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

MM Docket No. 91-140

In re

Revision of
Radio Rules and Policies

MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 5, 1992; Released: September 4, 1992

Comment Date: October 30, 1992
Reply Comment Date: November 15, 1992

By the Commission: Chairman Sikes, Commissioner Barrett and Commissioner Duggan each issuing a separate statement

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. NATIONAL OWNERSHIP RULES	
A. Background	9
B. Petitions/Comments	10
C. Discussion	13
D. Further Notice of Proposed Rule Making	20
III. LOCAL OWNERSHIP RULES	
A. Background	27
B. The Numerical Limits	
1. Markets With 15 or More Stations	30
2. Markets With Fewer than 15 Stations	34
3. Market Definition and Station Counts	37
C. The Audience Share Analysis	
1. Preventing Excessive Local Concentration	44
2. Use and Availability of Data to Determine Audience Share	50
D. Simulcasting	59
IV. JOINT VENTURES	
A. Background	60
B. Petitions/Comments	61
C. Discussion	63
V. CONCLUSIONL	69
VI. ADMINISTRATIVE MATTERS	71
VII. ORDERING CLAUSES	76
Appendix A -- Regulatory Flexibility	
Appendix B -- List of Petitioners and Commenters	
Appendix C -- Rule Changes	

I. INTRODUCTION

1. This *Memorandum Opinion and Order* disposes of issues raised in 20 petitions for reconsideration of the *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), and in related pleadings.[1] In the *Report and Order*, the Commission significantly relaxed the local and national radio ownership rules and included certain local time brokerage agreements within the scope of the new ownership restrictions.[2] By this *Memorandum Opinion and Order*, we further modify the national and local ownership limits adopted in the *Report and Order*, and clarify various aspects of that decision.

2. The *Report and Order* detailed the dramatic increase in competition and diversity in the radio industry over the last decade, noting that there are now over 11,000 radio stations in the United States. We observed as well that the number of non-radio outlets competing with radio stations for audiences and advertising revenue has risen substantially over the same period. There are, for example, nearly 1,500 operating television stations, and cable television now serves 64 percent of U.S. homes, up from only 25 percent in 1980. Cable services directly competitive with the popular music services that are central components of commercial radio programming have also emerged. MTV and VH-1 are available to more than 56 million and 41 million homes, respectively, while the number of 24-hour cable radio networks has more than doubled since 1984. We concluded in the *Report and Order* that this intense inter- and intra-industry competition has produced an extremely fragmented radio marketplace in which existing and future radio broadcasters will be subject to increasingly severe economic and financial stress. We noted that between 1985 and 1990, the growth rate of radio station revenues dropped nearly in half to, on average, six percent, while real per station revenue during this period remained virtually unchanged. Operating profits, on a per station basis, have fallen dramatically since peaking in 1988, and radio's share of local advertising revenues remained essentially flat throughout the 1980s. More than half of all radio stations lost money in 1990,[3] and almost 300 stations are currently silent. Moreover, the *Report and*

[1] A list of parties filing petitions, oppositions to petitions and replies to oppositions is attached as Appendix B.

[2] The new rules were originally scheduled to take effect on August 1, 1992. Motions for stay of the August 1 effective date were filed by several parties. On July 30, 1992, these requests were granted and the effective date of the new rules was stayed pending resolution of the petitions for reconsideration. *Order Deferring Effective Date* in MM Docket No. 91-140, FCC 92-351 (released July 30, 1992), 57 Fed. Reg. 35763 (August 11, 1992). That stay is lifted on the effective date of the rule amendments adopted herein.

[3] This trend has apparently continued; NAB reports that 58 percent of all radio stations lost money in 1991. NAB Press Release, July 2, 1992.

Order found that the competitive changes producing this stress are not cyclical or transient in nature, but persistent and likely to create even greater pressure on radio broadcasters in the future. The picture is especially bleak for small market stations, which comprise the bulk of the industry. Given these circumstances, the Commission concluded that radio's ability to serve the public interest has been substantially threatened.

3. In the face of this threat, the Commission rigorously reevaluated the validity of its existing ownership restraints to determine whether they unduly restricted the flexibility of radio licensees to adapt to changing market conditions and to obtain the substantial efficiencies that common ownership can provide. These efficiencies include the opportunity to "combine administrative, sales, programming, promotion, production and other functions as well as to share studio space and equipment."[4] Ultimately, we concluded that continued insistence on absolute ownership diversity at the local level and restraint of national ownership at existing 12-station levels would needlessly deny radio broadcasters the benefits of broader common ownership at a time when these benefits may prove critical to their survival. Indeed, we found that increased levels of common ownership could directly advance our underlying interest in promoting diversity and competition. Stations that are silent or severely stressed financially cannot provide the service to the public which the Communications Act contemplates. Moreover, the very robustness of competition in radio markets which is largely responsible for the economic distress many licensees face today also attenuates our concern for the impact on diversity and competition that permitting increased ownership levels might entail.

4. The rules adopted in the *Report and Order* thus relaxed the national ownership caps to allow a single licensee to own up to 30 AM stations and 30 FM stations nationwide. We also modified the local ownership rule to permit a single owner to own an increased number of stations within a local radio market, depending on market size. For all but the smallest markets, we adopted a 25 percent cap on the combined audience share of all owned stations, based on shares at the time of any new station acquisition. We also limited simulcasting on commonly owned stations in the same service serving substantially the same area to 25 percent of the broadcast schedule. We restricted local time brokerage by providing that if a station licensee programs more than 15 percent of the time of another station and the principal community contours of the brokering and brokered stations overlap, then the brokered station, and its market share, would be counted against the brokering station's permissible ownership levels in determining its compliance with the revised radio ownership rules. We also required that time brokerage contracts be placed in the stations' public inspection files, and that local brokerage agreements that would be attributed to the broker for purposes of the Commission's ownership rules be filed with the Commission within 30 days of execution.

5. After reviewing the petitions for reconsideration and related pleadings, we remain convinced that basic changes in our radio ownership rules are warranted, indeed essential, to ensure the continued availability of broad and diverse radio broadcast service to the public. We are unpersuaded by the suggestion of some petitioners that the fundamental changes in the radio marketplace that we documented in the *Report and Order* are either temporary or exaggerated and that no permanent regulatory response to them is therefore needed. After a thorough review of the record in this proceeding, however, we conclude that adopting more moderate increases in the national ownership rules and in the permissible level of station ownership in certain local markets at this time will provide necessary relief while enabling us to monitor marketplace developments as they unfold. We also conclude that expanding the new national ownership caps for group owners who invest in stations controlled by minorities or small businesses will further the goals of diversity and competition. In addition, we seek comment in a *Further Notice of Proposed Rule Making* on ways to encourage stations to adopt programs designed to increase pluralism in radio station ownership and stimulate investment in the radio industry. Such programs could achieve these goals by providing capital, technical and managerial assistance and training to small business entities.

6. Accordingly, as described in more detail below, we will amend our national ownership rule to permit a single entity to hold an attributable interest in up to 18 AM and 18 FM stations. After two years, that limit will increase to 20 AM and 20 FM stations. Further, we will permit an entity to hold a non-controlling attributable interest in an additional three stations in each service if the stations are controlled by minorities or small businesses.

7. We will amend our local ownership rules by eliminating the complex system of market tiers for markets with 15 or more stations. In those markets, a single entity will be allowed to own up to two AM and two FM stations, provided that the proposed combination does not lead to excessive concentration in the market. Excessive concentration will be presumed where the combined audience share of the stations to be jointly owned exceeds 25 percent. For markets with fewer than 15 stations, we will retain the rule adopted in the *Report and Order* that permits licensees to own up to three stations, no more than two of which may be in the same service, if the combination constitutes less than 50 percent of the stations in the market. We are also modifying the method of counting the number of stations in a market so that the number is counted with reference to overlapping principal community contours in all markets.

8. In addition, this *Memorandum Opinion and Order* rejects the request of a few petitioners that we revise our rules and policies regarding time brokerage arrangements between radio stations. We also clarify a number of issues in response to questions raised by petitioners and other interested parties.

II. NATIONAL OWNERSHIP RULES

A. Background

9. The *Report and Order* increased the national ownership limits to allow a single owner to own up to 30 AM stations and 30 FM stations. The previous limit had been 12 AM and 12 FM stations overall, with ownership in up to two more stations in each service permitted if those

[4] *Report and Order* at 2760-61.

stations were minority controlled. The Commission predicted that this expansion of the national limits would strengthen existing stations by allowing them to achieve economies of scale through combining administrative, sales, programming, promotion, production or other functions. The Commission found that, in view of the competitive realities of the industry, the likelihood of a single firm or group of firms exercising dominance or undue control over the radio industry through ownership of multiple radio stations at the national level is extremely remote. While competition and diversity are especially relevant at the local level, the Commission concluded that relaxation of the national caps may actually enhance the quality of viewpoint diversity, as economies of scale from group ownership provide additional resources to invest in programming.

B. Petitions/Comments

10. Several petitioners who agree that the 12/12 limits should be increased seek reconsideration of the Commission's decision to set the new limits at 30 AM and 30 FM stations. For example, John W. Barger suggests a limit of 24 FM and 30 AM stations.[5] The Cromwell Group and NAB support a 25-station limit per service with a 30-station limit for minority controlled entities.[6] With a limit of 25 rather than 30 stations, NAB argues, large group owners would still enjoy cost efficiencies but would be less likely to acquire stations in the very smallest markets. Sconnix Broadcasting contends that the 30/30 limits are reasonable in light of the 12-station television limit, but notes that it would support a reduction to 25 AM/25 FM.[7] Robert T. Wertime believes that the new rules should retain the general 30 AM/30 FM maximum, but preclude a single owner from acquiring more than 12 newly allotted AM and 12 newly allotted FM stations.[8]

11. Some petitioners are opposed to any increase in the national caps. LULAC, TRAC and UCC contend that nothing has changed since 1984 to justify increasing the limits and that the *Report and Order* exaggerated the financial problems of the radio industry. They reiterate their concern, raised in response to the *Notice* in this proceeding,[9] that raising the national ownership limits will threaten diversity of viewpoint. In arguing that the Commission need not increase its multiple ownership limits to resolve industry financial problems, LULAC contends that the same result can be achieved with a "failed station" waiver policy (*i.e.*, permit the combination when it is shown that one of the combining stations could not likely survive absent a waiver).[10] TRAC asserts that the Commission's action was based on "incomplete and often self-serving industry sponsored figures which overstate recession related short-term losses and obscure the fundamental health of the industry."[11] Even if the industry's numbers were correct, TRAC argues, the Commission incorrectly posits that radio's ability to serve the public interest is premised on economic viability, and does not have the data showing that stations are cutting news and public affairs programming.[12] UCC submits that the many station failures that have occurred despite the 12/12 decision cast doubt upon the efficacy of group ownership policy as a tool to afford economic relief to stations facing stiff marketplace competition. UCC also asserts that acquisitions above 12 stations should be contingent upon reinvestment in public service programming.[13] A number of petitioners contend that the higher national ownership limit will work against independent and minority broadcasters because they will be unable to compete with large groups. For example, LULAC contends that because minority owned stations tend to be low-rated and unprofitable, the new rules will drive minorities out of broadcast ownership. At the same time, LULAC argues, minorities not yet involved in broadcasting will be precluded from entering, both as owners and employees, because the new rules will increase station prices and will lead to discharge of existing employees.[14] NABOB argues that minority station owners have been unable to compete since the 12/12 rules were adopted because they cannot afford to acquire better facilities and because their competitors were becoming parts of large broadcast groups, thus improving their competitive position through economies of scale.[15] TRAC agrees, and contends that the Commission has not given the higher minority ownership limit sufficient time to work.[16] Several petitioners suggest that some type of higher ownership limit for minority owners be reinstated.[17]

C. Discussion

13. We remain convinced that the competitive realities of the radio industry, as detailed in the record in this proceeding and in the *Report and Order*, fully justify significant relaxation of the national ownership rule. Given the dramatic increase in the number of radio stations and the growth of competing media in recent years, we con-

---

[5] John W. Barger Petition, Attachment at 3.
[6] Cromwell Group Petition at 1; NAB Petition at 20.
[7] Sconnix Broadcasting Petition at 4-7.
[8] Robert T. Wertime Petition at 3.
[9] *Notice of Proposed Rule Making* in MM Docket No. 91-140, 6 FCC Rcd 3275 (1991) (*Notice*).
[10] *Id.* at 1-6.
[11] TRAC Petition at 1. TRAC also argues that a recent U.S. Tax Court decision released after the *Report and Order* renders the profit and loss figures in the *Report and Order* inaccurate, as it increases the market value of radio stations up to 10 percent. *Id.* at 6-7 (citing *Jefferson-Pilot Corp. v. Commissioner of Internal Revenue*, 98 T. C. No. 32 (filed April 13, 1992) (permits broadcasters to amortize the value of their broadcast licenses)). Assuming that TRAC's characterization of this case is accurate, we do not believe this decision significantly affects our conclusion that the fortunes of radio stations have steadily declined.
[12] *Id.* at 5-6.
[13] UCC Petition at 1-4.
[14] LULAC Petition at 7-8, 20-23.
[15] NABOB Petition at 3-4.
[16] TRAC Petition at 15-17.
[17] *See, e.g.*, John W. Barger Petition, Attachment at 3 (limit should be 25 percent higher for minorities); Cromwell Group Petition at 1 (minority limit of additional five stations); NAB Petition at iii (minority limit of additional five stations); NHMC Petition at 3; TRAC Petition at 14 n.10. In addition, NAB asks that the Commission expand its tax certificate and distress sale policies. NAB Petition at 20-22. These matters are more appropriately addressed in other Commission proceedings. *See* Petition of The Coalition to Improve Tax Certificate Policies (dated June 23, 1992); Petition for Rule Making of the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition and the National Black Media Coalition (filed Sept. 18, 1990).

tinue to believe that a substantial increase in the national radio ownership rules can be permitted without any threat to viewpoint diversity or competition in the broadcasting industry. Petitioners have failed to persuade us that our review of the record and our analysis of pertinent data were in error. The figures cited in the *Report and Order* illustrating the current state of the radio industry and analyzing the impact of relaxed radio ownership rules relied on a number of widely recognized industry and non-industry sources and, we believe, these figures are accurate.[18] Nor do we agree that our decision renders a radio station's economic vitality more important than the degree of service provided to the public; to the contrary, our decision underscores that radio stations cannot serve the public without adequate economic resources.[19] We thus decline to reinstate the former 12 AM/12 FM national ownership limits.

14. We are persuaded, however, that the new national limits should be changed in two respects. First, we are reducing to 18 AM and 18 FM the number of stations that a single entity may own or have an attributable interest in nationwide. After two years, the limit will increase to 20 AM and 20 FM stations. Second, as described below, an entity may have a non-controlling attributable interest in an additional three AM and three FM stations if those stations are controlled by minorities or small businesses.

15. While still affording radio broadcasters much-needed regulatory relief, adoption of this more cautious, phased-in approach will give us an opportunity to monitor marketplace developments and to make further adjustments in the rules if experience suggests that such adjustments would be desirable. The annual report assessing the effects of the revised rules on the radio industry to be prepared by our Mass Media Bureau will provide us with a means of analyzing changes in the market as they take place. At the same time, the rules adopted will enable the radio industry to begin strengthening its ability -- through more efficient operations and expanded resources -- to serve the public. Because the rules as amended will limit any single owner to owning less than one half of one percent of licensed radio stations, and because the radio industry as a whole is but a small portion of a much larger and highly competitive media marketplace, our concerns with promoting diversity and competition will be fully protected.

16. A second issue regarding the national ownership limits relates to those provisions of the former rules which allowed cognizable ownership of an additional two stations beyond the otherwise applicable limit if those two stations were minority controlled. The comments in the earlier phase of this proceeding observed that these provisions had not been effective in attracting investments from non-minority broadcast owners in minority controlled stations.[20] Citing this ineffectiveness, the *Report and Order* declined to include a minority ownership incentive in the new national ownership limits.

17. On reconsideration, several parties urge that their original comments should not have been read as a lack of support for a higher minority ownership limit and they argue that a minority ownership incentive should be retained in any amended rules.[21] In light of these comments, we have decided to revisit the issue of adopting ownership incentives in the national ownership rules. As stated in the *Report and Order*, we believe that "access to capital is the most critical limitation on minority participation in the industry."[22] We are now persuaded that minority controlled stations may gain such access to capital if group owners are permitted to exceed the national ownership caps where they take an attributable but non-controlling interest in such stations. In addition, because there may be other, non-minority individuals and entities that also face substantial difficulties securing financing to acquire radio stations, we will also allow group owners to exceed the national caps if they purchase attributable but non-controlling interests in stations controlled by a small business. Indeed, we note that earlier in this proceeding other parties emphasized that there is a problem for new entrants and small businesses generally -- not just minority-owned stations -- in entering the radio industry and that the core of the problem is the difficulty in acquiring the necessary capital.[23]

18. Accordingly, an owner that has acquired radio stations up to the national limit may hold a non-controlling attributable interest in an additional three stations per service if those stations are controlled by minorities or small businesses. By modifying the national ownership rules to include a higher minority/small business limit, we hope to encourage the entry of new minority and small business entities into broadcasting, as well as the expansion of existing minority and small broadcasting organizations. Like other group owners, a minority entity that has reached the overall national limit will not be permitted to own additional stations outright, but may take a non-controlling attributable interest in three stations per service that are controlled by other minority entities or small businesses. The minority ownership aspect of this provision is designed to help minority broadcasters increase their access to capital. We do not believe that minority

[18] In this respect, TRAC claims that the data used by the Mass Media Bureau in its *Overview of the Radio Industry*, which was included in the record, overlook interest payments, excessive salaries and other factors that may affect profitability. TRAC Petition at 4, TRAC Reply at 6-9. We note that all staff analyses of profitability in the *Overview* were based on earnings before taxes and interest payments. In addition, TRAC provides no data to support its allegation regarding artificially inflated salaries. Even if TRAC's assertions are valid, the potential magnitude of such claims would not warrant a change in either our assessment of the state of the radio industry or the remedy we have adopted.

[19] As noted above, LULAC supports adoption of a "failed station" waiver policy that would permit a particular station combination only when it is demonstrated that one of the stations could not likely survive without the waiver. This "failed station" standard is insufficient to achieve the goals of this proceeding because it would focus on the health of a few individual stations rather than the vitality of the industry as a whole. Moreover, under such a standard, stations would virtually have to leave the air before they could receive assistance. We prefer a rule that would assist stations before they reach the point of failure.

[20] *See Report and Order* at 2769.

[21] *See, e.g.*, NABOB Petition at 9-10; TRAC Petition at 15-16.

[22] *Report and Order* at 2770.

[23] *See, e.g.*, CapCities/ABC Comments at 23-24; CBS Comments at 31 (in response to the *Notice of Proposed Rule Making* in this proceeding). We note that additional proposals to assist in securing access to capital are explored in *Notice of Proposed Rule Making and Notice of Inquiry* in Docket No. 92-51, 7 FCC Rcd 2654 (1992) (*Capital Formation Notice*).

station owners who have reached the overall national ownership limit have the same level of need for such assistance, but we encourage them to take advantage of the provision to invest in other minority controlled stations.

19. The "small business" definition used for purposes of allowing the acquisition of additional stations will apply to all small businesses which, at the time of application to the Commission, had total annual revenues of less than $500,000 and total assets of less than $1,000,000. We have chosen to use a purposely conservative definition until we have had some experience with applications under this provision and have had an opportunity to evaluate information from our Small Business Advisory Committee. The asset limit of $1.0 million is an additional safeguard to ensure that a traditionally wealthy business will not be permitted to take advantage of the cap merely because it had a low revenue year.[24] The annual revenues and assets of commonly-controlled businesses will be aggregated for purposes of this definition. Eligible entities will include both organizations and individuals that do not presently have any mass media interests as well as organizations or individuals owning several radio stations or other mass media outlets, as long as they do not exceed the revenue and asset limits. This small business exception will effectively include all entities that need assistance to gain entry or expand modest holdings in the radio industry.

D. Further Notice of Proposed Rule Making

20. In addition, we believe it is useful to explore alternative means of facilitating the introduction of minority owners, new entrants and small businesses generally into the broadcasting field. The actions taken in this proceeding in the *Report and Order* and in the present *Memorandum Opinion and Order* are intended to strengthen the radio service as a whole by allowing entities -- including small businesses -- to take advantage of certain efficiencies that may be associated with group ownership. In the absence of a firm economic base, however, neither service to the public nor diversity of ownership will be benefited. Moreover, we believe it would be desirable to encourage the entry of hitherto unrepresented or underrepresented owners into the radio industry. For example, in our *Capital Formation Notice*[25] we have sought comment on various proposals aimed at increasing the availability of capital for investment in the broadcasting industry.[26]

21. The evidence received up to now in this proceeding continues to leave some question as to how the national multiple ownership rules can best be used to provide investment incentives for small business and minority entrants into the radio industry. We believe that encouraging investment in small business and minority broadcasters is a goal worth pursuing. Minority broadcasters who have had difficulty acquiring the resources to become station owners could significantly benefit from such assistance. We believe, moreover, that a broader category of individuals and small business entities that likewise have had difficulty acquiring sufficient resources or expertise to become station owners could benefit from such a remedy.

22. We accordingly seek comment on a proposal that would permit a group owner to own or have a controlling interest in some number of stations beyond the otherwise applicable national limits if it establishes and successfully implements a broadcast ownership "incubator" program designed to ease entry barriers and provide assistance to small businesses or individuals seeking to enter the radio field. Such a program would work as follows. A group owner would be permitted to acquire an attributable interest (including a controlling interest) in stations above the otherwise applicable ownership limit upon a prior demonstration that it has in place a small business investment incentives program involving a meaningful and ongoing commitment to increasing pluralism in radio station ownership and stimulating investment in the radio industry. Such programs would be designed to aid small businesses, including in particular minority owned businesses, that have limited access to capital and limited broadcast business experience, and that have expressed an interest in station ownership.

23. The Commission could adopt a flexible policy as to what constitutes a qualifying incentives program. This would afford broadcast groups the maximum ability to use their knowledge of the industry and its financing to create programs designed to help overcome entry barriers that result from capital inadequacy, initial lack of credit availability, initial inadequacy of business planning expertise or other difficulties often associated with persons who have not previously been in the radio business. Group owners are in a particularly good position to create incubator programs that not only will help persons become radio licensees but, of equal importance, will also help them succeed in station ownership.[27]

24. Without attempting to limit additional creative mechanisms that may be developed, some general guidelines and examples of qualifying programs can be provided. For example, a group owner might create an SBA-like program which offers to eligible participants:

---

[24] The asset limit chosen is twice as large as the corresponding revenue limit. While the ratio of assets to revenues varies widely across industries and individual companies, a ratio of 2:1 reflects the national average and appears to be representative of broadcast radio as well. *See Economic Report of the President*, February 1992, Table B-109 at 422, Table B-1 at 298 (indicates that Private Net Worth, less owner-occupied real estate and consumer durables, divided by Gross Domestic Product, equals approximately 2 during the period 1960-1990); *1989 Corporation Source Book of Statistics of Income*, Internal Revenue Service at 134 (indicates that the ratio of total assets to business receipts ranges from approximately 0.4 to 2.7 for the 8,000 radio and television broadcasting companies reported); *Standard and Poor's Corporation Records, Standard Corporation Descriptions*, 1992 (indicates that the ratio of total assets to sales for several radio companies ranges from 1.5 to 2.5).

[25] *Notice of Proposed Rule Making and Notice of Inquiry* in Docket No. 92-51, 7 FCC Rcd 2654 (1992).

[26] Indeed, a number of commenters in that proceeding have suggested ways to enhance the ability of minority entrepreneurs to raise capital. *See, e.g.*, National Association of Investment Companies Comments at 2 (relax attribution rules); Minority Broadcast Investment Corporation Comments at 6-7 (afford MESBICs passive institutional status and reduce their vulnerability to Commission's "sham" application and "accommodation letter" doctrines); NABOB Comments at 6 (expand tax certificate policy to assist buyers of stations that are not being sold for a profit).

[27] We note, for example, that broadcast owners already participate in NTIA's ComTrain program, which is designed to provide training assistance to new minority entrants in the broadcast field.

1. Management or technical assistance
2. Loan guarantees
3. Direct financial assistance through loans or equity investment
4. Training
5. Business planning assistance

Alternatively, a group owner could enter into a joint venture with an established Small Business or Minority Enterprise Small Business Investment Company (SBIC or MESBIC) to accomplish the intended objective. Working in conjunction with an established organization could increase the efficiency of the funding and development process.[28] We also might consider an administrative relationship between the stations' owners. Properly structured, such an arrangement might both provide a greater incentive for investment in the operations of hitherto untested owners as well as allow these owners to enjoy some of the administrative efficiencies associated with group ownership.

25. To ensure that such incubator programs are meaningful and effective, we contemplate granting increased ownership authority to applicants that have an established program and have experienced at least some success in its implementation. Additionally, we would propose that terminating the program or ceasing its implementation could result in the expanded ownership limit being withdrawn. We also seek comment on whether we should permit parties to seek additional ownership authority on the basis of incubator proposals that would be filed in advance with the Commission. Those proposals would be addressed on a case-by-case basis and would be approved if it appeared that the underlying objectives of assisting new entrants and small businesses to become radio station licensees would be achieved.

26. This proposal is intended to develop further incentives that will spur investment in the radio industry. In addressing this proposal, commenting parties are invited to suggest variants on the proposal or alternative means of accomplishing the same objective. Comment is invited, in particular, on: (1) the number of stations above the regular limit that might be obtainable through this process; (2) the nature of a program that might be approved, including the amount and types of financial assistance involved, particularly in relation to the financial size of the group owner involved, and the extent to which training and management and technical assistance should be a component of any program; (3) how such a program should be integrated with the "investment incentive" provisions of the rules already adopted; and (4) the best means of identifying and defining the beneficiaries of such a program.[29] The Commission will also ask its Small Business Advisory Committee to address this and alternative proposals in this area.

III. LOCAL OWNERSHIP RULES

A. Background

27. The *Report and Order* modified the Commission's local ownership rule, which had prohibited ownership of more than one AM station and one FM station licensed to the same principal city.[30] The Commission found that the increased fragmentation in the radio marketplace, the economic difficulties that many radio broadcasters are suffering, and the significant economies that can be realized from joint operation of same-market stations warranted relaxation of the local ownership rule to enable radio licensees to better compete in the marketplace.[31] Accordingly, the Commission adopted new local rules based on market size and audience share, as follows:

> For stations in markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. Common ownership of one AM/FM combination will continue to be allowed in any event.
>
> For stations in markets with 15 to 29 radio stations, a single licensee will be permitted to own up to two AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
>
> For stations in markets with 30 to 39 radio stations, a single licensee will be permitted to own up to three AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
>
> For stations in markets with 40 or more radio stations, a single licensee will be permitted to own up to three AM stations and three FM Tstations, provided that the combined audience share of the stations does not exceed 25 percent.[32]

We indicated in the *Report and Order* that, for stations licensed to designated radio metro markets, we would count the number of stations in the market based on the

[28] We stress that, under our proposal, incubator programs would have to involve a meaningful commitment to easing entry barriers to small businesses. Thus, we do not contemplate that simply writing a check to an SBIC or MESBIC, or holding a single symposium, would be sufficient to qualify as a *bona fide* incentives program.

[29] Parties wishing to address proposals of this type beyond the immediate area of radio ownership or that have alternative suggestions of broader coverage are invited to file such comments in our general video marketplace rulemaking proceeding, *Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992), by October 30, 1992.

[30] The previous local radio ownership rule, or contour overlap rule, prohibited an individual or entity from owning two AM stations with overlapping 5 mV/m contours, or two FM stations with overlapping 3.16 mV/m contours. In addition, Commission rules require that the 5 mV/m contour of an AM station and the 3.16 mV/m contour of an FM station encompass the entire principal community to be served. 47 C.F.R. Sections 73.24(j), 73.315(a). These rules together prohibited ownership of two AM or two FM stations licensed to the same principal city.

[31] *Report and Order* at 2773-76.

[32] *Id.*

number of commercial radio stations meeting minimum audience survey reporting standards. For stations licensed to communities located outside the geographic boundaries of designated radio markets, we indicated that the number of stations in the market would be determined with reference to overlapping principal community contours. We also specified the manner in which the 25 percent audience cap would be applied, and limited simulcasting on same-service stations in the same market to 25 percent of either station's airtime.

28. These provisions, taken together, were intended to allow increased local multiple ownership, and consequent efficiencies, to the greatest extent possible consistent with the realities of particular markets, but with ample safeguards to insure that our core concerns with diversity and competition were addressed. For this reason, we adopted both audience share and numerical ownership limitations, and provided for generally stricter numerical caps in smaller markets. We stated that both types of safeguards were necessary, and indicated that the greater level of competitiveness of stations in larger markets, as measured by the number of competing commercial radio outlets, justified somewhat greater relaxation of the ownership rules in those markets. In specifying the details of our audience share limit and the manner in which we would count the number of stations in a market, we uniformly chose means designed to be conservative and as simple to apply as possible, given their stated purpose.

29. The petitioners for reconsideration raise a number of issues concerning the new local rules. We first address the specific numerical limits adopted. We then discuss how a market will be defined and how to count the number of stations in a market. Finally, we address the 25 percent audience share limit for larger markets and issues concerning the use of Arbitron or other audience share data in conjunction with the new local rules.

B. The Numerical Limits

1. Markets With 15 or More Stations

30. *Petitions/Comments.* A number of petitioners for reconsideration support a more modest expansion of the local ownership restrictions than we adopted in the *Report and Order*. For example, NAB suggests that a simplified 2 AM/2 FM limit in larger markets would provide broadcasters with much-needed flexibility but would be sufficiently restrictive to obviate the need for an audience reach cap and ameliorate the concerns of those who believe that the new local rules are overly permissive.[33] Similarly, Alliance Broadcasting, the Cromwell Group, Entertainment Communications and Sconnix Broadcasting advocate a 2 AM/2 FM limit.[34] Jacor Communications asserts that the local limits should not distinguish between AM and FM stations because both services have faced decreased revenues and increased competition.[35]

31. Other petitioners believe that the previous local rule, permitting only one AM and one FM station per community, should be reinstated. For example, Empire Broadcasting Corporation submits that service to the community results not so much from financial strength as from the civic involvement of owners and managers. Empire argues that it is unlikely that any locally owned stations can survive in a situation in which group owners are encouraged, through multiple ownership, to gain up to 25 percent of a given market's audience.[36] LULAC asserts that the Commission has justified relaxation of other multiple ownership rules (*e.g.*, elimination of regional concentration rule and raising the national limits from 7 to 12 stations) by explaining that local ownership rules will remain in place. %T [37] TRAC and UCC similarly argue that the new local rules will threaten competition and diversity, and UCC proposes reinstating the prior duopoly rules with waivers for failed stations.[38]

32. *Discussion.* In response to the near unanimity of opinion in the pleadings, we will revise our market tiers to reduce from the levels set forth in the *Report and Order* the maximum number of stations that may be commonly owned in the same local area. Specifically, the new local ownership rule will consist of two tiers. One tier will include those markets with 15 or more commercial radio stations. In those markets, a single entity will be permitted to own up to two AM and two FM stations, provided that the proposed combination will not lead to excessive concentration in the local market. As detailed *infra*, excessive concentration will be presumed where the combined audience share of those stations exceeds 25 percent. The other market tier, discussed below, will consist of markets with fewer than 15 stations. For those markets, we will retain the rules adopted in the *Report and Order* which permit a single entity to own up to three radio stations, no more than two of which may be in the same service, provided that the owner's stations represent less than 50 percent of the total number of stations in the market. We believe this reduction in the number of market tiers will simplify administration of the new rule and will simplify the showings required to demonstrate compliance. We also believe that this modification should assuage the concerns of those who believe that the new local rules are overly permissive.

33. This modification to our numerical limits, along with the revised market share limit, will afford owners flexibility and will allow them to achieve economies of scale flowing from greater combination of stations, but will reduce any potential for undue influence or control in a local radio market. We are mindful of the concern that a greater consolidation of stations in any market can affect the operations of the weakest stations in that market. Of course, to the extent that struggling stations choose to consolidate with other stations, they can benefit from these rule changes. We also note that the revised national ownership rule includes an investment incentive that will encourage large group station owners to invest in and otherwise aid licensees that are small businesses or are

[33] NAB Petition at iii-iv.
[34] Alliance Broadcasting Comments at 1-4; Cromwell Group Petition at 1; Entertainment Communications Comments at 3-4; Sconnix Petition at 9-11.
[35] Jacor Petition at 4-5.
[36] Empire Petition at 5-10.
[37] LULAC Petition at 15-18.
[38] TRAC Petition at 11-12; UCC Petition at 8-12.

minority controlled.[39] To the extent that a concern remains about the impact of our rule changes on some small stations, that concern is outweighed by the considerable public benefit we anticipate from a general strengthening of stations as a result of an increase in the local ownership limits. We stress, furthermore, that our annual review of the radio marketplace should provide guidance in measuring the impact of these rule changes on small stations and, indeed, on the entire industry.[40]

2. Markets With Fewer Than 15 Stations

34. *Petitions/Comments.* Some commenters suggest that our limits for markets with fewer than 15 stations are too restrictive. The Cromwell Group and Entertainment Communications propose a 2 AM/2 FM limit for small markets as well as large markets, and the Minnesota Broadcasts Association also suggests that large and small markets should be governed by the same standard.[41] NAB urges an increased small market limit of "50 percent or fewer" of all stations, rather than the limit of "less than 50 percent" adopted in the *Report and Order.*[42] NAB argues that the benefits of common ownership are most needed in small markets and cites the Commission's recognition in the *Report and Order* that the plight of small market stations is "particularly bleak."[43]

35. *Discussion.* We continue to believe that, with respect to our local ownership rule, one size does not fit all, and that a rule tailored to the circumstances of different sized markets is appropriate. Therefore, we reject proposals that we eliminate any differential between markets with fewer than 15 stations and markets with 15 or more stations. We believe that the different provisions adopted for large and small markets strike an appropriate balance, bearing in mind the relative wealth of large and small markets, the potential risks of ownership concentration in such markets, the costs of administering the rules and our overall regulatory goals. We also reject proposals that would liberalize the rules applied to small markets. We have recognized, and continue to recognize, that some small markets face particularly difficult financial problems.

36. Nonetheless, allowing additional concentration beyond that already permitted in these markets with the fewest number of stations has not been justified. A change to *up to* 50 percent of the stations in a market of fifteen or fewer stations, rather than the adopted limit of *less than* 50 percent, could result in an unwarranted level of consolidation in too many markets. For example, in a six-station market, a licensee could own three, rather than two, of the six stations. In a four-station market, a licensee could own two same service stations. Either situation presents too great a potential to dominate the local radio market.[44] In view of our continuing concern with diversity and competition, we do not believe it would be in the public interest to allow this level of consolidation in those markets with the fewest alternative voices. In addition, we reject Jacor's request that no distinction be drawn between AM and FM stations. While we will not specify the mix of AM and FM stations a single entity may own in these smaller markets, we believe that permitting a licensee to own three sameservice stations in a small market would be excessive.

3. Market Definition and Station Counts

37. *Petitions/Comments.* Several petitioners question using Arbitron data as a basis for geographic market definitions and station counts. They contend that Arbitron market definitions change regularly and, because the number of rated radio stations in designated Arbitron markets continually fluctuates, a radio station owner will have difficulty determining which local limit applies to its market. Accordingly, some petitioners suggest alternative methods to define the relevant market. For example, Adventure Communications and Cox Enterprises propose that the Commission define markets with reference to

---

[39] Additional incentives are addressed in the *Further Notice of Proposed Rule Making* concerning the establishment of "incubator" programs. *See* Section II-D, *supra.*

[40] We note here that Entertainment Communications asks the Commission to indicate that group owners holding up to the maximum permitted number of AM and FM stations will not be subject to any greater diversification demerit in the context of a comparative renewal hearing. Entertainment Communications also asks that the Commission make clear that public interest programming that is co-produced, jointly broadcast or simulcast by two or more commonly owned radio stations in a market will be fully credited as to each such station for purposes of the station's renewal expectancy. Entertainment Communications Petition at 1-2; *accord* Cromwell Group Comments at 1. The ownership rules as amended herein reflect our considered policy judgment that a limited degree of common ownership of radio stations, both nationally and in local markets, will strengthen the radio broadcasting service as a whole and affirmatively serve the public interest in receiving improved radio service. The precise manner in which this policy judgment should be reflected in the comparative renewal context, however, is not a matter that is the subject of this proceeding.

In addition, we note that CapCities/ABC requests that the Commission extend the application of the top 25 markets/30 voices test (one-to-a-market waiver process) to television licensees who propose to acquire more than one radio station in a community in the same service. *See generally* CapCities/ABC Petition; *accord* Group W Comments, Winston Radio Corporation Comments. Possible revisions to the one-to-a-market prohibition, including the impact of revised radio ownership limits, are being addressed in the Commission's television ownership proceeding. *See Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111, 4116-17 (1992). Until the issue is resolved, we will consider waiver requests using the case-by-case waiver approach, taking into account our general conclusions in this proceeding regarding the public interest in a strengthened radio service.

[41] Cromwell Group Petition at 1; Entertainment Communications Comments at 3-4; Minnesota Broadcasters Association Petition at 1-3.

[42] NAB Petition at 17-20; *accord* Voyager Communications V Comments at 2.

[43] NAB Petition at 17 (quoting *Report and Order* at 2760).

[44] To further clarify the application of the rule, we note that in a four-station market the rule would only allow an entity to own less than 50 percent of the stations in the market, or one station. Because the new rule was not intended to be more restrictive than the previous rule, however, an entity in a four-station market still may own an AM/FM combination. In markets with fewer than 15 stations where the "less than 50 percent" standard would permit ownership of three stations, an entity may not own three same service stations; pursuant to the new local rules, no more than two of those three stations may be in the same service.

Metropolitan Statistical Areas (MSAs) or other established geographic designations; for stations not in MSAs, the relevant market would be the county in which the station is located, the area within a fixed radius of a station's transmitter site or the area within a station's principal community contour.[45] Jacor Communications suggests that the Commission ignore Arbitron market designations and instead use a market definition along the lines of that adopted for non-designated markets, which is based on overlapping contours.[46] NAB similarly advocates a contour overlap approach.[47]

38. In addition, a number of petitioners argue that the method of counting stations set forth in the *Report and Order* tends to either overcount or undercount the number of competing stations in the market. Some petitioners object to the exclusion of non-commercial educational (NCE) "stations in determining the number of stations in the market.[48] These petitioners contend that because NCE stations contribute to diversity in the market, they should be considered when measuring the market power of a single owner. Petitioners similarly object to the Commission's failure to count stations not meeting Arbitron or other similar survey's minimum reporting standard.[49] Other petitioners contend that with respect to designated radio markets, station counts and audience share calculations should not include stations licensed to communities outside the market in question (*i.e.*, "below-the-line" stations, in Arbitron terms).[50] These petitioners submit that only stations actually licensed to a market should be counted for purposes of the local rules because strong stations from neighboring larger markets do not directly compete for listeners with other stations in the smaller market.

39. *Discussion.* Upon reconsideration, we conclude that the rules should be modified to change the manner in which we count stations for purposes of determining which market tier is applicable. This count will be made with reference to a contour overlap standard in all situations, not just for stations outside of Arbitron's designated radio markets. Specifically, we will define the radio market as that area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) of the mutually overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations.[51] We will include all operating commercial full-power stations, including daytimers and foreign stations, but exclude non-commercial stations, translators or stations not operational (*i.e.*, stations for which construction permits have been authorized but that are not yet on the air, or stations that have gone off the air and been silent for more than six months). While we agree that non-commercial stations represent an additional voice in terms of traditional diversity concerns, we note that these stations do not compete for commercial advertising and are generally not included in reported ratings surveys.

40. We believe that the use of this station counting method will address our core concerns of competition and diversity. We are convinced by petitioners' arguments that this revised measure will reflect the actual options available to listeners and will reflect market conditions facing the particular stations in question. Furthermore, by excluding unrated stations from our determination of market size, we would have failed to count stations that serve limited or specialized audiences. That method may have underestimated the full diversity of voices available to listeners in a given locality.

41. *Clarifications.* Mid-West Family Stations has raised a number of technical points concerning the new rules. First, Mid-West is concerned that the local rules adopted in the *Report and Order* were inadvertently worded so as to prohibit the types of AM/FM combinations permitted under our prior rules. We agree. Although the *Report and Order* made clear that AM/FM combinations would continue to be permitted, without limitation, in the smallest markets, the rule adopted appeared to apply contour overlap and market share limits to AM/FM combinations in markets with 15 or more stations. It was not our intent to adopt more restrictive ownership provisions. Therefore, we are making appropriate changes in the rule to clarify that we are imposing no new restrictions on combinations of one AM and one FM station.

42. Mid-West also raises a related point. It notes that, under the rules in effect prior to the *Report and Order*, the principal community contour of an AM station with a large service area could encompass or overlap the principal community contours of two or more commonly owned FM stations. This combination was permissible as long as the principal community contours of the FM stations did not overlap.[52] Mid-West notes that the audience share and numerical limits adopted in the *Report and Order* would appear to impose new limits on such combinations. As noted above, however, we did not intend in this proceeding to adopt more restrictive ownership provisions. Therefore, we are making appropriate changes to the rule to clarify that we are imposing no new restrictions on combinations that do not involve principal community contour overlap of stations in the same service.[53]

---

[45] Adventure Communications Petition at 5; Cox Petition at 5-6.

[46] Jacor Petition at 2-4.

[47] NAB Petition at 6, 12-13, 16.

[48] *See, e.g.*, Cox Enterprises Petition at 8-9; Mid-West Family Stations Petition at 8; Minnesota Broadcasters Association Petition at 3-5; NAB Petition at 8-9; Sconnix Petition at 7-8; Robert T. Wertime Petition at 1-2.

[49] *See, e.g.*, Mid-West Family Stations Petition at 7-8; NAB Petition at 8-9.

[50] *See, e.g.*, Empire Broadcasting Petition at 12-14; Sconnix Petition at 11-12; *contra*, Mid-West Family Stations Petition at 7.

[51] For example, if Station A and Station B have overlapping principal community contours and Station A proposed to acquire Station B, the number of stations in the market includes not only Stations A and B, but also all commercial stations whose principal community contours overlap with those of Station A or Station B.

[52] Another example would be a Class C FM station with a principal community contour that overlaps the principal community contours of two or more relatively low power, non-overlapping AM stations.

[53] We note, however, that ownership combinations that do involve overlap of stations in the same service will, in markets with 15 or more stations, be subject to the audience share limit. Thus, for instance, where FM stations with overlapping contours are commonly owned, the acquisition of an AM station

43. Finally, Mid-West seeks guidance on how the Commission will analyze "chains" of commonly owned stations. Mid-West provides an example involving three FM stations -- FM1, FM2 and FM3. The principal community contour of FM1 overlaps the principal community contour of FM2, and the principal community contour of FM2 overlaps the principal community contour of FM3, but the principal community contour of FM3 does not overlap the principal community contour of FM1. Mid-West notes that the rules adopted in the *Report and Order* might be construed to prevent common ownership of the three stations, even though each area of overlap involves only two stations. MidWest argues that such a construction could have the negative effect of deterring the formation of regional networks. We agree, and wish to clarify that for purposes of analyzing "chains" of commonly owned stations, *i.e.*, where three or more stations overlap but not all such stations are mutually overlapping, each area of overlap between stations in the same service will be considered separately. Thus, the ownership arrangement in question is not *per se* inconsistent with our rules. In Mid-West's example, we would count the number of stations in the market based on the number of stations whose principal community contours overlap the principal community contours of FM1 and FM2. If necessary, we would then determine whether the combined audience share for the commonly owned stations, FM1, FM2 and FM3, complies with the audience share cap in the metro market where FM1 and FM2's contours overlap or (in the absence of a metro market) in the counties that are, in whole or in part, within the area defined by the contours of FM1 and FM2. In the event the combination in the market relevant to FM1 and FM2 satisfies our rules, we would separately examine the FM2/FM3 combination, calculating the number of stations in the market and, if necessary, compliance with the audience share cap, based on the principal community contours of FM2 and FM3.[54] The rules reflect this approach.

C. The Audience Share Analysis

1. Preventing Excessive Local Concentration

44. *Petitions/Comments.* A number of parties ask that we delete any ownership limit based on audience share. These arguments are generally based on two interrelated but separate sets of concerns. First, there are substantive arguments suggesting either that a share limit is unnecessary or that audience shares are an inappropriate measure of concentration. Second, objections are raised, which are more practical in nature, as to costs and difficulties associated with obtaining and using audience share information from Arbitron in the manner specified by the rules. We address these concerns separately below.

45. With respect to the general issue of an audience share limit, NAB argues that the 25 percent audience share cap is so conservative that it will frustrate the Commission's desire to facilitate consolidation in the radio marketplace.[55] NAB and others generally object to the audience share limit on the grounds that there are better means of measuring the type of concentration that implicates the Commission's core concerns with diversity and competition. Some petitioners suggest that the Commission consider audience reach (potential audience) rather than audience share (actual audience),[56] or limit a single owner to a given percentage of the total number of stations in a market.[57] In this vein, NAB asserts that the Commission should be concerned with how many alternative voices are actually available to the local public and not whether, or to what extent, the public chooses to listen to a given voice.[58] NAB further claims that the audience share of commonly owned stations in a market bears little relationship to the owner's share of the local mass media advertising market, which is the relevant measurement of market power. NAB notes that many stations with high audience shares have poor demographic compositions resulting in a lower share of the advertising market, while other stations with lower audience shares enjoy disproportionately larger shares of the advertising market because of their favorable demographics.[59] In addition, some petitioners who support continuation of an audience share limit are concerned that the new local rules contain no mechanism for compelling divestiture if a group's audience share grows to exceed 25 percent sometime after acquisition.[60]

46. *Discussion.* In the *Report and Order*, we adopted an outright 25 percent audience share limit as a means to ensure against excessive concentration in local radio markets. We continue to believe that the Commission should focus on market concentration in addition to limiting the number of stations an entity may acquire in a market, in order to avoid adverse effects of any proposed station combination on local competition and diversity. However, in response to the various challenges made by petitioners to our use of a market share limit in general, we modify our approach to measuring concentration. As outlined below, applicants under the new ownership limits in markets with 15 or more stations will be required to submit an application exhibit demonstrating that the proposed acquisition will not result in excessive local concentration. *See* para. 55, *infra*.

47. We recognize that there are some limitations to relying exclusively on market share data to weigh concentration in the local radio marketplace, as pointed out

---

with a principal community contour that overlaps the principal community contour of either FM station would require a showing that the audience share limit would not be exceeded in the relevant market or markets.

[54] We note that, given the same configuration of stations except that FM3 is an AM station, we would undertake a similar analysis. Specifically, we would examine the market relevant to the FM1/FM2 combination and the market relevant to the FM2/AM combination separately for compliance with audience share limits. Although this has the effect of applying the audience share limitation of an AM/FM combination, we do not believe this approach is any more restrictive than our prior rule. Our prior rule would not have allowed the same service (FM/FM) combination that triggers application of the audience share limit to the AM/FM combination.

[55] NAB Petition at 8.

[56] *See, e.g.*, John W. Barger Petition, Attachment at 4; Cox Petition at 9-10.

[57] *See, e.g.*, Jacor Petition at 2-4.

[58] NAB Petition at 8-9.

[59] *Id.* at 6-8.

[60] *See, e.g.*, Adventure Communications Petition at 8-9; Cox Enterprises Petition at 11-12; TRAC Petition at 11-12.

by petitioners. However, to the extent petitioners argue that ratings data are inherently unsuitable for purposes of analyzing local concentration, we disagree. We believe that audience share information will be useful in helping to measure diversity and competition. Specifically, audience share data can identify the most dominant stations in a market. And, compared to limits based solely on the number of stations involved, use of audience share is a means of accounting for the variety of types of stations -- clear channel, regional, daytime, low and high power -- that exist in various markets. Moreover, by continuing to consider this factor as part of our ownership limits, our rules may provide an incentive for stronger, successful stations to invest in other local stations with generally low audience shares -- an outcome that is consistent with the purposes of this proceeding. While our consideration of audience share, in the manner described below, may foreclose some acquisitions, our goal in this proceeding was not to foster consolidation as an end in itself but as a means of strengthening the radio industry's ability to serve the public interest.

48. We thus affirm our decision under the new ownership limits to evaluate showings of audience share in approving acquisitions in all but the smallest markets. We emphasize, however, that the Commission is concerned with preventing excessive concentration, not with freezing audience shares at a prescribed level.[61] In particular, as discussed below, we retain 25 percent as the audience share benchmark at which an acquisition will raise a *prima facie* concern that the transaction will lead to undue local concentration.[62] At the same time, we see no reason to alter our determination that divestiture should not be generally required where station combinations exceed an audience share of 25 percent after acquisition. We will also generally permit such stations to be assigned or transferred as a group.[63] Our elimination of the higher numerical limits for the largest markets minimizes any concern that such situations will lead to excessive concentration. Again, our goal is to promote robust competition, and we do not believe that penalizing enterprises that grow into stronger competitors is consistent with this objective.

49. To the extent petitioners express the view that ratings data are inherently unsuitable for purposes of setting multiple ownership limits, we disagree. Certainly, share data, unlike the relatively simple numerical limit in our prior rules, may change as market conditions change. Yet we believe this is a strength in our new rules, rather than a weakness. Fluctuations in market share are likely to have the greatest impact where a proposed acquisition would present high levels of audience share or market concentration. To the extent the rule provides an incentive for stronger, successful stations to invest in other local stations with commensurately low audience shares, we see no harm in such a result.

2. Use and Availability of Data to Determine Audience Share

50. *Petitions/Comments.* In addition to objecting to audience share limits as a general proposition, a number of petitioners specifically object to using data from Arbitron to determine the local "market share" of a group owner's stations.[64] They submit that Arbitron calculations are sometimes inaccurate and that the data are subject to manipulation.[65] Petitioners are also concerned that subscribing to Arbitron is costly and that the data are copyrighted and confidential. They contend that all parties to a transaction would be forced to become Arbitron subscribers just to determine if the transaction was even possible.[66] Moreover, petitioners contend that the audience survey requirement for non-Arbitron stations is expensive and burdensome.[67] Various concerns are also raised regarding fluctuations in the data from survey to survey. Because audience shares fluctuate, petitioners assert, a station owner will have difficulty determining whether a proposed combination would violate a 25 percent share limitation.[68] Petitioners thus believe that a share limitation may unduly complicate business planning.

51. *Discussion.* We continue to believe that widely-used audience survey data, while not exact, are a probative and accessible measure of market power relevant to the Commission's regulatory concerns. These surveys are based upon reporting by listeners unaffiliated with Commission licensees and are conducted by independent professional audience research firms. In addition, listener share data are widely available and provide information on a market-by-market basis. Thus, we continue to believe that audience share is best measured with reference to Arbitron or similar independent survey information.

52. However, we agree with petitioners that some changes in the rules can and should be made to address particular concerns with data availability and use. Petitioners have expressed serious concerns about the expense of

[61] If the Commission's goal were to lock in audience shares at a given level, we would require divestiture whenever an entity's share grew to exceed 25 percent of the local audience. But as indicated *infra*, we are not requiring divestiture where an entity acquires stations and improves their market performance.

[62] The 25 percent audience figure will provide most broadcasters with a simple means of demonstrating that a proposed transaction will not foster excessive concentration. Proposed transactions that will result in a combined audience share of less than 25 percent will be deemed not to present a concentration problem.

[63] *See Report and Order* at 2783, n.109.

[64] *See, e.g.*, Adventure Communications Petition at 2-10; Cox Enterprises Petition at 2-13; Cromwell Group Petition at 1; Jacor Communications Petition at 2-4; Minnesota Broadcasters Association Petition at 3; NAB Petition at 6-17; Sconnix Petition at 7-8; Plum Creek Broadcasting Comments at 1-3; Tribune Comments at 2.

[65] *See, e.g.*, NAB Petition at 13-17; Adventure Communications Petition at 9. *See also* TRAC Petition at 13 & n.9 (Petitioner argues that unlike its television service, Arbitron surveys radio markets only when it has clients interested in a market; market definitions are changed with some frequency to suit clients' desires, rather than by actual demographic considerations). We note that Arbitron surveys all U.S. counties once a year and some designated markets more frequently.

[66] *See, e.g.*, NAB Petition at 10-13; Adventure Communications Petition at 5 n.5.

[67] *See, e.g.*, Adventure Communications Petition at 5-6; Cox Enterprises Petition at 6-7; Minnesota Broadcasters Association Petition at 2.

[68] *See, e.g.*, Cox Petition at 9-11; NAB Petition at 15; Alliance Comments at 5-6; Radio Operators Caucus Comments at 2.

subscribing to Arbitron[69] and about the possibility that Arbitron's data, which are copyrighted, may not be disclosed to the Commission.[70] We are also mindful of petitioners' concerns that Arbitron data are not accurate. While we recognize that the measurement tools used by Arbitron are subject to the statistical variances associated with any survey process and, indeed, may not in every instance involve a sufficient degree of accuracy to satisfy broadcasters anxious to present detailed information to advertisers, we do not believe that, for our purposes, a higher degree of accuracy is generally necessary. We have incorporated audience share into the new rules as a screening mechanism to identify potential problems with concentration. To the extent that petitioners are concerned that Arbitron's measuring tools may be too rough-hewn and thus may unfairly foreclose them from acquiring stations due to inaccuracies in the data, we note that applicants will be free to submit additional showings demonstrating compliance with the share limit based on more accurate survey methods or the alternative measures of market share described below.[71]

53. At the same time, in response to petitioners' concerns, we are modifying the rules and the process whereby we use audience survey data. First, as discussed above, we have generally adopted petitioners' suggestions to define and calculate numbers of stations in a market by using engineering data (station contours) rather than Arbitron or other survey information. We have also reduced the complexity of the rules by reducing from four to two the number of market tiers in which different rules apply. These changes should greatly reduce problems resulting from the use of audience survey based definitions. We will continue, with the exceptions described below, to calculate audience share based on metro market data where such data areNavailable. Although share information may not match precisely the market area definitions adopted for purposes of counting number of stations in a market, it should generally reflect the relevant competitive market involved. We will require the use of either audience data for the metro market if the contours of both stations at issue are mainly located within a single metro market, or audience data for the counties covered in whole or in part by the principal community contours of the stations at issue.[72] The relevant audience share figures in such cases will include audience statistics either for the metro market or from each county encompassed all or in part by the area covered by the principal community contours of the stations proposing to merge.[73] We recognize that disclosure of complete underlying survey reportsmay in some cir-

[69] Arbitron does not generally disclose the precise charges for its regular services to specific clients. The cost to subscribe to Arbitron for any particular station within a designated market depends on the size of the market and the size of the station. Books that include state-wide county data, which should generally be sufficient for the showing required by our rules, appear to be generally affordable for most broadcasters. Although special studies tend to be somewhat more expensive, we do not believe special studies will generally be necessary under our revised rule. Moreover, as described below, we have provided an opportunity for applicants to submit alternative market share information in situations where Arbitron or equivalent data are unavailable or unduly expensive.

[70] We note, however, that the disclosure of Arbitron or other audience share data required to make the showing under our rule is limited, and in many instances is widely and reliably reported in trade and other publications.

[71] Where potential applicants are concerned that a single ratings period does not accurately measure audience share or that the Arbitron market is not the same as the market as defined by contour overlap, we have adopted a procedure to permit applicants to clarify their particular situations regarding audience share. For example, an applicant may explain in an application exhibit that a given ratings period is anomalous and that trend data (reflecting several ratings periods) are more accurate. *See* para. 55, *infra*.

However, to the extent some parties suggest that privately collected audience survey data are inherently inaccurate, arbitrary or subject to potential manipulation by private interests, we find nothing in the record to support these contentions. It is true, for example, that Arbitron market definitions change from time to time in response to the urging of specific Arbitron clients. These changes, however, do not appear to be frequent and we have no information suggesting that those changes that do take place are anything other than good faith efforts to properly reflect the actual changing nature of the markets involved. Because the data involved is used by competitors (broadcasters and other sellers of advertising time) and entities with other conflicting interests (both sellers and buyers of advertising time), a variety of private checks and balances exists to protect the integrity of the collection process. Arbitron's commercial self-interest in maintaining its reputation for integrity serves as a further safeguard against market definition and data manipulation. In addition, the data collected are used for advertising purposes and are thus subject to some governmental oversight that should help to prevent unwarranted or arbitrary manipulation. The Federal Trade Commission's "Guidelines Regarding Deceptive Claims of Broadcast Audience Coverage," (issued July 8, 1965), which were issued to help assist interested parties avoid possible violations of the Federal Trade Commission Act, specifically provides that claims based on survey data "should not be based on data obtained in a survey that the person (or firm) making the claim knows or has reason to know was not designed, conducted, and analyzed in accordance with accepted statistical principles and procedures, reasonably free from avoidable bias and based on a properly selected sample of adequate size." *See, e.g. Report and Order in Docket 20501*, 36 RR 2d 938, 41 Fed. Reg. 11556 (1976) (containing reprint of FTC guidelines).

[72] We note that this area may differ from the area covered by all stations counted in the market.

[73] If county data are used and if more than one county is required to encompass the entire area of the principal community contours of the stations, then the audience data for all counties involved shall be weighted based upon the populations of the counties and totalled to arrive at the the average audience share for applying the 25 percent guideline. For example, assume station A proposes to acquire station B and their principal community contours overlap in County #1. In addition, a portion of station A's principal community contour falls in County #2 and a portion of station B's contour covers Counties #2 and #3. Thus, the relevant data would show the audience shares of both stations A and B in Counties #1, #2 and #3.

Thus, we can calculate the combined audience share of Stations A and B assuming the following information:

Station A, County #1: Audience share 5, population 25,000

Station A, County #2: Audience share 10, population 25,000

cumstances raise questions as to the confidentiality of some of the data contained therein. Accordingly, we will not require that stations provide the complete underlying survey reports if they report and certify their combined shares and note the source of that information.[74]

54. Second, the rules adopted in the *Report and Order* required an audience share calculation based on the share among *rated* commercial stations rather than on the share of the entire local market audience.[75] This extra calculation now appears to us to add an unnecessary complication to the rules and make access to the relevant data more difficult without providing a necessarily more relevant or accurate measure and without any other significant countervailing regulatory benefit. We will amend the rules accordingly. This change will generally not make a major per-station rating difference and will allow parties to use widely reported data generally relied on for other industry purposes.

55. Third, we are revising the rules to permit parties to submit data that improves upon the accuracy of the regularly available metro market or county data or to make alternative showings where the applicant certifies that regular survey data are not readily available. In markets with 15 or more stations, the applicant will be required to demonstrate in an exhibit to its application for a proposed acquisition that the proposed combination will not result in an overly concentrated market. If audience share data for the market (*e.g.*, from Arbitron, another ratings service or other published source) are readily available, the applicant will be required to provide such information on the resulting market share in the exhibit. A demonstrated combined market share of 25 percent or more will raise a *prima facie* concern that the transaction will lead to excessive concentration.[76] A combination resulting in less than a 25 percent market share will not raise such concerns.[77]

56. While we believe that the audience research in general use by the industry provides a sound basis for action in the vast majority of cases, we acknowledge that there may be situations where applicants can provide data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other information proving that excessive concentration will not result. Thus, for example, a special survey with a larger sample size could eliminate statistical anomalies. Survey data averaged over a number of survey periods may be appropriately qualified to be used as the practical equivalent of a more recent survey with a larger sample size. Audience data may be available, for example by the extraction of zip code area data, that eliminates anomalies resulting from unusual geographic features associated with the area served by the stations in question. We will thus not preclude applicants from relying on such alternative data. In all cases where applicants use special surveys, however, they must be conducted by an independent professional audience survey firm and applicants must submit, along with the survey, a description of the methodology used, including an estimate of the reliability of the survey.

57. In cases where the applicant certifies that market data are not readily available (*i.e.*, not in the applicant's possession, publicly available or obtainable without undue expense), we will also consider alternative demonstrations sufficient to assure us that no excessive concentration will result. While ratings data appear to be the most readily usable measure of a station's market share, we recognize that there may be alternative measures that demonstrate a lack of market power. It is not our intent to preclude proposed acquisitions simply because parties do not have reasonable access to one specific data source. Indeed, it would be anomalous to impose unduly high costs on those financially weak stations that the rule changes adopted are most likely to assist in better serving the public.

58. Thus, where applicants certify that they do not have readily available audience share data, they may substitute other information that can serve as a proxy for such data in an exhibit to their application. Alternative showings of the market share that will result from a proposed acquisition may include the stations' share of market advertising revenues or the market value of such stations relative to the other stations in that market. In addition, it may be possible to demonstrate with a high degree of certainty, based on the number of stations in the market and the nature of stations involved, that no public interest concern

---

Station A, County #3: Audience share 0, population 50,000

Station B, County #1: Audience share 10, population 25,000

Station B, County #2: Audience share 5, population 25,000

Station B, County #3: Audience share 30, population 50,000

The total population in Counties #1, #2 and #3 equals 100,000. The percentage of the total population in the three counties residing in County #1 is 25 percent; in County #2, 25 percent; and in County #3, 50 percent.

In County #1, as a result of the proposed acquisition, one owner would have stations with a combined audience share of 15 (Station A's 5 share plus Station B's 10 share). Similarly, for the other counties, the total audience share of the proposed combination would be a 15 share in County #2 and a 30 share in County #3.

The weighted audience shares of Stations A and B for these Counties would be the sum of the product of each County's audience share times the County's share of the total population (*i.e.*, (15 x 0.25) + (15 x 0.25) + (30 x 0.50). In this example, the total would be 22.5, and the proposed combined audience share would thus not raise a concern.

[74] A false certification, like other false statements of fact made in FCC applications and pleadings, may constitute misrepresentation under our rules and policies. *See* 47 C.F.R. Section 73.1015.

[75] Typically, in the designated market reports, the shares of commercial stations in any given rating book add up to about 85 percent of the entire audience, with the other 15 percent being attributed to noncommercial stations and stations not meeting the minimum reporting standard.

[76] As we explain further below, for purposes of market share estimates, applicants may use either the counties in which the acquiring and acquired stations are located or the Arbitron market encompassed by both stations' contours.

[77] Where it is demonstrated that a proposed combination will result in less than a 25 percent market share and the application is otherwise acceptable, the staff will be authorized to grant the application without further consideration of the concentration issue.

associated with a high market share would exist. While it is clearly not adequate to simply recite data as to the number of local stations in operation, certain types of stations, for example daytime AM stations or relatively low power AM and FM stations, rarely have substantial audience shares in markets with a large number of stations. We will not insist on such stations expending significant sums of money to acquire audience data when it is clear in any case that the combination involved will not approach the share limit based on the nature of the facilities involved and the types of audiences received in comparable markets from which data is available. As is the case for audience share measurements, our evaluation of all alternative information will presume that a combination resulting in a market share of less than 25 percent will not lead to excessive concentration.[78] While we are providing applicants with some additional flexibility in terms of the specific nature of the data they may present (*i.e.*, either regularly available audience share data or an alternative showing), each applicant will bear the burden of proof in demonstrating that they have complied with the audience share threshold. Applications that do not include the necessary demonstration and that leave the Commission unable to evaluate compliance will be dismissed.[79]

D. Simulcasting

59. Apparent uncertainty emerges from some parties' pleadings regarding our rules governing the simulcasting of programming as a result of the increased ownership permitted within a market under our new local ownership limits. We will take this opportunity to clarify our simulcasting rules. Simulcasting remains unlimited for stations in different services. For stations in the same service whose principal community contours overlap such that the overlap area constitutes more than 50 percent of either station's principal community contour area, simulcasting may not exceed 25 percent of either station's daily broadcast time. These rules apply both to stations commonly owned and to those separately owned but time brokered. Our rules will be clarified where necessary.

IV. JOINT VENTURES

A. Background

60. In the *Report and Order*, the Commission declined to further restrict joint venture arrangements that do not involve "time brokerage," or joint programming arrangements. The Commission observed that these types of arrangements benefit the radio industry without threatening competition or diversity.[80] With respect to time brokerage agreements,[81] the Commission determined that the substantial relaxation of the local ownership rules in the *Report and Order* warranted some further restriction if the stations involved in a time brokerage arrangement are in the same local market. Accordingly, the Commission concluded that where an individual or entity owns or has an attributable interest in one or more stations in a market and time brokers any other station in that market for more than 15 percent of the brokered station's broadcast hours per week, the brokered station will be counted toward the brokering licensee's permissible ownership totals under the revised local and national ownership rules.[82] The *Report and Order* also prohibited licensees from duplicating more than 25 percent of their owned station's programming through brokered stations (or otherwise) where both stations are in the same service and serve substantially the same area.[83] Finally, the *Report and Order* required stations involved in time brokerage agreements to keep copies of all such agreements in their public inspection files and to file with the Commission a copy of any time brokerage arrangement which would result in the brokered station being counted in determining the brokering licensee's local and national ownership totals.[84]

B. Petitions/Comments

61. A few petitioners seek reconsideration of the Commission's decision regarding joint ventures. TRAC raises three points. First, TRAC asserts that the Commission must define what is meant by licensee "control" of its station. TRAC contends that, contrary to certain Commission staff decisions, a licensee's duty to retain control of its station involves more than retaining veto power over time brokered programming. U&T [85] TRAC also submits that anyone, even someone who could not be a station licensee, may program a6. broadcast station under the current rules.[86] Second, TRAC disagrees with the Commission's

[78] We recognize that this alternative showing process will need to be refined on a case-by-case basis as the new rules are implemented. At the same time, we do not intend to create unnecessary obstacles to applicants who use this process as a result of the unavailability or cost of obtaining share data. Accordingly, while the staff is delegated authority to act on applications that are in full compliance with the revised ownership rules, applications that involve *bona fide* issues as to compliance with the 25 percent *prima facie* share limit and all cases involving alternative (nonArbitron) showings that cannot be clearly and unambiguously resolved, will only be acted on by the full Commission until clearly applicable precedents are established. Section 0.283 of the Commission's Rules (Mass Media Bureau delegations of authority) will be revised in a separate *Order*.

[79] *See United States v. Storer Broadcasting Company*, 351 U.S. 192, 202205 (1956) (application not in compliance with Commission rules may be dismissed without a hearing).

[80] *Id.* at 2787. The *Report and Order* reiterated that a licensee involved in a joint venture must retain control of its stations and must comply with the Communications Act, the Commission's Rules and policies and the antitrust laws. *Id.*

[81] The *Report and Order* defines time brokerage as "a type of joint venture that generally involves the sale by a licensee of 'discrete blocks of time to a "broker" who then supplies the programming to fill that time and sells the commercial spot announcements to support it.'" *Report and Order* at 2784 (citing *Policy Statement* in BC Docket No. 78-355, 82 FCC 2d 107, 107 n.2 (1980).*See also* 47 C.F.R. Section 73.3555(a)(3)(v).

[82] *Report and Order* at 2788-89.

[83] *Id.* at 2789.

[84] *Id.*

[85] TRAC Petition at 17-21 (citing *Joseph A. Belisle*, 5 FCC Rcd 7586 (Mass Media Bureau 1990); *J. Domenic Monahan*, 6 FCC Rcd 1867 (Mass Media Bureau 1990); *Peter C. O'Connell*, 6 FCC Rcd 1869 (Mass Media Bureau 1990)).

[86] *Id.* at 21.

decision to count only those programming arrangements that involve same-market stations. TRAC asserts that a station in a small market programmed by another station in a larger market will be able to offer advertising at greatly reduced rates, and that this situation will cause other stations in the smaller market to either go out of business or become extensions of other large market stations. TRAC is also concerned that stations programmed by stations from other markets will broadcast the news, weather and traffic of the distant city, which could have serious public safety implications in the local market.[87] Third, TRAC disputes the Commission's survey regarding the prevalence of time brokerage agreements as methodologically flawed and argues that as a result, the survey cannot "be the basis of reasoned decisionmaking."[88] In opposition to TRAC's petition, South Fork points out that all licensees are required to provide programming responsive to issues of concern to their communities, and that a station must render substantial service to the community to be assured a renewal expectancy.[89]

62. UCC argues that the *Report and Order* was not responsive to its questions regarding time brokerage. UCC asserts that the Commission must prohibit licensees from sharing the duty to assess community needs and problems and to provide issue-responsive programming. UCC also asserts that the Commission must establish standards for petitioners seeking to challenge a time brokerage agreement as a transfer of control, and standards for granting applicants renewal expectancies if their stations are brokered.[90] In addition, John W. Barger asserts that sales-only arrangements have the same, if not greater, potential for anti-competitive abuse as programming arrangements,[91] and Leventhal, Senter & Lerman contends that new time brokerage restrictions should not apply to television stations.[92]

C. Discussion

63. The petitioners have raised no new arguments to support reconsideration of the time brokerage restrictions adopted in the *Report and Order*. First, TRAC improperly seeks reconsideration here of staff decisions "issued two years ago. We believe that determinations regarding a licensee's retention of control of its time brokered station are most appropriately made on a case-by-case basis. This has been and will continue to be our practice in the time brokerage area. Further, the Commission has already responded to TRAC's concern that a non-licensee may broker a station, concluding in the *Report and Order* that "[w]e do not regard time brokerage agreements in which the broker has no cognizable ownership interest in any licensee in the brokered market as posing a significant threat to the integrity of our ownership rules or the diversity and competition principles upon which they are based."[93] Moreover, we emphasize that the licensee is ultimately responsible for all programming aired on its station, regardless of its source.

64. Similarly, TRAC raises no new arguments to rebut the Commission's conclusion that "[t]ime brokerage agreements involving stations licensed to different markets raise little public interest concern; indeed they can be difficult to distinguish from network affiliation agreements, of which the Commission has long approved."[94] The *Report and Order* reflects the Commission's concern that relaxation of the local rules, coupled with unrestricted time brokerage, might affect competition and diversity, which are primarily relevant at the local, as opposed to the national, level. This concern is not raised by different-market time brokerage arrangements. TRAC's fear that brokered stations will not air local news, weather and traffic in times of emergency is likewise unfounded. Not only are stations required to program in the public interest, convenience and necessity, but the Commission's Emergency Broadcast System rules may be invoked during various types of local weather emergencies and other disturbances.[95] We note South Fork's assertion that since entering an affiliation agreement, its station has doubled the amount of local public affairs programming it airs, increased the number of public service announcements it broadcasts and initiated local news reports. South Fork also submits that when necessary, it has preempted programming to provide information regarding local emergencies.[96] With respect to TRAC's concerns regarding the Commission's time brokerage survey, we note that the survey was not intended as a scientific poll, nor was it intended to be the exclusive basis of the Commission's decision. Our reference to the survey in a footnote in the *Report and Order* was intended only as an illustration that time brokerage apparently is not particularly widespread.[97] The specific questions raised by UCC imply that the Commission should treat time brokered stations differently from non-brokered stations in license renewal proceedings. We do not intend to penalize stations for engaging in time brokerage arrangements that are consistent with our new rules. Nor, however, do we intend to exempt brokered stations from the standards required of non-brokered stations. Accordingly, we reaffirm that brokered stations, like non-brokered stations, have the same responsibility to assess community needs and problems and provide issue-responsive programming as non-brokered stations. We also do not intend to differentiate between brokered and non-brokered stations in assessing renewal expectancy criteria. Similarly, petitioners seeking to challenge a time brokerage agreement as an unauthorized transfer of control should refer to the same standards applicable to any alleged unauthorized transfer of control.[98] In addition, we conclude that John W. Barger does not raise any new issues sufficient to warrant reconsideration of the Commission's decision not to further restrict joint sales ventures

---

[87] *Id.* at 21-22.
[88] *Id.* at 22-23.
[89] South Fork Opposition at 3.
[90] UCC Petition at 14-15.
[91] John W. Barger Petition, Appendix at 3, 4-5.
[92] *See generally*, Leventhal, Senter & Lerman Petition; *accord*, NAB Opposition at 22; *contra* TRAC Opposition (re Leventhal, Senter & Lerman Petition and Osborn Comments) at 1-3.
[93] *Report and Order* at 2789 n.129.
[94] *Id.* at 2788 n.126.
[95] *See* 47 C.F.R. Section 73.935(a).
[96] South Fork Opposition at 3.
[97] *See Report and Order* at 2788 n.127.
[98] *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981).

among stations. The propriety of sales-only arrangements was upheld in the *Report and Order* and has been addressed in other Commission decisions.[99] In response to Leventhal, Senter & Lerman, we note that the revised time brokerage rules, including public inspection file and reporting requirements, were not intended to apply to time brokerage arrangements between television stations. Our rules will be revised accordingly.[100] This issue is currently being explored in the Commission's television ownership proceeding.[101]

66. *Clarifications.* In response to additional questions raised by petitioners and to informal inquiries received by Commission staff, we clarify the following points regarding time brokerage. First, apparently to facilitate a reduction in staff for brokered stations, NAB urges the Commission to reconsider the aspect of the Commission's main studio rule requiring the presence of at least one full-time managerial and one staff person at the main studio during regular business hours.[102] This issue is outside the scope of the current proceeding. Second, if two stations enter a time brokerage agreement in a market with 15 or more stations and their audience shares subsequently exceed 25 percent of the market, one station may not purchase the other, subject to the procedures described in Section III-C-2, *supra*. We do not consider engaging in time brokerage tantamount to transfer of control, so the two stations will be treated as separately owned regardless of the existing brokerage agreement. Third, while we will not interfere with parties' decisions regarding liquidated damages or the length of a brokerage agreement, we emphasize that licensees must retain control over their stations. If a licensee agrees to an excessive liquidated damages clause or to an unreasonably lengthy brokerage agreement, that licensee's control of its station may be questioned. Fourth, a station in one market may not enter into an attributable time brokerage agreement with a station in another market if the licensee is at the local ownership limit in that other market.[103] Fifth, licensees currently engaged in time brokerage will have one year from the effective date of these rules to modify their time brokerage agreements to account for both the 15 percent attribution restriction and the 25 percent limitation on same-service, same-market simulcasting. Agreements entered into prior to the effective date of the rules will be required to come into compliance with the simulcasting provisions one year following the effective date of the rules, but, with respect to the ownership rules, will be treated in the same manner as are station ownership acquisitions entered into prior to the rules (*i.e.*, termination of the agreement generally will not be required).

67. Finally, we clarify procedures for implementing the time brokerage reporting requirements adopted in the *Report and Order*. All time brokerage agreements between radio stations must be included in the public inspection files of both the brokering station and the brokered station. Confidential or proprietary information may be redacted where appropriate. These agreements must remain in the stations' public inspection files for the term of the time brokerage contract. Time brokerage agreements in existence on or before the effective date of these rules must be placed in the stations' public inspection files within 30 days of the effective date of these rules. In addition, the brokering station must report the existence of an attributable brokerage agreement on its ownership report (FCC Form 323, at Question 3).

68. A station that is brokering time on another station must also file, within 30 days of execution, a copy of any local time brokerage agreement that would result in the arrangement being counted in determining the brokering licensee's compliance with local and national multiple ownership rules. Such arrangements already in existence must be filed with the Commission within 30 days of the effective date of these rules. Filing of brokerage agreements with the Commission is primarily informational. However, in light of the modifications to the local rules adopted in this *Memorandum Opinion and Order*, this filing must include, as part of the certification already required, a verification that the arrangement complies with the ownership rules. In those situations where parties are unable to verify the relevant audience share data due to the absence of such information or for other reasons, those parties must first seek a ruling from the Commission, before implementing the time brokerage agreement, that the arrangement will not lead to excessive concentration in the market. Any request for such a ruling should contain the same detailed information regarding market concentration as would be included in an assignment or transfer application (see discussion above) and will be processed following the same procedures that are followed with an assignment or transfer application (*i.e.*, will be put on public notice and be made available for comment in accordance with the transfer or assignment pleading schedules).

V. CONCLUSION

69. The record in this proceeding is clear that the radio industry is in dire need of regulatory relief. It is also clear that, given the dramatic increase in the level of competition and diversity in the industry, measured relaxation of our ownership rules to permit radio owners to achieve greater economies of scale poses no threat to diversity and competition.

70. Nevertheless, in an abundance of caution, we have decided to reduce the national ownership limits we adopted in the *Report and Order* from 30 AM and 30 FM to 18

---

[99] *See Report and Order* at 2787; *see also Second Report and Order* in MM Docket No. 83-842, 51 Fed. Reg. 11,914 (April 8, 1986); *Report and Order* in BC Docket No. 80-438, 87 FCC 2d 668 (1981).

[100] We will continue to require, however, that time brokerage agreements involving television stations be kept at the station and be made available for inspection upon request by the Commission. This requirement was inadvertently omitted from the rules attached to the *Report and Order* but has been restored in the rules attached to this *Memorandum Opinion and Order*. *See* Appendix C at 5 (Section 73.3613(e)).

[101] *See Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992) (Television Ownership Proceeding).

[102] NAB Petition at 23; *accord* Entertainment Communications Comments at 5.

[103] For example, in Market X, Owner owns the maximum permissible number of stations under the local ownership rules. Owner owns another station in Market Y. Owner's Market Y station may not broker more than 15 percent of the time on a station in Market X owned by another licensee.

AM and 18 FM stations. After two years, the limits will increase to 20 AM and 20 FM stations. We will also permit owners to have a non-controlling attributable interest in up to three additional AM and three additional FM stations nationwide if those stations are controlled by minorities or small businesses. On the local level, we have reduced the maximum number of stations an entity may own in large markets from three AM and three FM stations to two AM and two FM stations. We have also modified our local rules to define the relevant market based on a contour overlap standard rather than a designated metro market standard, and we have modified the audience share aspect of our local rules to afford broadcasters more flexibility. These changes to the national and local radio ownership rules will provide significant relief to the troubled industry but will lessen potential disruption of the marketplace and will promote entry by minorities and small businesses. Finally, we decline to adopt more restrictive rules regarding time brokerage agreements between radio stations.

VI. ADMINISTRATIVE MATTERS

71. *Ex Parte Rules -- Non-Restricted Proceeding.* The *Further Notice of Proposed Rule Making* included herein is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

72. *Regulatory Flexibility Act.* Pursuant to the Regulatory Flexibility Act of 1980, a Final Regulatory Flexibility Analysis for the *Memorandum Opinion and Order* included herein is set forth in Appendix A. In addition, as required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in the *Further Notice of Proposed Rule Making* included herein. This IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice of Proposed Rule Making,* but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of the *Further Notice of Proposed Rule Making,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601, *et seq.* (1980).

73. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on the *Further Notice of Proposed Rule Making* included herein on or before **October 30, 1992,** and reply comments on or before **November 15, 1992.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

74. *Effective Date.* The rules adopted in the *Report and Order* in this proceeding, with the modifications included in this *Memorandum Opinion and Order,* will become effective on the date they are published in the Federal Register,[104] except for the requirements contained in paragraph 68 above relating to time brokerage rulings, which will become effective November 20, 1992, to allow sufficient time to apply for and receive approval from the Office of Management and Budget.[105]

75. *Additional Information.* For additional information regarding this proceeding, contact Jane Hinckley Halprin, Mass Media Bureau, (202) 632-7792.

VII. ORDERING CLAUSES

76. IT IS THEREFORE ORDERED that, pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), Part 73 of the Commission's Rules, 47 C.F.R. Part 73, IS AMENDED as set forth in Appendix C, below. The rules will become effective upon publication in the Federal Register.

77. IT IS FURTHER ORDERED that the stay of the rules adopted in the *Report and Order* (*See* 57 Fed. Reg. 35763 (August 11, 1992)) IS LIFTED as of the effective date of these rules.[106]

---

[104] Because this action relieves a restriction, it will be made effective without 30 days' prior public notice.

[105] FCC Forms 301 (application for construction permit), 314 (application for consent to assignment) and 315 (application for consent to transfer) have been amended in accordance with the rules adopted in this proceeding. Until such time as printed copies of the revised forms are available, applicants proposing common ownership of overlapping stations may continue to use the prior form but shall attach a separate exhibit including the market and audience information necessary to demonstrate compliance with the revised ownership rules. This exhibit should include (as will the revised forms): (1) identification of the location and geographic coverage of the radio market involved; (2) the number of commercial AM and FM stations counted as being in the market, including contour maps that show those stations whose principal community service contours fall, in whole or in part, within the radio market; (3) for markets with 15 or more commercial radio stations, the basis and/or source material for the combined audience share figure, including the results and qualification of any commissioned audience survey or alternative showing used; and (4) the call letters and locations of all stations in the market that are, or are proposed to be, commonly owned, operated or controlled, including any AM or FM station in the market for which the applicant or any party to the application brokers more that 15 percent of the station's broadcast time per week.

[106] Appendix C includes all rules adopted in the *Report and Order* and the *Memorandum Opinion and Order* in this proceeding. This version of the amended rules therefore supercedes the version included in the *Report and Order.*

78. IT IS FURTHER ORDERED that the petitions for reconsideration filed in this proceeding ARE GRANTED to the extent indicated herein and are otherwise DENIED.[107]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Regulatory Flexibility

Final Regulatory Flexibility Analysis for Memorandum Opinion and Order

I. Need for and Purpose of this Action: This action is taken to relax the Commission's national and local ownership rules and to refine its policies regarding joint ventures. The Commission believes that this action will strengthen the radio industry.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

III. Significant Alternatives Considered and Rejected: First, in the *Report and Order* in this proceeding, the Commission adopted a 30 AM/30 FM numerical limit for radio ownership. The Commission concluded in this *Memorandum Opinion and Order* that a slight reduction in the limit would be effective in benefitting the radio industry and the listening public while also guarding against undue market dominance. Second, in the *Report and Order* in this proceeding, the Commission adopted a local ownership limit consisting of four market size tiers. The Commission concluded in this *Memorandum Opinion and Order* that a modification of the rule to allow for two tiers would be effective in benefitting the radio industry and the listening public while also guarding against undue market dominance. Finally, petitioners for reconsideration of the *Report and Order* in this proceeding urged the Commission to adopt more stringent restrictions on time brokerage arrangements between radio stations. The Commission declined to do so in this *Memorandum Opinion and Order*.

Initial Regulatory Flexibility Analysis for Further Notice of Proposed Rule Making

I. Reason for this Action: The *Further Notice of Proposed Rule Making* was adopted to explore ways to encourage investment in broadcasters that are small businesses.

II. Objective of this Action: The actions proposed in the *Further Notice of Proposed Rule Making* are intended to encourage entities to establish "incubator" programs designed to ease entry barriers and provide assistance to small businesses or individuals seeking to enter the radio industry.

III. Legal Basis: Authority for the actions proposed in the *Further Notice of Proposed Rule Making* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 and 303.

IV. Reporting, Recordkeeping and Other Compliance Requirements Inherent in the Proposed Rule: None.

V. Federal Rules Which Overlap, Duplicate or Conflict With the Proposed Rule: None.

VI. Description, Potential Impact and Number of Small Entities Involved: Incubator programs would be specifically designed to aid small businesses, including in particular minority owned businesses, that have limited access to capital and limited business experience, and that have expressed an interest in station ownership. Approximately 11,000 existing radio broadcasters of all sizes may be affected by the proposals contained in the *Further Notice of Proposed Rule Making*.

VII. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With Stated Objectives: All the proposals included in the *Further Notice of Proposed Rule Making* are aimed at assisting small entities gain entry into the radio industry.

APPENDIX B

Petitions for Reconsideration

1. Adventure Communications, Inc., Adventure Three, Inc., Booth American Company, Double L Broadcasting Limited Partnership, Double L Broadcasting of Lansing Limited Partnership, Evanston Broadcasting Co., Inc., Great Empire Broadcasting, Inc., KBIM Radio, Midcontinent Media, Inc., North East Kingdom Broadcasting, Inc., Paxson Enterprises, Inc., Prettyman Broadcasting, L.P., Stauffer Communications, Inc., WZPL, Inc.
2. Altoona Trans-Audio Corp.
3. Mr. John W. Barger
4. Capital Cities/ABC, Inc.
5. Cox Enterprises, Inc.
6. The Cromwell Group, Inc.
7. Empire Broadcasting Corporation
8. Entertainment Communications, Inc.
9. Jacor Communications, Inc.
10. League of United Latin American Citizens
11. Leventhal, Senter & Lerman
12. Mid-West Family Stations
13. Minnesota Broadcasters Association
14. National Association of Black Owned Broacasters, Inc., National Black Media Coalition, Inc.
15. National Association of Broadcasters
16. National Hispanic Media Coalition
17. Sconnix Broadcasting Company

[107] A list of petitioners and commenters is attached as Appendix B.

18. Telecommunications Research and Action Center, the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights and the National Association for the Advancement of Colored People

19. Office of Communication of the United Church of Christ

20. Mr. Robert T. Wertime

Comments on and Oppositions to Petitions for Reconsideration

1. Alliance Broadcasting, Inc.

2. Entertainment Communications, Inc.

3. Nashville Partners, L.P., Pittsburgh Partners, L.P., and KIXL Partners, L.P.

4. National Association of Broadcasters

5. National Telecommunications and Information Administration

6. Osborn Communications

7. Plum Creek Broadcasting Company

8. Radio Operators Caucus

9. South Fork Broadcasting Corporation

10. Telecommunications Research and Action Center and the Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights (2 pleadings)

11. Tribune Broadcasting Company

12. Voyager Communications V. Inc.

13. Westinghouse Broadcasting Company, Inc., Group W Radio, Inc. and Group W Television, Inc.

14. Winston Radio Corporation

Replies to Oppositions/Comments

1. Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights

2. League of United Latin American Citizens

Other Comments

1. Honorable Louise Williams Bishop

2. Anita Brower

3. Demaree Media, Inc.

4. Brenda Evans

5. KELD-AM/KAYZ-FM

6. KFIN Radio

7. KKIX-FM

8. KYKK Radio

9. WAMB-AM

10. WROW AM/FM

APPENDIX C
Rule Changes[108]

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154,303.

2. Section 73.3526 is amended by adding new paragraph (a)(12) and by revising paragraph (e) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

(a) * * *

(a)(12) For commercial radio stations, a copy of every agreement or contract involving time brokerage of the licensee's station or of another station by the licensee, with confidential or proprietary information redacted where appropriate.

* * * * *

(e)*Period of Retention.* The records specified in paragraph (a)(4) of this section shall be retained for periods specified in § 73.1940 (2 years). The manual specified in paragraph (a)(6) of this section shall be retained indefinitely. The letters specified in paragraph (a)(7) of this section shall be retained for the period specified in § 73.1202 (3 years). The "significant treatment of community issues" list and the records demonstrating the station's response to the educational and informational needs of children specified in paragraph (a)(8) of this section shall be retained by commercial broadcast television licensees for the term of license (5 years). Commercial AM and FM radio licensees shall retain the "significant treatment of community issues list" specified in paragraph (a)(9) of this section for the term of license (7 years). The certification specified in paragraph (a)(10) of this section shall be retained for the period specified in § 73.3580 (for as long as the application to which it refers). The records specified in paragraph (a)(12) of this section shall be retained as long as the contract or agreement is in force. The records specified in paragraphs (a)(1), (2), (3) and (5) of this section shall be retained as follows: * * *

[108] For the convenience of the reader, this Appendix incorporates all rules modified in the *Report and Order* in this proceeding and in this *Memorandum Opinion and Order.* Some rules included in this Appendix have been redesignated rather than modified, such as the television contour overlap rule, the one-to-a-market rule, the daily newspaper cross-ownership rule and the television national multiple ownership rule.

* * * * *

3. Section 73.3555 is amended by revising paragraphs (a), (b), (c), (d), (e) and notes 4, 5 and 7 to read as follows:

§ 73.3555 Multiple ownership.

(a)(1)*Radio Contour Overlap Rule.* No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests, or in the following circumstances:

(i) In radio markets with 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same service (AM or FM), provided that the owned stations, if other than a single AM and FM station combination, represent less than 50 percent of the stations in the market.

(ii) In radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered *prima facie* inconsistent with the public interest.

Note: When evaluating audience share evidence submitted under Section 73.3555(a)(1)(ii), the Commission will consider data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other relevant information. Where applicants certify that they do not have readily available audience share data, they may substitute other information that can serve as a proxy for such data. *See Memorandum Opinion and Order* in MM Docket No. 91-140, FCC 92-361 (released Sept. 4, 1992).

(iii) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(2)(i) Where the principal community contours of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (e). This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(ii) Every time brokerage agreement of the type described in subparagraph (a)(2)(i) above shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming, and by the brokering station that the arrangement complies with the provisions of paragraphs (a)(1) and (e)(1) of this section.

(iii) Any party operating in conflict with the requirements of paragraph (a)(2)(ii) above on the effective date of this rule shall come into compliance within one year thereafter.

(3) For purposes of this paragraph:

(i) The "principal community contour" for AM stations is the predicted or measured 5 mV/m groundwave contour computed in accordance with §73.183 or §73.186 and for FM stations is the predicted 3.16 mV/m contour computed in accordance with §73.313.

(ii) The number of stations in a radio market, is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question (i.e. the station for which an authorization is sought and any station in the same service that would be commonly owned whose principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service.

(iii) A station's "audience share" is the average number of persons age 12 or older on an average quarter hour basis, Monday-Sunday, 6 a.m.-midnight, who listen to the station, expressed as a percentage of the average number of persons listening to AM and FM stations in that radio metro market or a recognized equivalent, in which a majority of the overlap between the stations in question takes place. The "combined audience share" is the total audience share of all AM or FM stations that would be under common ownership or control following a proposed acquisition. In situations where no metro market or recognized equivalent exists, the relevant audience share data is the data for all counties that are within the principal community contours of the stations in question, in whole or in part.

(iv) "Time brokerage" is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

(b) *Television Contour Overlap (Duopoly) Rule.* No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station (computed in accordance with Section 73.684) and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated or controlled by the same party.

(c) *One-to-a-market Ownership Rule.* No license for an 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 one or more such broadcast stations and the grant of such license will result in:

(1) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the AM station; or

(2) The predicted 1 mV/m contour of an existing or proposed FM station, computed in accordance with § 73.313, encompassing the entire community of license of

an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the FM station.

(d) *Daily Newspaper Cross-Ownership Rule.* No license for an 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:

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

(2) 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; or

(3) The Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(e)(1) *National Multiple Ownership Rule.* No license for a commercial AM, FM, or TV broadcast station shall be granted, transferred, or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, members, officers, or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in:

(i) more than 18 AM or more than 18 FM stations, or more than 20 AM or more than 20 FM stations two years after the effective date of this rule, provided, however, that an entity may have an attributable but noncontrolling interest in an additional 3 AM and 3 FM stations that are small business controlled or minority-controlled.

(ii) more than 14 television stations, or

(iii) more than 12 television stations that are not minority-controlled.

(2) No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(i) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, or

(ii) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority-controlled.

(3) For purposes of this paragraph:

(i) "National audience reach" means the total number of television households in the Arbitron Area of Dominant Influence (ADI) markets in which the relevant stations are located divided by the total national television households as measured by ADI data at the time of a grant, transfer or assignment of a license. For purposes of making this calculation, UHF television station shall be attributed with 50 percent of the television households in their television market. Where the relevant application forms require a showing with respect to audience reach and the application relates to an area where Arbitron ADI market data are unavailable, then the applicant shall make a showing as to the number of television households in its market. Upon such a showing, the Commission shall make a determination as to the appropriate audience reach to be attributed to the applicant.

(ii) "TV broadcast station" or "TV station" exclude stations which are primarily satellite operations.

(iii) "Minority-controlled" means more than 50 percent owned by one or more members of a minority group.

(iv) "Minority" means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.

(v) "Small business" means an individual or business entity which, at the time of application to the Commission had, including all affiliated entities under common control, annual revenues of less than $500,000 and assets of less than $1,000,000.

* * * * *

Note 4: Paragraphs (a) through (e) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class C stations, to applications for assignment of license or transfer of control filed in accordance with § 73.3540 (f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled broadcast stations in the same service and if no new encompassment of communities proscribed in paragraphs (c) and (d) of this section as to commonly owned, operated or controlled broadcast stations or daily newspapers would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other no greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience or necessity.) Commonly owned, operated or controlled broadcast stations with overlapping contours or with community-encompassing contours prohibited by this section may not be assigned or transferred to a single person, group or entity, except as provided above in this note and by § 73.3555(a). If a commonly owned, operated or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 5: Paragraphs (a) through (e) of this section will not be applied to cases involving television stations that are "satellite" operations. * * *

* * * * *

Note 7: The Commission will entertain requests to waive the restrictions of paragraph (c) of this section on a case-by-case basis. * * *

4. Section 73.3556 is added to read as follows:

§ 73.3556 Duplication of programming on commonly owned or time brokered stations

(a) No commercial AM or FM radio station shall operate so as to devote more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any station in the same service (AM or FM) which is commonly owned or with which it has a time brokerage agreement if the principal community contours (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station.

(b) For purposes of the section, duplication means the broadcasting of identical programs within any 24 hour period.

(c) Any party engaged in a time brokerage arrangement which conflicts with the requirements of paragraph (a) above on the effective date of this rule shall bring that arrangement into compliance within one year thereafter.

5. Section 73.3613 is amended by revising paragraph (d) and adding new paragraph (e) to read as follows:

§ 73.3613 Filing of contracts.

* * * * *

(d) Time brokerage agreements: Time brokerage agreements involving radio stations, where the licensee (including all parties under common control) is the brokering entity, there is a principal community contour (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) overlap with the brokered station, and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee. Confidential or proprietary information may redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC: contracts relating to the sale of television broadcast time to "time brokers" for resale; subchannel leasing agreements for Subsidiary Communications Authorization operation; franchise/leasing agreements for operation of telecommunications services on the TV vertical blanking interval; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

STATEMENT OF CHAIRMAN ALFRED C. SIKES
RE: RECONSIDERATION OF RADIO REPORT & ORDER

Today's radio ownership rules -- like those first concluded in March of this year -- will be beneficial for one central reason: The Commission abandoned the "one-size-fits-all" local ownership limits. There was then, and there is today, a recognition that attaining and sustaining economic and thus programming health might well require larger holdings in bigger markets than in smaller ones. This conclusion, and the resulting deregulation, are at the heart of our action to provide radio station owners with more freedom and listeners with better programming.

The large reduction in the total number of stations that any one entity can own nationwide is a simple function of the fact that we live in a city of shared power. We were asked by key members of Congress to reduce the limit and we did.

Finally, there has been some effort in this Report and Order to help aspiring broadcasters who lack the wherewithal to become station owners achieve that status. I welcome that effort. However, in most respects it is a continuation of one aspect of our earlier rules which has not worked.

The far more promising part of today's action, however, is the "incubator" initiative that we are putting out for further notice. In essence, we would allow group broadcasters to expand beyond the national ownership limits if they begin an "incubator" program to help those with modest means get a start in ownership and then nurture their development. This approach would use a significant market-based incentive (or what might be considered a "money equivalent") to boost station ownership.

I will look forward to the comments on this proposal. In particular, I am interested in whether an opportunity to exceed the national caps is likely to result in "incubator" programs and what kind of incentive or ownership cap increase would achieve optimal results.

STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: Revision of Radio Rules and Policies (MM Docket No. 91-140)

On April 10, 1992 I issued a statement dissenting in part and concurring in part to the newly adopted radio ownership rules.[109] I have never disagreed with the need to take action to help the economic plight of radio station owners. In fact, the proposal I submitted to my colleagues provided for substantial relaxation of the radio ownership rules. My disagreement with the majority was threefold. First, I felt the Commission's *Order* lacked record support for the changes adopted to the national and local ownership rules. Second, I voiced concern over the impact of the new rules on diversity and competition on the local, regional and national levels. Finally, I disagreed with the elimination of the incentives for increased minority ownership. I believed that at a time when minority ownership of radio stations appears to be at a level less than 2 percent, and declining, the Commission should be fostering greater participation by minorities, not less.

I made clear in my statement that I was ready to "discuss with my colleagues any reasonable, more cautious modifications to these rules."[110] Such discussions have occurred. I am pleased to be able to join with my colleagues in taking a more cautious approach to modifications of the radio ownership rules. Today's Order adopts a national ownership limit of 18 AM and 18 FM stations. The Order further provides incentives for increased minority ownership through the allowance of the ownership of three additional stations where these stations are minority-controlled.[111] In addition, I support the decision to add a small business incentive that will work along side the minority ownership incentive. Under this scheme a group owner has a choice of joint venturing with either an entity controlled by a minority or any entity that qualifies as a small business. I also support the decision to seek further comment on an "incubator" program, and to have the Commission's Small Business Advisory Committee examine this and other proposals in this area. A Further Notice on this issue will permit the Commission to gather comment on the most effective means to implement such a program. At the same time, licensees will be permitted to proceed with transactions involving the minority ownership or small business incentives while a record is developed on the incubator program.

I view the incubator program as an opportunity to move forward with additional methods to increase the participation of all segments of our diverse population. This incubator program is not a replacement for the minority incentive provision included in this decision.[112] But rather, it is an additional attempt to enhance the participation of small businesses into the broadcast industry.

With respect to the local rules, I believe the Commission's Order provides for a simpler approach. I had trepidations about the four tier system adopted in the Commission's *Report and Order* in this proceeding. The new rule allows licensees in markets with fifteen or more stations to buy one additional FM and one additional AM station, provided that there is no undue concentration of media control. In the smaller markets licensees have the flexibility to purchase up to three stations provided that no more than two are in the same service. In addition, the Commission is returning to its traditional contour overlap approach in counting the number of stations in a market. I also agree with the decision not to count noncommercial stations for purposes of this rule.

In conclusion, I believe that the Order we adopt today provides for a level of fundamental fairness and consideration of the impact on diversity and competition. It is a decision built upon compromise by all the Commissioners. It is a decision which I am pleased to support. Hopefully, the radio industry can move forward in a cautious manner toward achieving greater economies of scale and greater participation by diverse entities.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re Revision of Radio Rules and Policies (MM Docket No. 91-140) *Memorandum Opinion and Order on Reconsideration*

If the Commission's action last March to authorize ownership of up to 60 radio stations by one group owner seemed bold and heady stuff--- a rendezvous with destiny--- today's reconsideration will seem, by contrast, muted and modest: a rendezvous with reality.

I voted with the majority last spring to relax the ownership rules. The record and conditions in the market, in my judgment, amply supported liberalized limits. I viewed our action as possibly a tonic for an ailing industry.

Less than a month after that vote, I spoke to an American Bar Association group at the National Association of Broadcasters' annual convention.[113] I described why I believe that the deregulation of broadcasting, on balance, has advanced the public interest and should continue. I point-

[109] *See Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2808 (1992) (Statement of Commissioner Andrew C. Barrett, Dissenting in part and Concurring in part).

[110] *Id.* at 2822.

[111] I note that numerous parties who filed for reconsideration of our radio decision supported the retention of the minority ownership incentive. *See, e.g.*, Petition for Reconsideration filed by the National Association of Black Owned Broadcasters; Petition for Partial Reconsideration and Clarification filed by the National Association of Broadcasters; Petition for Reconsideration filed by the Office of Communications of the United Church of Christ; Petition for Reconsideration filed by League of United Latin American Citizens, Petition for Reconsideration filed by Telecommunications Research and Action Center, the Washington Area Coalition Interested in Viewers' Constitutional Rights and the National Association for the Advancement of Colored People; and Petition for Reconsideration filed by the National Hispanic Media Coalition.

[112] In addition, the Commission has other traditional policies favoring minority ownership of broadcast stations (i.e. the tax certificate, distress sale and comparative preference policies).

[113] "A Democrat Defends Deregulation," Remarks Before the 11th Annual ABA Forum on Communications Law, National Association of Broadcasters Convention (April 12, 1992).

ed out, however, that a decade of experience with broadcast deregulation should have taught us three sobering lessons:

- o First, because the Commission can never fully predict the consequences of its actions, mistakes are possible.
- o Second, overzealous, ideologically driven deregulation can deplete the Commission's scarce political capital and lead to confrontations with Congress that poison the atmosphere long after individual votes are over.
- o Third, our regulation of broadcasting must reflect its special nature as a business "affected with the public interest."

Those lessons have forcibly come home to us in the intervening months. In my view, three events compel us to take today's action on reconsideration of the new ownership rules.

Urging Caution

First, broadcasters themselves expressed misgivings about the proposed new rules, warning of potentially severe unforeseen consequences. In late May the National Association of Broadcasters and other industry groups asked us to reconsider, and scale back, the rules. They suggested that more conservative national limits would better protect diversity and that a straightforward duopoly limit of 2 AMs and 2 FMs in larger markets would safeguard competition at the local level. The Commission thus found itself in the bizarre position of having advocated rules more generous than the radio industry itself seemed to want.

Second, minority broadcasters and several public interest groups argued forcefully against the Commission's abandonment of the minority-incentive features of the old rules. Many acknowledged that the old incentive had not worked as hoped to attract capital to minority ventures. But they strongly suggested that such incentives, which had been in place only seven years, *could* work, given time and encouragement. They deplored the loss of a policy that had symbolized the Commission's commitment to encouraging minority ownership, which previous Commissions, the Congress and the courts had identified as an important interest of government. Finally, they warned that unless such incentives were built into the Commission's ownership rules, minorities and small businesses could fall farther behind in their efforts to gain a foothold in the industry.

Finally, the Commission heard objections from a third important sector: the Congress. In May, Congressman John Dingell wrote to the Commission to express his own doubts about the impact of the new rules "on small operators who are a source of diverse programming in the marketplace." In June, Senator Ernest Hollings wrote a similar letter, observing that the Commission's March vote "seem[ed] certain to create unwanted levels of concentration of ownership, and a corresponding loss of diversity." In July, Senators John Danforth, Bob Packwood, Larry Pressler and Ted Stevens--- all Republicans generally supportive of deregulation--- asked the Commission to moderate the rules on reconsideration.

These expressions of Congressional unease built to a crescendo in late July. Just days before the rules were to take effect, the Commission learned that its March action was likely to be rolled back in legislation: an appropriations measure setting in statutory stone the old "12-12-12" ownership *status quo*. The Commission faced losing *any* chance to relax the ownership rules, despite its judgment that such a relaxation was fully justified.

Only rarely do our decisions come under such intense, widespread and relentless questioning. When that occurs, I believe that the Commission has a duty to reconsider--- even, as in this instance, when it can defend its actions as resting on a solid record and informed analysis.

Twin Goals

Given the questions raised so widely and persistently after the March vote, it seemed to me that the Commission should pursue two goals in its reconsideration of the radio rules: We must preserve some deregulation in hopes of reviving the sagging fortunes of the radio industry. Equally important, we should defuse the rising tension between the Commission and Capitol Hill by responding to the petitioners' substantive concerns that overzealous change might be unwise.

Today's action, in my judgment, serves these goals.

Those who see Congress as interfering, who believe that consultation and conciliation are timid acts, and that the Commission can be heedless of Congressional opinion may take a dim view of today's decision. For my part, I do not see Congress as an enemy; I believe that the Commission can and should balance full consultation on Capitol Hill with its deregulatory goals. Attention to Congressional concerns, after all, is grounded in tradition and law: The Supreme Court long ago concluded that "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953). When Congress reacts so strongly and negatively to our actions, we have a serious obligation to respond. To behave otherwise could amount to a dangerous brinksmanship whose consequences could only be harmful.

The rules we adopt today address the concerns of the affected parties, the Congress, and the Commission. Acts of prudent compromise never please everyone. This act of compromise, nevertheless, protects the Commission's goal of regulatory change, while allowing the Commission to move on to other matters--- free of rancorous objections from the Congress, and free of suspicion that we have somehow overreached.

Enterprise Zones

I support the new rules for another reason: They create, to use Commissioner Marshall's apt phrase, small business and minority radio "enterprise zones," designed to attract capital and the expertise of group owners to small and minority-owned stations. The Commission's efforts under the old rules to spur such investment were not very fruitful. Our new approach--- allowing group owners to acquire attributable interests in three additional stations if those stations are small businesses or minority-controlled---

offers a fresh opportunity, I believe, to strengthen broadcast diversity and to attract capital to stations that badly need it.

In a recent filing with the Securities and Exchange Commission, the National Association of Broadcasters starkly outlined the disappearance of capital from the broadcast marketplace:

* In 1989, at least 115 senior commercial banks were actively engaged in broadcast lending. Today, half of them no longer make broadcast loans.

* In 1989, $2.2 billion in new broadcast financing was issued. By 1991, that figure had shriveled to $191 million.[114]

Clearly, if capital to bolster the radio industry is to be found--- particularly capital for small and minority-owned ventures--- much of it will have to come from the industry itself. The investment incentives we create today are designed to give group owners a reason to plow some of their earnings back into stations that need help. These incentives are totally market-oriented and voluntary. They simply offer a regulatory benefit to those who freely choose to help a small business or minority owner. They reject harsh government intrusion into the marketplace. They are, in short, all carrot and no stick.

In addition, we unveil for further comment a number of other creative ideas, suggested by Chairman Sikes, to help develop additional capital and to improve management for small and minority broadcasters. While there are no guarantees of success, we hope to encourage a tide that will lift many boats.

A New Approach

I am convinced that the Commission today strikes an appropriate balance between prudent deregulation and fidelity to the public interest. The public suffers when the radio industry is in economic trouble, and we are altering our rules in the hope of alleviating those problems. What we do today gives radio licensees the relief they seek from the old rules and the certainty they need about the new ones. It also demonstrates that the lessons learned from a decade of deregulation have not been lost on today's Commissioners.

[114] Comments of the National Association of Broadcasters before the Securities and Exchange Commission, *In the Matter of Small Business Initiatives*, File No. S7-4-92 at 1-2 (June 18, 1992). These comments were also filed in MM Docket No. 92-51 on July 13, 1992.