.

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

175. Media Ownership Study 7 focuses on the provision of radio programming to minority audiences. It first documents the significant differences in listening patterns across the Black and White and across the Hispanic and non-Hispanic demographic groups. The study also examines the impact of market structure on listening with inconclusive results. The Commission seeks comment on the design of Media Ownership Study 7, as well as its results with respect to radio listening, and what, if anything, those results can contribute to the Commission's analysis.

176. Media Ownership Study 2 utilizes survey data as a basis for estimating consumers' willingness to pay for (*i.e.*, valuation of) various characteristics of their media environment (diversity of opinion, community news, multiculturalism, and advertising). The portion of the Media Ownership Study 2 analysis most directly related to competition is the study of advertising and consumers' revealed willingness to pay for reductions in it. Some past research has interpreted the amount of advertising as a kind of "price" that consumers must pay to receive television programming. The market structure analysis in Media Ownership Study 2 focuses on the number of television voices in the market, and the results appear to show that an increase raises the amount of advertising. The Commission seeks comment on whether the characteristics used in Media Ownership Study 2 to measure consumer satisfaction adequately measure total consumer

satisfaction. In particular, the Commission seeks comment on the extent to which correlations between market structure and the amount of advertising in a market provide a useful proxy for competition in the marketplace. Commenters who argue that important elements of the media environment are missing from the study are requested to indicate how consumer satisfaction is affected by the missing elements as well as how the missing elements are likely to be correlated with the elements of the media market structure the Commission's ownership rules can influence.

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

#### 2. Studies Relating to Localism

178. The Commission sought to measure localism, in part, by looking at the effect of local market structure on the quantity of local news and public affairs programming provided at both the market level and the station level. Media Ownership Study 1 examines a number of factors relating to the quantity and quality of local information and correlates that information with the structure of the local media market. In this study, quality is measured by using ratings as the variables to determine how much people prefer certain types of programming, including local news programming. The study does not identify a relationship between ownership structure and local news ratings or hours of programming. The Commission seeks comment on how

well Media Ownership Study 1 measures the degree to which the localism needs of the local population are being served. The study defines television ratings, restricted to the evening time period, as a reasonable measure for the quality of the local television content in the market. Does a measure of the rating of local news provide a better measure of localism than a measure of all content viewing during this period? Should the Commission's localism metric necessarily rely on consumer preference? Media Ownership Study 1 also examines three measures of the amount of news available in the market: The number of news formatted radio stations, the number of hours of local news, and daily newspaper circulation. Is the number of news formatted radio stations an appropriate measure of localism in the absence of information on the type of news carried by the stations? Would one expect the amount of local news on a news formatted station to vary across markets in a predictable manner? Is the circulation of daily newspapers in a market a reasonable measure of the availability of local content? How should it be interpreted? What, if anything, does a high newspaper circulation level indicate about local content on television and radio stations in the same market?

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

weigh conflicting results between market outcomes and station behavior?

180. Media Ownership Study 5 examines the prevalence of news formatted radio stations and the listenership of those stations. The data for this study do not separate local and national news programming or account for news programming on stations that are not designated as news formatted. Is the news content of news-formatted stations sufficiently local that the Commission can use the number of such stations as a reliable metric for the amount of localism in a radio market? The study also analyzes usage of news, via the overall ratings of the news-formatted radio stations. Are ratings a sufficient measure of the quality of the local content provided by the station? The Commission notes that the study examines only radio markets defined by Arbitron, which tend to be in the more populous areas of the country. Should the Commission expect the more rural areas to differ? The study concludes there are few significant relationships between news formatted stations and ownership structure. The study does provide weak evidence, however, that an increase in the size of the largest local owner group is associated with an increase in the number of news stations and the number of different news formats offered in the market. The Commission seeks comment on these conclusions.

181. Media Ownership Study 6 examines the state of local news on the Internet to determine whether the Internet provides a net increase to media diversity in local markets. Media Ownership Study 6 first determines which news sites are not affiliated with a traditional media outlet such that they can be considered a new or independent news source. The study provides data on online local news sites within the top 100 U.S. television markets that reach more than a minimum threshold of traffic. Media Ownership Study 6 concludes that there is a very limited amount of local news on the Internet that is provided by organizations that are not broadcasters or print media organizations. The Commission tentatively concludes from Media Ownership Study 6 that, while the potential of the Internet for local, or even hyper-local, news is great, very few such sites today reach a significant audience, at least in the top 100 markets. The Commission seeks comment on that tentative conclusion. The Commission also notes that the analysis is based upon the most widely visited sites. Is it possible that a sufficient number of lightly visited sites carrying content produced by non-

traditional media exist such that they act as a reservoir of local content available to consumers? If not, are the barriers to entry into Web publishing sufficiently low such that a failure by broadcasters to provide consumers with their desired level of local news and information will attract competitors? Does the current relative absence of competitors provide any indication of how well the traditional media are serving the needs of consumers?

182. Media Ownership Study 3 examines public knowledge and civic participation to determine whether consolidation results in a more or less informed public. Media Ownership Study 3 considers several metrics of civic engagement, including knowledge of political candidates and issues, as potential indicators of how well the media environment supplies information about local issues. It finds little relationship between media market structure and consumers' knowledge about presidential and congressional candidates, interest in politics, or turnout at the polls. The peer reviewer raised several questions about the usefulness of these particular measures of civic knowledge and engagement. Are the metrics reliable indicators of such characteristics? The study does find a relationship between political participation and political advertising on television. Could there be a connection that Media Ownership Study 3 did not measure between market structure and a political candidate's decision to advertise in that market, which influenced civic knowledge and participation? The Commission seeks comment on these issues.

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

### 3. Studies Relating to Diversity

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

185. The Commission also assessed diversity in Media Ownership Study 2. The study analyzes the existing and preferred quantity of information of interest specifically to women and minorities, which it refers to as multiculturalism. Analysis of the survey results allowed the researchers to estimate the value consumers place on increased amounts of this media market characteristic. The Commission tentatively concludes that what the study labeled as multiculturalism is a useful, though not singular, indicator of the level of program diversity in the market. The survey asked consumers about their media environments overall rather than the characteristics of a particular medium such as radio or television. When examining the influence of market structure on consumer valuation, the study finds that the number of television voices has a significantly positive impact on consumers' valuation of opinion diversity and multiculturalism, even after accounting for the number of stations in the market. Examining the effect of a combination of two television stations in a market, the study finds such a combination leads to a loss in average consumer welfare which is greater in smaller markets. The study finds that the combination does benefit consumers due to a reduction in the perceived amount of advertising. While

the changes in consumer welfare from such a transaction vary significantly by market size for opinion diversity and advertising, the effect on multiculturalism varies substantially less by market size. How should the Commission assess consumers' satisfaction against the overall media environment when balancing the benefits of program diversity with any possible countervailing effects?

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

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

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

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

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

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

191. Measures of civic engagement also can be used to assess the level of viewpoint diversity in a market. For instance, if media outlets in a market supply programming with a diverse range of viewpoints, consumers may be

better informed, which can lead to increased local civic participation. As noted above, Media Ownership Study 3 provides data relevant to this analysis. It measures civic participation and knowledge. Does this metric also provide useful information about the level of viewpoint diversity in the market? Several measures examined by the study may have relevance to diversity depending on how consumers react to hearing diverse viewpoints. The study measures consumers' recognition of politicians. Is it reasonable to conclude that markets where consumers are more likely to recognize the positions held by various politicians are markets in which more diverse information is available? The Commission seeks comment on the relevance of civic participation for measuring the level of viewpoint diversity in the market.

#### 4. Study Relating to Minority and Women Ownership Issues

192. Media Ownership Study 7 considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences. It provides mixed evidence on whether minority-owned radio stations better serve minority populations. This study looks at the provision of radio programming to minority (African-American and Hispanic) audiences, as reflected in the choices of radio stations to select formats that are popular with minority audiences. It reflects that minority audiences—specifically Black and Hispanic listeners—have very different listening preferences from the majority non-Hispanic, White population. For example, the study shows that a single programming format, Urban—attracts half of black listening, while it attracts less than five percent of nonblack listening. The data also suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market—in other words, that minority-owned stations are more likely to provide programming targeted to minorities than are non-minority owned stations. The data do not indicate a clear relationship between ownership concentration and the number of different radio formats in each market, although the cross-sectional analysis does suggest that ownership concentration promotes a greater number of formats in the market. The Commission seeks comment on this study and on the appropriate application of its analysis to the

Commission's policy goals. Are there other statistical studies available that the Commission should consider, relating market structure and the promotion of content that is specifically of interest to minorities and women? Do such studies use statistical analysis of a reasonably large sample of markets? Are there individual market case studies available that are relevant and, if so, what role is there for such case studies in the Commission's deliberations?

#### F. Attribution Matters

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

194. The Commission seeks comment in particular regarding local news service (LNS) agreements and shared service agreements (SSAs). An LNS agreement is defined by commenters as an agreement in which multiple local broadcast television stations contribute certain news staff and equipment to a joint news gathering effort coordinated by a single managing editor. According to commenters, an SSA is an agreement, or series of agreements, in which one in-market station provides operational support and programming for another in-market station. Public interest commenters contend that LNS agreements and SSAs result in fewer independent voices and less local news content and could be used to circumvent the Commission's rules. On the other hand, broadcasters assert that these agreements facilitate greater collaboration between media outlets and permit stations to sustain labor intensive journalism, thereby offering more communities access to local news content than could otherwise be achieved.

195. *Background.* The Commission's attribution rules currently make attributable certain local marketing agreements (LMAs), also referred to as time brokerage agreements (TBAs), in which a broker purchases discrete blocks of time from a licensee and

supplies programming and sells advertising for the purchased time. Certain joint sales agreements (JSAs), which "involve primarily the sale of advertising time and not decisions concerning programming," are also subject to attribution. These agreements are not precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities.

196. The Commission first adopted attribution rules for same-market radio LMAs in 1992. The Commission was concerned that absent such rules significant time brokerage under such agreements, combined with increased common ownership permitted by revised local radio ownership rules, could undermine the Commission's competition and diversity goals. In 1999, the Commission adopted attribution rules for television LMAs, finding that the rationale for attributing same-market radio LMAs applied equally to same-market television LMAs, but declined to adopt attribution rules for radio or television JSAs. However, the Commission, in its *2002 Biennial Report and Order*, adopted attribution rules for same-market radio JSAs, finding that JSAs may convey sufficient influence and control over advertising to merit attribution. Subsequently, in 2004, the Commission initiated a rulemaking to determine whether or not to adopt attribution rules for television JSAs; the Commission tentatively concluded that it should. No decision has been issued in that proceeding.

197. *Potential Concerns.* CWA and Free Press object to LNS agreements because they believe that collaboration under LNS agreements harms competition and reduces the amount of independently produced local news programming available to consumers. These commenters are concerned that stations will be unable to devote sufficient resources to independent journalism as a result of the staff reductions and resource sharing resulting from the creation of an LNS. CWA also is concerned that consolidating newsgathering and editorial control reduces diversity and in-depth coverage of local news. Because stations are reporting the same story, CWA argues, viewers are exposed only to a single perspective on every story covered by the LNS. Moreover, CWA suggests that increased communication between stations could lead to antitrust law violations.

198. CWA and Free Press also object to SSAs, particularly those that allow a

single station to produce the news content for multiple stations in a local market. According to these commenters, such agreements result in “re-run” content being broadcast over multiple newscasts, thereby reducing the number of independent voices available in the local community. Furthermore, these commenters assert that the staff reductions that typically accompany SSAs reduce the quality, quantity, and diversity of local news coverage.

199. CWA and Free Press object to SSAs also because they believe broadcasters may be using them to circumvent the Commission’s multiple ownership rules. CWA suggests that SSAs contain very similar provisions to LMAs and JSAs, which are attributable under certain conditions under the Commission’s multiple ownership rules. For instance, like many LMAs and JSAs, SSAs may involve the sharing of facilities, advertising sales personnel, news production, and certain station operations, and options to purchase the brokered station. CWA opposes broadcasters using SSAs to outsource (or broker) newscasts, in asserted circumvention of the Commission’s attribution rules. According to CWA, news programming accounts for an average of 45 percent of a station’s revenue; therefore, a brokering station can unfairly acquire a significant portion of the economic benefit generated by the brokered station without triggering the attribution rules. In addition, the American Cable Association (ACA) argues that both SSAs and LMAs harm local competition particularly when they permit stations to jointly negotiate retransmission consent. ACA argues that such arrangements permit local broadcast stations to exercise additional leverage with respect to MVPDs leading to higher fees for signal carriage, which are passed on to consumers in the form of higher rates. ACA suggests that broadcasters should be precluded from including collective negotiation of retransmission consent in SSAs or LMAs, particularly with respect to the four top-rated local stations.

200. *Potential Benefits.* On the other hand, broadcasters assert that sharing arrangements (including LNS agreements, LMAs, SSAs, and JSAs) are beneficial to local media markets, generating local news and other services that would not be possible otherwise. Gray asserts that, because of the considerable cost savings associated with its sharing agreements, it can invest in the development of multicast programming streams, mobile video applications, and other uses of the broadcast spectrum. The Local TV

Coalition and Nexstar note that the Commission has long held that sharing agreements (e.g., JSAs) generate efficiencies and serve the public interest.

201. According to the Local TV Coalition and TTBG, sharing agreements can be particularly important in small and mid-sized markets. The Coalition asserts that the advertising revenue available in most small and mid-sized markets is insufficient to support four stand-alone broadcast television news operations. In such markets, the Coalition states, broadcasters budget an average of approximately \$1.8 million per year for the capital and operating expenses associated with local news production. The Local TV Coalition notes that unprofitable news operations, like any unprofitable business venture, likely will be eliminated over time. The Local TV Coalition submits an analysis of 20 small and mid-sized markets, which it asserts shows that one or more news operations would have been lost without the existence of shared services agreements or common ownership of local stations.

202. In addition, the Local TV Coalition provides numerous examples of claimed public interest benefits from sharing agreements. For example, in the Burlington, Vermont–Plattsburgh, New York market, the local Fox affiliate and the local ABC affiliate entered into a JSA and a SSA in 2005. Prior to entering into these agreements, the Fox station had never aired a local newscast and the ABC station had discontinued its news operation and fired 25 staffers. Since concluding the sharing agreements, the Fox station now produces newscasts for both stations, resulting in 28 new jobs. NAB also submits examples of broadcast television stations that increased local news programming as a result of sharing agreements. Nexstar states that sharing agreements have enabled it to increase news coverage in the Lubbock, Texas and the Peoria-Bloomington, Illinois markets, and as a result it has launched a nightly newscast in various markets across five states that previously had no local news coverage. Nexstar asserts that any layoffs associated with these agreements typically involve back-office staff and not news personnel. It also asserts that any layoffs of redundant news personnel permit local broadcasters to invest more money in news production and other local programming. Broadcasters state that issues concerning the joint negotiation of retransmission consent fees should be addressed in the Commission’s retransmission consent proceeding, and not in the media ownership proceeding. Ultimately, broadcasters oppose any

additional regulation of sharing agreements.

203. *Request for Comment.* Are LNS agreements and SSAs substantively equivalent to agreements that are already subject to the attribution rules, and are they therefore attributable today or should they be attributable? What characteristics make them different from already attributable agreements? How, if at all, do LNS agreements and SSAs create interests in licensees that confer a degree of “influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions”? What is the impact of agreements such as LNS agreements and SSAs on the Commission’s competition, localism, and diversity goals? Does either of these types of agreements have a greater impact on the Commission’s policy goals than the other? If so, what characteristics account for the disparity in impact? Should the Commission, and if so how, consider the impact of these agreements on the Commission’s policy goals when formulating the ownership rules?

204. If the Commission determines that LNS agreements and/or SSAs should be attributable, how should the Commission define LNS agreements and SSAs and what attribution standard should the Commission adopt? If the Commission adopts new attribution rules, should existing agreements be grandfathered? If so, how should the grandfathering be structured? If not, how long should broadcasters have to comply with the new attribution rules? If the Commission determines that these arrangements should not be attributable, should the Commission adopt disclosure requirements? If so, what disclosures should be required? Such disclosures could help viewers determine the origin of news content and help the Commission monitor the proliferation of such agreements and determine whether to revisit the issue of attribution.

205. What benefits accrue from stations entering into LNS agreements or SSAs? What would be the impact of a rule that would lead to the attribution of LNS agreements or SSAs? If these agreements result in attribution, what would be the effect, if any, on the cost to produce local news, the ability to employ journalists, and the overall quality of news programming? Is it possible that, without such agreements, local news coverage could be reduced or that some stations will cease news production?

206. Instead of focusing on attributing certain named agreements (e.g., JSAs,

LMAs, SSAs, LNS agreements) as the Commission has in the past, should the Commission adopt a broader regulatory scheme that encompasses all agreements, however styled, that relate to the programming and/or operation of broadcast stations? If so, how should the Commission define the covered agreements and structure this regulatory scheme? What characteristics of such agreements are most likely to confer a degree of “influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions”? Should the Commission consider the impact of these agreements on other matters of Commission interest, such as retransmission consent negotiations? Or are these issues more appropriately considered in another context, such as the retransmission proceeding?

207. The Commission strongly encourages parties to existing agreements of all of these types to respond to this request for comment and to provide any other information they think is relevant. It is critical that the Commission obtain accurate information on how these agreements operate in order to make a reasoned decision on what, if any, changes should be made to the Commission’s attribution rules.

## II. Procedural Matters

### A. Filing Requirements

208. *Ex Parte Rules.* The proceeding this *Notice of Proposed Rulemaking* initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying

the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

209. *Comment Information.* Pursuant to §§ 1.415 and 1.419 of the Commission’s rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.

- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet email. To get filing instructions, filers should send an email to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message “get form.” A Sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW-A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

- People with Disabilities: Contact the FCC to request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), (202) 418-0432 (TTY).

### B. Initial Regulatory Flexibility Analysis

210. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking*. 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 provided in this *Notice of Proposed Rulemaking*. The Commission will send a copy of this *Notice of Proposed Rulemaking*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Notice of Proposed Rulemaking* and IRFA (or summaries thereof) will be published in the **Federal Register**.

#### 1. Need for, and Objectives of, the Proposed Rules

211. Pursuant to a statutory mandate under the Telecommunications Act of 1996, the *Notice of Proposed Rulemaking* seeks comment on the Commission’s media ownership rules and proposed changes thereto. As discussed in the *Notice of Proposed*

*Rulemaking*, the Commission is required by statute to review its media ownership rules every four years to determine whether they “are necessary in the public interest as the result of competition.” The *Notice of Proposed Rulemaking* discusses 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. A challenge in this proceeding is to take account of new technologies and changing marketplace conditions while ensuring that the media ownership rules continue to serve the Commission’s public interest goals of competition, localism, and diversity. The *Notice of Proposed Rulemaking* also seeks 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, the *Notice of Proposed Rulemaking* seeks comment in this proceeding on the aspects of the Commission’s 2008 *Diversity Order* that the Third Circuit remanded in *Prometheus II*.

212. The Commission finds that the public interest is best served by modest, incremental changes to the rules. Recognizing current market realities, the *Notice of Proposed Rulemaking* seeks comment on the following proposals:

- *Local Television Ownership Rule*. In the *Notice of Proposed Rulemaking*, the Commission tentatively concludes that it should retain the current local television ownership rule with minor modifications. Specifically, the *Notice of Proposed Rulemaking* proposes to eliminate the Grade B contour overlap provision of the current rule. The Commission tentatively concludes that it should retain the prohibition against mergers among the top-four-rated stations, the eight-voices test, and the existing numerical limits. In addition, the *Notice of Proposed Rulemaking* seeks comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, the *Notice of Proposed Rulemaking* seeks comment on whether multicasting should be a factor in determining the television ownership limits.

- *Local Radio Ownership Rule*. The *Notice of Proposed Rulemaking* proposes to retain the current local radio ownership rule. The *Notice of Proposed Rulemaking* also seeks comment on alternative modifications to the rule and whether and how the rule should account for other audio platforms. The *Notice of Proposed Rulemaking* also proposes to retain the

AM/FM subcaps, and seeks comment on the impact of digital radio. The *Notice of Proposed Rulemaking* seeks comment on whether to adopt a waiver standard and on specific criteria to adopt.

- *Newspaper/Broadcast Cross-Ownership Rule*. In the *Notice of Proposed Rulemaking*, the Commission tentatively concludes that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. The *Notice of Proposed Rulemaking* proposes to use Nielsen 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. The *Notice of Proposed Rulemaking* proposes to adopt a rule that includes elements of the 2006 rule, including the top 20 DMA demarcation point, the top-four television station restriction, and the eight remaining voices test.

- *Radio/Television Cross-Ownership Rule*. The *Notice of Proposed Rulemaking* proposes to eliminate the radio/television cross-ownership rule in favor of reliance on the local radio rule and local television rule. The Commission believes that the local radio and television ownership rules adequately protect the Commission’s localism and diversity goals and tentatively conclude that eliminating this rule is not likely to lead to significant additional consolidation of broadcast facilities. The *Notice of Proposed Rulemaking* seeks comment on this.

- *Dual Network Rule*. In the *Notice of Proposed Rulemaking*, the Commission tentatively concludes that the dual network rule remains necessary in the public interest to promote competition and localism and should be retained without modification.

- *Diversity Order Remand/Eligible Entity Definition*. The Commission seeks comment in this *Notice of Proposed Rulemaking* on issues that previously were being addressed in a separate rulemaking proceeding focused on enhancing the diversity of ownership in the broadcast industry, including by increasing ownership opportunities for minorities and women. As explained in the *Notice of Proposed Rulemaking*, the Third Circuit in *Prometheus II* remanded the measures adopted in the Commission’s 2008 *Diversity Order* that relied on a revenue-based “eligible entity” standard and emphasized that the actions required on remand from the *Diversity Order* should be completed “within the course of the Commission’s 2010 Quadrennial Review of its media ownership rules.” Accordingly, the

Commission seeks comment in this proceeding on how the Commission should respond to the court’s remand and on other actions the Commission should consider to increase the level of broadcast station ownership by minorities and women.

## 2. Legal Basis

213. The proposed action is authorized under sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310, and section 202(h) of the Telecommunications Act of 1996.

## 3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

214. 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 generally 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.

215. *Television Broadcasting*. The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts. Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.” The Commission has estimated the number of licensed commercial television stations to be 1,382. According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of October 3, 2011, 950 (or about 73 percent) of an estimated 1,301 commercial television stations in the United States have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 392. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. The Commission’s estimate, therefore, likely overstates the number of small entities that might be

affected by the Commission's action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

216. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the Commission's estimates of small businesses to which they apply may be over-inclusive to this extent.

217. *Radio Broadcasting.* The proposed policies could apply to radio broadcast licensees, and potential licensees of radio service. The SBA defines a radio broadcast station as a small business if such station has no more than \$7 million in annual receipts. Business concerns included in this industry are those primarily engaged in broadcasting aural programs by radio to the public. According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database on as of October 3, 2011, about 10,783 (97 percent) of 11,125 commercial radio stations have revenues of \$7 million or less and thus qualify as small entities under the SBA definition. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by the Commission's action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

218. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its

field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the Commission's estimates of small businesses to which they apply may be over-inclusive to this extent.

219. *Daily Newspapers.* The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees. Census Bureau data for 2007 show that there were 4,852 firms in this category that operated for the entire year. Of this total, 4,771 firms had employment of 499 or fewer employees, and an additional 33 firms had employment of 500 to 999 employees. Therefore, the Commission estimates that the majority of Newspaper Publishers are small entities that might be affected by the Commission's action.

#### 4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

220. The *Notice of Proposed Rulemaking* proposes a number of rule changes that will affect reporting, recordkeeping and other compliance requirements. Each of these changes is described below.

221. The *Notice of Proposed Rulemaking* proposes modifications to several of the media ownership rules as set forth above. The proposals, if ultimately adopted, would modify several FCC forms and their instructions: (1) FCC Form 301, Application for Construction Permit For Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission may have to modify other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303-s and Form 323. The impact of these changes will be the same on all entities, and the Commission does not anticipate that compliance will require the expenditure of any additional resources.

#### 5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

222. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance 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.

223. The specific proposals on which the *Notice of Proposed Rulemaking* seeks comment, set forth above, are intended to achieve the Commission's public interest goals of competition, localism, and diversity. The *Notice of Proposed Rulemaking* seeks comment on a number of measures designed to minimize the economic impact of the Commission's proposed rules on firms generally, as well as those intended to promote broadcast ownership opportunities among a diverse group of owners, including small entities. For example, as part of the local radio ownership rule, the *Notice of Proposed Rulemaking* proposes to retain the AM/FM subcaps, which limit the number of radio stations in the same service that an entity can own. As noted in the *Notice of Proposed Rulemaking*, the Commission has previously concluded that AM/FM subcaps serve the public interest by promoting new entry into radio ownership, particularly by small businesses, including minority- and women-owned businesses.

224. The *Notice of Proposed Rulemaking* also seeks comment in this proceeding on the aspects of the Commission's 2008 *Diversity Order* that the Third Circuit remanded in *Prometheus II*. Among other measures, the *Notice of Proposed Rulemaking* seeks comment on those intended to promote broadcast ownership opportunities for small businesses. For instance, the *Notice of Proposed Rulemaking* seeks comment regarding whether to reinstate the preexisting revenue-based eligible entity definition, which the Commission has concluded would "be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including minorities and women." The *Notice of Proposed Rulemaking* also seeks comment on

whether increasing station ownership by small businesses should be an independent policy goal in this proceeding and, if so, whether readopting the preexisting eligible entity definition would be a reasonable and effective means of promoting this objective.

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

225. None.

C. Ordering Clauses

226. Accordingly, *It Is Ordered*, that pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310, and section 202(h) of the Telecommunications Act of 1996, this *Notice of Proposed Rulemaking Is Adopted*.

227. *It Is Further Ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 73**

Radio, Reporting and recordkeeping requirements, Television.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

**Proposed Rules**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

**PART 73—RADIO BROADCAST SERVICES**

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

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

2. Amend § 73.3555 by removing and reserving paragraph (c) and revising paragraphs (b) and (d) to read as follows:

**§ 73.3555 Multiple ownership.**

\* \* \* \* \*

(b) Local television multiple ownership rule. An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if:

(1) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.–midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(2) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located.

Count only those TV stations with a community of license in the same DMA as the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations with a community of license in the same area that would be the functional equivalent of a TV market as the stations in the proposed combination.

(c) [Reserved]

(d) Daily newspaper-broadcast cross-ownership rule. (1) No license for a full power AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(i) The TV station's community of license and the entire community in which the newspaper is published being located within the same Nielsen DMA;

(ii) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with §§ 73.183 or 73.186, encompassing the entire community in which such newspaper is published; or

(iii) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

(2) There is a presumption that it is consistent with the public interest, convenience, and necessity for an entity to own, operate or control in a top 20 Nielsen DMA a daily newspaper and

(i) A full power radio station, or

(ii) A full-power TV broadcast station provided that,

(A) The TV station is not ranked among the top four TV stations in the DMA, based on the most recent all-day (9 a.m.–midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(B) At least 8 independently owned and operating major media voices would remain in the DMA in which the community of license of the TV station in question is located (for purposes of this provision major media voices include full-power TV broadcast stations and major newspapers).

(4) There is a presumption that it is inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control in a DMA other than the top 20 Nielsen DMAs a daily newspaper and a full-power TV broadcast station in the same DMA as the newspaper's community of publication, or a commercial AM or FM broadcast station as defined in paragraph (d)(1) of this section.

\* \* \* \* \*

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