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

MM Docket No. 91-140

In re

Revision of
Radio Rules and Policies

## NOTICE OF PROPOSED RULE MAKING

**Adopted: May 9, 1991; Released: May 30, 1991**

**Comment Date: August 5, 1991**
**Reply Comment Date: September 5, 1991**

By the Commission: Chairman Sikes issuing a separate statement; Commissioner Quello approving in the overall result, concurring in part and issuing a separate statement; Commissioners Barrett and Duggan issuing separate statements.

### I. INTRODUCTION

1. In initiating this proceeding, our goal is to explore changes in the structural and ownership regulations governing radio broadcasting, with a view toward ensuring that the aural services can continue to compete in the communications marketplace and provide service to the public. In recent years, the diversity of information and sources of information in the communications industry has increased substantially. Numerous outlets of communication in addition to broadcast radio are currently available, including television, cable, wireless cable, [1] low power television, motion pictures, video and audio cassette recordings, and print material. [2] In addition, direct broadcast satellite (DBS) audio and video services are on the horizon. This multitude of sources provides consumers with an unprecedented variety of choices and requires radio broadcasters to program ever more astutely to meet the needs and interests of the public and, in turn, to attract advertisers, who are also able to choose from an unprecedented variety of media to reach the public. As a result, radio service to the public has been diminished in some instances as stations fall silent, in part, it appears, because they have been constrained by regulation from adapting to quickly changing market realities.

2. These changes have particularly affected AM radio. Commission records indicate that 197 AM stations are currently dark, as compared with 30 FM stations. While MM Docket No. 87-267 was initiated to improve the technical quality of AM service, it does not address the non-technical economic pressures currently faced by AM broadcasters. Moreover, industry representatives submit that AM radio, in particular daytime only AM radio, is, on the average, unprofitable. [3] FM stations, as a whole, have not experienced the same degree of decline as AM stations, but both AM and FM broadcasters must contend with dramatic changes in the radio industry, as well as increasingly challenging competition from new aural services. For example, the activation of the Docket 80-90 allotments [4] will increase the number of FM radio stations by almost 700, thereby significantly increasing intra-service competition. Moreover, other significant changes affecting all radio service will result from the expansion of the AM band proposed in MM Docket No. 87-267. [5] In addition, new radio services pose a competitive challenge to broadcast radio. Digital audio is already being introduced through satellite to cable TV delivery systems, and other types of digital broadcast radio, such as Broadcast Satellite Sound Service, are on the horizon. Similarly, home satellite dish owners now have the ability to receive a large number of radio services from many different parts of the country. [6] Moreover, growth in the video

---

[1] The term "wireless cable" refers here to certain uses of frequencies in the Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Private Operational-Fixed Microwave Service and the Instructional Television Fixed Service. Use of this term here is not intended to suggest that these services constitute cable service for any statutory or regulatory purpose. *See Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (paras. 2, 3) (1990), *pet. for recon. pending*.

[2] In 1984, cable television was available to approximately 70 percent of the United States; in 1989, cable was available to approximately 90 percent of the United States. *See Report* in MM Docket No. 89-600, 5 FCC Rcd 4962, 4966 (1990) *(Cable Report)*. Home satellite dish use has grown from approximately 900, 000 units in use in 1984 to 2.8 million units in use today. *See id.* at 5016. In 1986, 30 percent of television households owned video cassette recorders; in 1990, VCR penetration reached 72 percent. *See id.* at 5019. Wireless cable currently serves approximately 300, 000 subscribers and is expected to increase as a result of rule changes adopted in Gen. Docket 90-54. *See id.* at 5014; *Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990), *pet. for recon. pending; Further Notice of Proposed Rule Making* in Gen. Docket No. 90-54, 5 FCC Rcd 6472 (1990).

[3] The National Association of Broadcasters (NAB) submits that the average profit margin for daytime AM stations in 1989 was negative 5.4 percent, as compared with 5.1 percent for FM stations and 3.9 percent for AM/FM stations. Comments of NAB in Gen. Docket No. 90-357, at 15-16 (filed Nov. 13, 1990) (citing *1990 NAB/BCFM Radio Financial Report*, National Association of Broadcasters, Washington, D.C.). *See also Report on the Status of the AM Broadcast Rules*, RM-5532 (Mass Media Bureau, April 3, 1986).

[4] *Report and Order* in BC Docket No. 80-90, 53 RR 2d 1550 (1983). In Docket 80-90, the Commission modified its technical rules to make possible more intensive use of the FM spectrum. Subsequently, in MM Docket No. 84-231, the Commission allotted approximately 700 new FM channels as a result of the technical rule changes of Docket 80-90. *See Second Report and Order* in MM Docket No. 84-231, 101 FCC 2d 638 (1985). In addition to channels allotted in Docket 84-231, Docket 80-90 made possible a large number of new allotments and station upgrades. Many of these new stations have not yet commenced operation, but are likely to do so within the next several years.

[5] *See Notice of Proposed Rule Making* in MM Docket No. 87-267, 5 FCC Rcd 4381 (1990) *(AM Notice)*.

[6] For example, the January 1991 issue of *Satellite Orbit* lists more than 80 radio stations and services available to dish owners.

market will continue to affect the audio marketplace: the number of video outlets, both broadcast and non-broadcast, has increased in recent years and may soon increase even further, depending on the success of DBS.

3. To enable broadcast radio in general, and AM radio in particular, to have the potential to prosper in the environment of these considerable competitive challenges, we propose modifying our ownership rules to permit a larger assemblage of stations by individual owners. The Commission has historically encouraged ownership diversity and economic competition to achieve fundamental Communications Act objectives -- assuring service to the public and diversity of choice in the marketplace of ideas. It also has recognized, however, that tension may arise between ownership diversity and economic efficiency, and that "[t]he multiple ownership of broadcast stations. .. play[s] an important role in our nation-wide broadcast system. " and diversity goals must therefore be balanced with the need to foster economic growth in order to provide for vigorous competition. [7]

4. In establishing the current national ownership limitation in 1984, the Commission noted that group ownership may lead to economies of scale, particularly given group owners' ability to consolidate management, bookkeeping, secretarial, sales and programming personnel for a number of stations, and to engage in group advertising sales and group program development and purchases.[8] The Commission concluded at that time that group ownership may "foster news gathering, editorializing and public affairs programming," and may lead to the development of independent programming networks.[9] These economies of scale provide broadcasters with greater financial resources, which can be used to meet the needs and tastes of the public more effectively. Such benefits ultimately redound to the public by increasing the responsiveness, quality and diversity of programming. The continual increase in group ownership of radio stations is proposition.[10] We also note the development of strong public broadcasting networks in some areas *(e.g.,* Minnesota, Florida, Oregon), due at least in part, we believe, to the absence of ownership restrictions on public radio and television stations. We continue to be motivated by this belief, and commenters' observations regarding this proposition, including specific examples, are welcome.

5. In addition, greatly divided ownership may weaken local radio station operations in their interactions with other participants in the market and in particular with networks or other centralized providers of programming, so that local participation in the broadcasting process is weakened rather than strengthened. Wide dispersion of ownership, far beyond that mandated by antitrust principles, may, in pursuit of the important values associated with increased competition and diversity of viewpoint, ultimately undermine the overall viability and competitiveness of radio service. Maximizing competition may provide many voices, but each might maintain such a minute fraction of the audience that it would lack an economic base sufficient to effectively serve the needs of the public. On a local level, we believe that stations separately owned will each tend to strive for the same core audience with roughly the same type of programming, while the same stations managed in common may have greater incentives to appeal separately to distinct segments of the audience with distinct programming. In other words, stations managed in common can effectively counterprogram each other. Therefore, we believe that increased group ownership need not necessarily decrease diversity of programming and, to the contrary, may encourage it: the Commission has noted that "it is indeed possible to have greater viewpoint diversity than there is ownership diversity." [11] Although developments associated with cable television provide some support for this principle, [12] the Commission's traditional public interest concerns for diversity of ownership and diversity of viewpoint, together with the abundance of applicants for a limited number of station licenses, have prevented this theory regarding overall programming diversity from being tested in the radio marketplace.

6. Accordingly, we present a number of options for modification of the current rules regarding common ownership of radio stations and our present policy "regarding joint ventures among stations that are not commonly owned.[13] Commenters are requested to discuss whether the current ownership limitations have unduly stagnated

[7] *Memorandum Opinion and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 74, 81 (1985) *(Ownership Reconsideration Order)* (citing *Report and Order* in Docket No. 10822, 43 FCC 2797, 2801-02 (1954)).

[8] *Report and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 17, 45 (1984) *(Ownership Report and Order)* , *on reconsideration, Ownership Reconsideration Order, appeal dismissed sub nom. National Association of Black Owned Broadcasters v. FCC,* No. 85-1139 (D.C. Cir. Jan. 4, 1991). In addition, the *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), dealing with radio-television combinations, illustrates economies of scale and other efficiencies that can be achieved via group ownership in general. For example, the *Order* refers to evidence that existing group-owned stations spend a larger percentage of their budgets on news and overall programming and appear to air more informational programming than stations that are not group-owned. *Id.* at 1748-1749. The *Order* also cites other potential service benefits such as enabling marginal stations to stay on the air, the activation of unused channels or improvement of the facilities of existing stations. *Id.* at 1749-1750.

[9] *Id.* at 44-45.

[10] From 1985 through 1990, the number of group owners of radio stations rose from 423 to 536, increasing every year but one (1986-1987) during that period. Similarly, the number of stations held by group owners rose from 2, 318 to 3, 261 from 1985 through 1990, increasing every year but one (1986-1987).

[11] *Ownership Report and Order* at 34.

[12] The *Cable Report, supra,* note 2, notes that horizontal concentration and vertical integration have contributed to "a wealth of new viewing options for consumers" due to the availability of economies of scale. *Cable Report* at 5009. The *Report* also submits that investment by multiple system operators has enabled several programming services to remain operational, and observes that horizontal concentration and vertical integration can promote the introduction of new services by enabling operators to share information with producers regarding consumer preferences. *Id.*

[13] In order to fully understand the impact of this proceeding and future proceedings on new entrants and small businesses, we also expect to form an Advisory Committee on Small Business, which may in turn lead to other specific mechanisms to provide information and interface with small businesses. We will also hold a conference on entrepreneurial communications opportunities later this year. Although this initiative has been announced in this broadcast docket, our focus in these efforts is much broader; we also need to examine the effects of our

or inhibited the radio industry by preventing some owners from purchasing new stations. Commenters are also invited to suggest both ways and reasons other than those mentioned herein to strengthen radio broadcasting in anticipation of further change in the communications marketplace, including specifically the anticipated arrival of digital audio broadcasting. By exploring these matters, we do not intend to artificially re-energize any service that is not valued or used by the public, nor do we intend to shield radio from competition with other media. Rather, the proposals presented below are designed to ensure that regulation is not a contributing factor in the demise of radio service. We seek comment on our general evaluation of the situation currently faced by radio broadcasters, specifically, whether radio service (or AM in particular) is foundering as we perceive and, if so, whether our proposed rule changes (or any changes) are useful or appropriate.

7. Throughout these deliberations we will remain attentive to the impact of the proposals herein on minority ownership, and on how any or all of the following options could be modified to encourage it. In implementing our national minority ownership rule over the past six years, we have seen the emergence of minority-owned station groups. We desire to continue fostering such development through more flexible national minority ownership rules. In this regard, four minority organizations filed a petition for rule making proposing that the present minority ownership limitation of 14 AM and 14 FM stations be increased to 20 AM and 20 FM stations.[14] We seek specific comment on that proposal. How will the other changes proposed in this *Notice* affect the potential for growth in minority ownership? Would the affirmative effects of the current rule be undermined? If the general limitation is increased above the current 12 AM and 12 FM station cap, is there an appropriate separate minority limitation? Should minority owners be permitted to own an unlimited number of stations, or be exempt from any non-numerical limits? It is not the Commission's intent in considering these proposals to impose further impediments to increased minority ownership of broadcast properties. Therefore, commenters are asked to address the issue of whether the changes proposed in this item would have an unintended adverse effect on the ability of minorities to acquire a first or subsequent radio station.

## II. THE "12-12-12" NATIONAL OWNERSHIP LIMITATION

8. From the inception of radio regulation in the 1920s and through 1940, no formal limit was placed on the number of stations that one person or entity could own. When the Commission adopted rules governing the new commercial FM service in 1940, it imposed a six-station maximum for that service "[t]o obviate possible monopoly and encourage local initiative." [15] Six years later, the Commission established a *de facto* seven-station limit for the AM service by denying an application filed by CBS to purchase an eighth AM station. [16] In 1953, the Commission formally adopted a seven-station limit for each service. [17]

9. In 1984, the Commission, noting studies that found the radio marketplace remarkably unconcentrated, modified the ownership limitation by permitting a single broadcasting group to own, directly or indirectly, up to 12 AM and 12 FM stations. [18] *See* 47 C.F.R. § 73.3555(d). These rules originally carried a sunset provision under which the ownership restrictions would have been eliminated after six years. [19] Upon reconsideration, the Commission rescinded the sunset provision, stating, "[w]e continue to believe that it is appropriate to proceed cautiously in relaxing rules that affect such a vital aspect of the broadcasting industry." [20] The Commission also established a broader limit that permits group owners to own up to 14 stations if at least two of the stations in which they hold attributable interests are minority-controlled. [21] Six years have passed since the Commission adopted the current national ownership rules. Although we continue to believe that caution is warranted in this area, developments over the past six years make this an apt point at which to re-examine the rules and the radio marketplace.

10. Based upon our evaluation of the national multiple ownership rules, it now appears that further modification is appropriate. Accordingly, we seek comment on a variety of options for relaxing the multiple ownership rules on the alternative bases of number of stations, audience reach or size, or market ranking. The numerically based alternatives discussed below would relax the current national ownership restrictions but retain a set numerical limitation as a precaution to ensure that diversity and competition are maintained. The audience-based options discussed below would incorporate a numerical element but focus on the audience reach and market position of a group owner's stations rather than the number of stations the group owns. These options should serve the Commis-

---

actions and provide information to small businesses with respect to telecommunications, private radio and other new technologies.

[14] *See* 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, at 19-22 (filed Sept. 18, 1990) *(Minority Ownership Petition)* . That pleading also seeks modification of other rules and procedures regarding station transfer and the comparative hearing process designed to enhance minority ownership. We hereby incorporate into this proceeding that portion of the petitioners' pleading concerning revision of the multiple ownership rules. The other issues will be considered in a separate proceeding or proceedings.

[15] Federal Communications Commission, *Sixth Annual Report/Fiscal Year 1940*, at 68.

[16] *Sherwood B. Brunton*, 11 FCC 407 (1946).

[17] *Report and Order* in Docket 8967, 18 FCC 288 (1953). For a detailed discussion of the history of broadcast ownership restrictions, see *Notice of Proposed Rule Making* in Gen. Docket No. 83-1009, 95 FCC 2d 360 (1983).

[18] *Ownership Report and Order* at 18, 42-43 (1984). The *Ownership Report and Order* also raises the national ownership limit for television stations.

[19] *Ownership Report and Order* at 18.

[20] *Ownership Reconsideration Order* at 96.

[21] *See Ownership Reconsideration Order* at 94; 47 C.F.R. § 73.3555(d). The *Ownership Reconsideration Order* also established a national audience cap of 25 percent for non-minority-owned television stations and 30 percent for minority-owned television stations.

sion's objectives of fostering diversity and competition while providing station owners with more flexibility to structure their ownership patterns as they see fit to achieve individual business objectives. Additionally, such an approach would provide opportunity and incentive for successful broadcasters to acquire (and thereby strengthen) small and/or currently underachieving radio stations. The market rank-based option considers the size and diversity of each station's local market and would not factor into the national limit the stations owned in larger markets where a given degree of diversity has been achieved. Finally, each option is examined first with regard to its potential application to AM stations only, and then to both AM and FM stations.

**Proposed Rule Revisions for AM Stations**

11. With regard to the current numerically based limits, one option would be to eliminate the restriction for AM stations. Alternatively, we could raise the numerical limit on the number of AM stations that a licensee can own (*e.g.*, raising the limit from 12 to 18 AM stations). A third option would be to eliminate the restriction on the specific number of AM stations that could be owned, but retain an absolute cap on the total number of aural services. For example, the Commission could establish a total limit of 30 stations, all of which could be AM stations, but no more than 12 of the 30 could be FM stations. If a numerically based rule is adopted, we might further include an exception whereby an AM station that falls below a certain percentage rating in its local market would not be counted in calculating the number of stations owned by a single entity. If we were to take this approach, what percentage should be used for such an exception? If that station's ratings subsequently rise above the benchmark, what, if any, action should be taken? Should the station then be counted? If so, how should the Commission proceed if counting that station will cause the group owner to exceed the national ownership limitation? [22] We seek comment on these issues.

12. An audience reach approach to AM radio ownership may be a more direct way to address diversity and concentration concerns than a numerically based approach. Because a single owner can own a considerable number of AM stations, depending on their size, without threatening diversity, it may be beneficial both to the public and to owners of AM stations if we adopt a national audience reach limitation as an alternative to the current numerical restriction. This approach would permit a single entity to increase its ownership of AM stations beyond the current 12-station limit, as long as the combined national audience reach of all group-owned radio stations does not exceed some set percentage of the national radio audience. We seek comment on this proposal. What would be an appropriate maximum audience reach? Should the limit be the same as that employed for the television multiple ownership rule -- 25 percent -- or should it be some other number? [23] How should audience reach be defined for purposes of the rule? Should we refer to ADI data or the population of the area within a station's signal contour? At night, clear-channel AM stations are sometimes received hundreds of miles away from their principal listening area. Is there a way to include distant listeners in such a station's audience reach figures, and is it desirable to do so? How, if at all, should stations not in operation be counted? In conjunction with the above proposal, one option is to permit parties observing the numerical limit to exceed any national reach limitation established, and vice versa. [24] We seek comment on these issues.

13. Another option is to consider the actual size of the local audience of a group owner's AM stations rather than their national audience reach. In the *Ownership Report and Order*, the Commission noted that the individual consumer perceives diversity in the communications marketplace with reference to local outlets of communication immediately available to him or her. [25] Thus, it may be of greater benefit to the listening public if the national ownership limitation incorporates a local element. Such a rule would be based on the cumulative audience of an owner's AM and FM stations, derived from local audience shares and local population data. For example, the Commission might permit acquisition of AM stations beyond the numerical limit if the cumulative local market shares of a group's AM and FM stations, weighted by population, would not exceed a given percentage of the national radio audience, such as ten percent. We seek comment on this proposal. Is ten percent a workable cutoff point? Would five percent further encourage acquisition of AM stations by group owners? What procedures should be followed if the market shares of a group owner's stations subsequently increase? As before, we propose that a group owner observing the numerical limit on stations be permitted to exceed any local market share limitation adopted.

14. Finally, we could adopt a rule for national AM station ownership based on market size or rank similar to the criteria currently used in waiving the "one-to-a-market," radio/television cross-ownership rule. Pursuant to that procedure, the Commission favorably views requests for waiver of the rule if the request involves, *inter alia*, stations in one of the top 25 television markets where

[22] We do not currently contemplate compelling a group owner to divest itself of any of its stations if it ultimately exceeds a benchmark established under this standard, or under the audience reach or local market share standards discussed below. If we were to compel divestiture, a disincentive would exist against purchasing and improving weak stations and maximizing station performance and success, which are key goals of this proceeding. We would be concerned, and might have to take appropriate action, if a particular group owner ultimately garnered an undue measure of market power as a result of any of the rule changes proposed here. We also seek comment on whether we should allow a group owner to sell stations as a group if, at the time of sale, the group exceeds our established market share threshold.

[23] *See* 47 C.F.R. § 73.3555(d).

[24] Using a 24-station limit and a 25 percent permissible audience share for purposes of illustration only, this proposal would permit a single group to own at least 24 stations regardless of cumulative audience reach. Conversely, if the cumulative reach of a group's stations totals 25 percent or less of the national radio audience, that group could own more than 24 stations. This is less restrictive than our present television multiple ownership rule, which generally prohibits ownership of more than 12 stations or ownership of stations with a cumulative national audience reach of more than 25 percent. *See* 47 C.F.R. § 73.3555(d)(1).

[25] *Ownership Report and Order* at 37.

there are at least 30 separately owned, operated and controlled broadcast licensees, or "voices."[26] This procedure affords group owners of television stations greater flexibility in larger, more diverse markets, in which our concerns with control by any individual group owner are less salient. We seek comment on whether a similar procedure would provide group owners of radio stations with the same type of flexibility and would thus create similar diversity benefits. Specifically, should we relax or eliminate the national AM radio ownership limitations so that AM stations in the top 25 markets where at least 30 separate broadcast voices exist do not count toward the multiple ownership limit? If we adopt the above approach, how should we define the relevant market? Is the 25th radio market an appropriate cutoff point, or should some other number be used?

**Proposed Rule Revisions for FM Stations**

15. The above proposals focus on AM radio, which has faced greater competitive hurdles due to its technical limitations. In focusing on the AM service as the service in most immediate need of the benefits that might flow from changing our multiple ownership rules, we do not suggest that licensees and listeners to FM stations might not also benefit if the current restrictions on multiple FM station ownership were also revised. Nor do we wish to introduce a new element of competitive disequilibrium into a radio marketplace that is already vigorously competitive. In many respects, AM and FM radio constitute a single audio service that faces increasing competition from other outlets of aural and visual communication. Thus, particularly in the case of smaller FM stations authorized to operate at low power levels, the need to ensure robust participation in the local market may serve as an equally persuasive rationale for changing the rules that apply to the FM service. Additionally, the advent of digital audio broadcasting could lessen the distinction between AM and FM radio.

16. Parties are therefore asked to comment on whether changes similar to those outlined for the AM service should be considered for the FM service, and how the two services should be treated differently, if at all. For example, while we propose that an owner be permitted to own 30 stations overall, no more than 12 of which may be FM, the converse (30 overall, no more than 12 of which may be AM) would not be appropriate in light of the relative strength of the FM service as compared with the AM service. Would it be appropriate to set the overall limit at 30, no more than 14 (or some other number) of which may be FM, so that the FM limitation is also relaxed, but to a lesser extent than the AM limitation? On the other hand, should the overall limit be set at 30 (or some other number) without distinguishing between the two services? We request comment on how any or all of the rules proposed above could be adapted to apply to both the AM and FM services.

## III. THE CONTOUR OVERLAP RULE

17. A prerequisite to the provision of quality broadcasting service is that stations have a sufficient economic base to support innovation and investment in programming. Further, while the Commission will not review individual programming format decisions and proposals, to the extent feasible, incentives should be provided for stations to operate efficiently and to provide diverse types and formats of programming.[27] The contour overlap rule was established to foster diversity of ownership and viewpoint in the radio marketplace by prohibiting common ownership of more than one station in the same service in a given community. In 1938, the Commission adopted a presumption against granting new licenses which would result in such ownership structures.[28] In 1940, when it adopted rules governing commercial FM service, the Commission established a set prohibition on ownership of more than one FM station in a given area.[29] When the Commission promulgated its "chain broadcasting rules" a short time later, it included a provision barring network ownership of more than one AM station in the same area.[30] In 1943, the Commission adopted generalized rules which resulted in a case-by-case approach to requests for ownership of more than one station per service in an area.[31] These rules were superseded in 1964 by a fixed standard which prohibited common ownership of two or more commercial radio stations in the same service whose 1 mV/m contours overlap.[32]

18. In 1989, in its *Radio Contour Order*, the Commission adopted the current rule, modifying the contour overlap prohibition to increase the amount of permissible overlap between stations' service areas.[33] The present rule, a "principal city" standard, contains a contour limitation of 5 mV/m for AM stations and 3.16 mV/m for FM stations, which, unlike the prior benchmark, takes into account differences between AM and FM signals. *See* 47 C.F.R. § 73.3555(a). Pursuant to this rule, broadcasters are permitted to own two or more commercial radio stations in the same service in closer proximity to each other than was allowed by the previous 1 mV/m limitation, but ownership of two AM or of two FM stations licensed to the same principal city is prohibited. The Commission concluded that the 1 mV/m rule was overly restrictive and that the modified rule would enable broadcasters to realize some of the efficiencies of common ownership while maintaining economic competition and diversity of viewpoints.

---

[26] *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989).

[27] *See FCC v. WNCN Listeners Guild*, 450 U. S. 582 (1981).

[28] *Genesee Radio Corp.*, 5 FCC 183 (1938).

[29] The Commission adopted this prohibition at the same time it adopted the six-station national ownership limit on FM stations. *See supra* note 8.

[30] *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, Regulation 3.106 (May 1941).

[31] *Order No. 84-A*, 8 Fed. Reg. 16065 (Nov. 23, 1943). This approach involved consideration of a variety of factors, such as the classes of the stations involved, the extent of overlap between the service contours of the stations, the area and populations within the overlap, interference limitations on the signals of the stations, and the degree of competition with other broadcast stations. For a description of this approach, see *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989).

[32] *Report and Order* in Docket No. 14711, 45 FCC 1476, *recon. granted in part and denied in part*, 3 RR 2d 1554 (1964).

[33] *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989) *(Radio Contour Order)*.

**Proposed Rule Revisions for AM Stations**

19. In light of the aforementioned marketplace changes and our particular concern for the vitality of AM service, balanced with the need to foster diversity at the local level, we propose to relax the contour overlap rule. Common ownership of stations within the same area would not only allow group owners to take advantage of the economies of scale mentioned above in our discussion of the national ownership rule, but would enable owners to collocate studio and transmitter facilities for same-service stations (economies that are now available to owners of AM/FM combinations). Relaxation of the rule may also facilitate sales of multi-station advertising and cooperative production, as well as group purchase of programs and program services. Moreover, this approach could strengthen small or marginal AM stations.

20. Specifically, we propose to modify the current rule to permit a single entity to own two or more AM stations in the same area if the combined audience share of all the entity's stations in the area is below a given percentage of the local market. For example, a group owner could own any number of AM stations and an FM station in an area if those stations have a combined local audience share of ten percent or less at the time of acquisition. We believe that this type of approach could benefit the radio marketplace in that it will aid low-rated AM stations, which may be financially weak, by permitting several to be combined and by enabling some of them to be acquired by groups owning higher-rated and financially stronger stations. This approach would also permit AM stations ranked in the middle of the market to merge operations in an effort to improve their financial position. We seek comment on this proposal. Is ten percent a reasonable benchmark? Would five percent be more appropriate? [34] In determining a benchmark, should the Commission strive to aid all AM stations in a market, or only the smaller or less profitable AM stations? As an alternative to employing a straight market share benchmark, should we impose an overall numerical restriction in conjunction with the market share limit? [35]

21. The above proposals do not take into account the size of the particular market. A consistently applied market share standard will permit much less flexibility in smaller markets than in larger markets. For example, stations in a 25-station market, whether they are highly rated or struggling, will usually have smaller audience shares than their counterparts in a 10-station market. Consequently, a market share limit that affords group owners the opportunity to own several stations in a large market may provide few or no such ownership opportunities in a smaller market, even for the stations at the bottom of the ratings in that market. It may be appropriate, therefore, to adopt a more flexible framework for the combination of facilities in smaller markets. A countervailing consideration, however, is the more limited number of outlets in such markets. This concern could provide a basis for retaining a standard that minimizes the opportunity for combinations in markets with fewer listening options. We seek comment on the need for or propriety of adopting a standard that would vary with market size or according to the number of stations in a market, and the formula appropriate to provide for such variation. [36] If a given formula is dependent on the number of stations in a market, commenters should indicate whether all stations, only rated stations or only commercial stations should be counted, and the underlying rationale for such a selection.

22. Whatever proposal is adopted for modification of the contour overlap rule, we would not generally be inclined to compel divestiture if the combined audience shares of a group owner's stations increases above the local benchmark after acquisition. We believe that doing so would remove the incentive to purchase and strengthen a competitively weak station. We would be concerned, however, if the audience shares of the group owner's stations subsequently reaches an exceedingly high percentage of the market, and we seek comment on the appropriate Commission response. In any event, such an owner would be barred from acquiring additional stations in the market unless its stations' cumulative share subsequently

[34] The following information illustrates the effects of a 10% or a 5 market share limitation. According to the 1989 Radio and Records Volume II Ratings Report and Directory, a 10% limit would permit the number 1 rated stations in Los Angeles, San Francisco and Philadelphia (markets number 2, 4 and 5) to each acquire at least three additional low-ranked stations or one additional mid-ranked station, or would permit three or four mid-ranked stations to be combined in each of those markets. A 5% limit, on the other hand, would prohibit the top five or six stations in Los Angeles or San Francisco, and the top eight or nine in Philadelphia from adding any another outlet, while allowing three or four of the lowest ranked stations to be combined. In addition, two lower mid-ranked stations could be combined in Los Angeles or San Francisco, but not in Philadelphia. In Cleveland, Phoenix, and Portland (markets 22, 23 and 25), a 10% limit would permit all but the top-ranked stations in Cleveland and Phoenix to acquire a low-ranked station. In addition, mid-ranked stations could add another mid-ranked or two low ranked stations in each market, and five to seven of the lowest ranked stations could be combined. A 5% limit would prevent the top eight or nine stations from adding another, while permitting lower mid-ranked stations to combine or add two of the lowest ranked stations. Three or four of the very lowest ranked stations could be combined in each market. In Orlando and Nashville (markets 44 and 47) a 10% limit would prevent the top three or four stations from adding another station, and in Louisville (market number 49) only the top station would be so prohibited. Any other station in these markets could add at least one more low-ranked station, and lower mid-ranked stations could be combined in pairs. A 5% limit would prohibit additions to all but lower mid-ranked stations, which could add one low-ranked station. Several of the lowest ranked stations could be combined under either limitation.

[35] This proposal is akin to the current limitation on multiple ownership of television stations which employs both a numerical limitation and an audience reach cap. *See* 47 C.F.R. § 73.3555(d).

[36] One possible formula would be based upon a ratio limitation, such as 1/n, where n is the number of stations (or of rated stations, or of commercial stations) in a market. With such a standard, markets with 20 stations would have a five percent market share limitation, while markets with 10 stations would have a ten percent market share limitation. With a standard of 2/n, markets with 20 stations would have a ten percent share limitation and markets with 10 stations would have a twenty percent share limitation, and so on. A ratio-based standard could be combined with a range limitation to prevent extremes at either end, such as a standard of 1.5/n but in no case less than ten percent or greater than fifteen percent. Alternatively, specific market share standards could be established for each group of markets, based on market rank or size. For example, a ten percent standard for the top 25 markets, a 12 percent standard for the next 25 markets, and so on.

fell below the benchmark. We seek comment on these issues. A further question is how audience share should be calculated. Should we refer to the most recently published ratings for the market as of the date of the seller's application for assignment or the group owner's application for a new station? Should we instead average the stations' ratings for the previous four quarters or some other period, or use the highest rating achieved during some recent period? Would such a rule provide perverse incentives to some stations, at least with regard to short-term performance? What if ratings do not exist for a particular station? What market share, if any, should we attribute to stations that are not currently in operation? We seek comment on these issues.

23. In addition, although we favor increasing the flexibility of our ownership rules, we question whether the public would benefit if commonly owned stations in the same community were permitted to simultaneously broadcast the same programming. Such use of the spectrum is generally inefficient, and inefficient use of the spectrum is not in the public interest. Nonetheless, permitting same-service simulcasting for a limited period of time would provide owners with a transitional period after acquisition of a new station, in which they may promote their new dial position and redirect established listening patterns. [37] What would be a reasonable transitional period?

24. We also note that in the *AM Notice* we proposed to permit one entity to own two AM stations in an area if such common ownership would reduce interference. [38] We do not believe that the objectives of that proceeding are frustrated by our proposal in this proceeding. The rule change proposed in the *AM Notice* is based on interference considerations, while the rule change proposed here is designed to keep pace with changing competitive and economic conditions in the communications industry. Moreover, unlike this *Notice*, the *AM Notice* would permit simulcasting on commonly-owned, same-service stations with overlapping 5 mV/m contours if the stations served substantially different markets or communities. [39] Nevertheless, we request comment on the interplay between the proposals presented here and those advanced in the *AM Notice*.

### Proposed Rule Revisions for FM Stations

25. For the reasons stated at paragraph 15, above, parties are asked to comment on the degree to which the foregoing proposals should be extended to FM radio, and how any revised rules should be crafted to take into account our historical efforts to treat AM and FM as a single aural service. For example, if we were to adopt an audience share approach governing the number of stations that can be owned in a local market, should we permit a single owner to cumulatively acquire an unlimited number of radio stations in an area, regardless of whether they are AM or FM, if those stations have a combined audience share less than some set percentage of the local market? Would this cause some broadcasters to concentrate their efforts on acquiring FM stations to the detriment of AM service? If a numerical limit is adopted for FM stations, what should it be? [40] In general, to what extent would it be necessary to differentiate between the AM and FM services for each of the proposals discussed above?

## IV. JOINT VENTURES

26. We also seek comment on permitting, or even encouraging, separately owned and licensed radio stations, consistent with the requirements of the antitrust laws, to enter into joint ventures or other cooperative arrangements. [41] Pursuant to these types of arrangements, separately owned stations could function cooperatively in terms of advertising sales, technical facilities and formats, but each would maintain an independent editorial voice. We believe that this practice strengthens the service the public receives, while continuing to maximize, to the extent feasible, the number of voices in the market. Such an approach can be particularly advantageous for struggling stations by permitting them to pool resources. For example, stations that share news gathering resources and personnel are able to provide expanded news coverage at reduced cost. Stations with joint advertising agreements can better appeal to advertisers seeking larger or multidemographic audiences, and can pool demographic data rather than independently performing expensive community research. These cost-saving arrangements enable stations to spend more money in other areas so as to remain competitive.

27. Joint ventures are not now specifically precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. Cooperative arrangements in terms of technical facilities, such as joint tower use, are common and are indeed encouraged in order to avoid unnecessary intrusions into aviation air space. Cooperative advertising sales and joint sales practices, once specifically discouraged under Commission policies, are no longer so restricted[42] These arrangements could, however, be subject to scrutiny under the Commission's "cross-interest" policies, and if not carefully formulated could be subject to challenge as involving anticompetitive price fixing or market

---

[37] A similar proposal was advanced in the *AM Notice*. The Commission proposed in that proceeding to permit simulcasting on existing AM stations and stations in the expanded AM band for a transitional period, so as to facilitate migration to the expanded band. *AM Notice* at 4392.

[38] *See supra* note 5, *AM Notice* at 4387.

[39] *Id.*

[40] We do not intend here to alter our longstanding policy regarding common ownership of one AM and one FM station in an area. Accordingly, we will continue to permit a single entity to own one AM/FM combination in an area, even if the established numerical or percentage limitation is exceeded. We believe any change in this policy would be unduly disruptive to the radio industry. Certain of our proposals described above, however, might allow a single entity to own two or more AM/FM combinations in the same area.

[41] The issues raised here are distinct from those in our outstanding *Further Notice of Inquiry/Notice of Proposed Rule Making* in MM Docket No. 87-154, 4 FCC Rcd 2035 (1989). That proceeding addresses joint ventures involving radio stations operating in the same service in the same market that seek to construct or purchase a radio station in another service in that market.

[42] *See Second Report and Order* in Docket No. 83-842, 51 Fed. Reg. 11914 (April 8, 1986).

divisions.[43] Although these arrangements would, to some degree, limit economic competition among the specifically involved participants, they could enhance competition in the market as a whole, particularly if individual audience segments were afforded more effective service as a result. "Economic research suggests this might well be the case.[44]

28. While the above discussion suggests that there are benefits from encouraging certain types of cooperative arrangements between broadcasters, we believe it is desirable to obtain comment on whether to prescribe limits on certain aspects of these agreements. For example, while these arrangements may serve the public interest in some highly competitive markets by securing a firmer economic base for the stations involved, or may result in the provision of quality programming service to a more sparsely populated market area, a more careful review may be warranted where competition is limited and stations cease to become full-fledged competitors. Accordingly, we believe that these arrangements are worth considering, with certain careful qualifications, as a means of improving the service listeners receive. At a minimum these qualifications would have to include:

1) Full and careful compliance with the antitrust laws;

2) A provision that such cooperative arrangements be undertaken only with a sufficiently limited number of stations in sufficiently large and diverse markets, so that price and service competition outside the arrangement remain effective and robust;

3) A requirement that each licensee involved retain control, in particular, editorial control, sufficient to comply with all Commission Rules and public interest requirements; and

4) Mechanisms for prompt termination of the arrangement when individual participants believe that it is no longer consistent with the public interest or their responsibilities as licensees.

29. We seek comment on this proposal. How should "retention of editorial control" be assured? The Commission is able to monitor joint station arrangements through complaints, requests for rulings to approve such agreements, petitions to deny renewal applications or the filing of mutually exclusive applications against renewal applicants. Are the Commission's present complaint and compliance procedures adequate to assure that the licensees are not in violation of the Communications Act or Commission rules or policies, or should they be augmented, for example with reporting requirements? At what point would reporting requirements become so burdensome as to deter beneficial cooperative arrangements? In addition, what should be the maximum number of stations in a market permitted to participate? Should we instead use an audience share limitation, or a combination numerical limit/audience share limit? In which markets should such arrangements be permitted? Could we use the 25 markets/30 voices test used for television/radio cross-ownership (and proposed above regarding modification of the national ownership rule)? Can safeguards be established regarding termination of these agreements that will not inhibit the parties' right to contract freely among themselves?

30. Similarly, the recent proliferation of programming agreements in common service areas, or "time brokerage" agreements, has raised a number of concerns that the Commission has not previously addressed in the context of the contour overlap and cross-interest policies, as evidenced by the complaints filed with the Commission.[45] The Commission has previously determined that issues of joint advertising sales should be left to antitrust enforcement, [46] and has specifically amended its "cross-interest" policy to exempt time brokerage arrangements from its coverage. [47] Provided that licensees maintain control over station operations [48] and otherwise comply with the Commission's Rules and policies, the agreements do not violate the law. For example, a recent ruling by the Mass Media Bureau denied a complaint from a competitor alleging that the effectuation of reciprocal time brokerage agreements between two Miami stations constituted an unauthorized transfer of control, or violated the contour overlap rule or cross-interest policy. [49] Such arrangements may also assist the survival of stations in financial distress, thereby contributing significantly to the service received by the public from otherwise silent stations.

31. There may be, however, market situations that would warrant appropriate limits on these arrangements, particularly where significant competitive damage could not be sufficiently addressed via antitrust enforcement. We seek comment on whether certain types of market situations would warrant careful scrutiny of joint programming agreements between broadcasters in the same market, and if so, which ones. Such comments should address market size and the amount of common program-

---

[43] *See* Notes 45 and 49 for examples of challenges to time brokerage arrangements.

[44] *See* Steiner, *Program Patterns and Preferences, and the Viability of Competition in Radio Broadcasting*, 66 Q. J. Econ. 194-223 (1952).

[45] *See, e.g.*, Letter of East Shore Broadcasting Corporation, licensee of WRHD and WRCN-FM, Riverhead, New York (filed Dec. 18, 1990); Request for Advisory Opinion filed by Independence Broadcasting Company, licensee of KAMG-AM, Victoria, Texas (filed Dec. 13, 1990); Letter of Citadel Associates, L. P., licensee of KKFM-FM, Colorado Springs, Colorado (filed Nov. 23, 1990) (Commission response issued as *Letter to Peter D. O'Connell* from Chief, Mass Media Bureau, 6 FCC Rcd 1869 (1991)); Letter of Capital Cities/ABC, licensee of WTVD-TV, Durham, North Carolina (filed Nov. 6, 1990) (withdrawn Dec. 11, 1990).

[46] *Second Report and Order* in MM Docket No. 83-842, FCC 86-111 (March 31, 1986), 51 Fed. Reg. 11914 (April 8, 1986).

[47] *Policy Statement* in MM Docket No. 87-154, 4 FCC Rcd 2208, 2214 (1989).

[48] *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

[49] *Letter to Roy R. Russo* from Chief, Mass Media Bureau, 5 FCC Rcd 7586 (1990). *See also Letter to Joseph A. Belisle* from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, 5 FCC Rcd 7585 (1990) (released Oct. 17, 1990) (stating that network affiliation agreement for 12 to 24 hours of programming per day between stations with overlapping contours violates no Commission Rule or policy); *accord Letter to J. Dominic Monahan* from Chief, Mass Media Bureau, 6 FCC Rcd 1867 (1991); *Letter to Brian M. Madden* from Chief, Mass Media Bureau, 6 FCC Rcd 1871 (1991).

ming and advertising sales permitted in relation to the amount of service area overlap. Should same-service agreements be treated differently from cross-service agreements? Should there be a limit on the number of stations in the same market (or service) a single program supplier may serve? Should simulcast agreements be treated differently from other programming agreements? Should agreements involving 24 hours per day of programming be permitted? We also seek comment on the possible impact at renewal time for stations with these types of agreements, particularly those that involve the provision of programming approaching 24 hours per day. Do such agreements circumvent our ownership restrictions, or is it sufficient that diversity of86ownership and attendant editorial discretion are maintained? A related concern is the simulcast by a smaller market FM station of the programming of a neighboring major market FM station. We invite comments on whether this situation effectively allows an FM station to extend its own contour into that of another FM station, even though Section 74.1232(d)(1) would prohibit that station from owning an FM translator to accomplish the same purpose. What are the public interest implications of that result?

32. Finally, we seek comment on the interaction among all of the above joint venture issues and our proposals to modify the national and local ownership rules. Does a permissive policy toward joint ventures obviate any need to alter the ownership limits? Does altering the ownership limits obviate any need to encourage joint ventures?

## V. ADMINISTRATIVE MATTERS

### Ex Parte Rules -- Non-Restricted Proceeding

33. This 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 Commission rules. *See generally* 47 C.F.R. § § 1.1202, 1.1203 and 1.1206(a).

### Comment Information

34. Pursuant to applicable procedures set forth in § § 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **August 5, 1991**, and reply comments on or before **September 5, 1991**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the 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 (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

### Initial Regulatory Flexibility Analysis

35. **Reason for the Action**: This proceeding was initiated to review and update the Commission's national and local radio ownership rules.

36. **Objective of this Action**: The actions proposed in this *Notice* are intended to relax some of the national and local ownership restrictions on radio broadcasters to enable them to adjust to the changing communications marketplace, and to better respond to the needs of the public.

37. **Legal Basis**: Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. § § 154 and 303.

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

39. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule**: None.

40. **Description, Potential Impact and Number of Small Entities Involved**: Approximately 10,000 existing radio broadcasters of all sizes may be affected by the proposals contained in this decision.

41. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives**: The proposals contained in this Notice are meant to simplify and ease the regulatory burden currently placed on commercial radio broadcasters.

42. As required by § 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 this document. 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 *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, 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. § 601 *et seq.* (1981)).

### Additional Information

43. For additional information on this proceeding, contact Jane Hinckley, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## SEPARATE STATEMENT OF CHAIRMAN ALFRED C. SIKES

**Re: Notice of Proposed Rulemaking on Revision of Radio Rules and Policies**

By adopting this Notice of Proposed Rulemaking, the Commission recognizes the need to assure that the structural rules governing radio broadcasting, no less than the rest of our rules, need to undergo a reality check.

The reality that radio stations face today is vastly different from the reality of a decade ago. Now there is the additional competition each radio station licensee faces from other stations, a degree of competition that did not exist ten years ago and that will only increase in the foreseeable future. There also are the changes that the industry faces with the coming of digital audio technology, changes that could transform the future of radio.

The shadow these contemporary realities casts on our rules demands that we reassess them carefully. The results of increasing competition strongly suggest that more stations are not always synonymous with more diversity. Those who attack this proceeding ignore the fact that when insufficient audiences and revenues cause stations to go dark or cut back on service, diversity is not enhanced.

I welcome Commissioner Barrett's proposals, which are intended to assure that the Commission gives careful and particular consideration to the effect the rules have on both small businesses and new entrants into the broadcasting business. I wholeheartedly agree that the Commission should take steps to assure that small businessmen, whether they are current licensees or new entrants, understand the impact of our rules and decisions on the future of telecommunications. Increasing that kind of understanding can do more to increase diversity by educating businesses about new opportunities in all telecommunications businesses, I know that all Commissioners agree that the final shape of the small business initiative will be developed in conjunction with OMB, GSA, the Small Business Administration, and other interested Government agencies, to assure that we use Commission resources in the most efficient, cost-effective manner possible and to avoid duplicating the functions of other similar Government programs or initiatives.

As this proceeding moves forward, it needs to be borne in mind that our current ownership rules are a means to an end -- *not* an end in and of themselves. Where the means is maximizing diversified ownership and the end actually attained is increased diversity, the rules make sense. But where the means produce perverse results, logic as well as sound public policy require that we not be blind to this reality and that we act reasonably in responding to it. It is with those thoughts in mind that I look forward to evaluating the evidence compiled in this proceeding.

## SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

**In re: Notice of Proposed Rule Making on the Revision of Radio Rules and Policies**

Broadcast radio markets have changed considerably over the past decade. The proliferation of over-the-air radio stations, aural cable services and the possibility of satellite delivered radio to mobile as well as fixed locations creates a very competitive radio marketplace. I believe it is appropriate for the Commission to examine closely regulations that might thwart broadcast radio's ability to compete. At the same time, however, the Commission must be careful not to place disproportionate emphasis on competition at the expense of public interest, localism, diversity and minority ownership.

I agree that we should ask questions about if, or how, Commission regulations may limit radio broadcasters' ability to compete in the changing marketplace. I do not necessarily agree with some of the proposals presented in the Notice of Proposed Rule Making. Generally, I would focus this proceeding on AM radio only, and more specifically on the numerical limits on ownership. I believe that ownership limits based on national or local audience levels may invite a number of problems for the Commission. The Commission could find itself mired in local population figures and local radio audience shares in its efforts to resolve disputes or to establish the appropriate benchmarks. This is particularly difficult since audience shares change frequently.

The proposal to allow the ownership of more than one AM station within a market so long as combined local market share does not exceed a given level, and the possibility of joint ventures, may present significant problems for individually owned local radio stations. Local broadcasters may be faced with increased competition from dominant group owners who may own two or more AM stations and an FM outlet within a community, especially if there are no penalties if the audience share benchmark is exceeded. Additionally, joint ventures may create undesirable local market conditions. More rural markets may be dominated by adjacent, more populated or urban markets.

Special attention must be given to the effects of the proposals on the Commission's interest in fostering minority ownership. Although the item references petitions filed by 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 to increase the current 14 AM and 14 FM ownership limitation to 20 AM and 20 FM, these petitions reference the existing 12-12-12 rules and the exception they provide for minority owned stations. The numerical ownership proposals in the Notice pertain to ownership in general, not just ownership by minorities. To the extent that numerical limitations can affect minority ownership, the numerical ownership proposals contained in the Notice could, in fact, reduce the number of stations available for minority ownership. Such an outcome runs contrary to Commission objectives and policies to increase minority ownership of broadcast stations.

Within the context of the proposals to allow for common ownership of broadcast radio stations in a market, I also have concerns about the proposal to allow simulcasting on these commonly owned stations. Commenters should indicate when simulcasting would be appropriate and for what duration. How does simulcasting effect diversity?

Finally, I agree we should examine the proliferation of time brokering requests. The growth of such arrangements either could be an indication of the financial condition faced by local radio broadcasters, or an opportunity to maximize profits at the expense of serving the public interest, or a real opportunity to serve the community by providing programming otherwise not available on the station. Careful attention must be given to this matter.

In responding to the proposals contained in this Notice, commenters also should address the ramifications of these proposals to the principles of public interest, localism, diversity and minority ownership. Although we must assure our rules do not inhibit a competitive, viable broadcast industry, a license is no guarantee that the broadcaster's operation will be profitable. Obviously, profitable broadcasters are in a better position to serve the public interest. What distinguishes broadcasting from other industries, however, is its public interest requirements.

## SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

**Re: Revision of Radio Rules and Policies**

I do not oppose examining the Commission's rules in this proceeding. I believe that periodically the Commission must examine its rules to ensure that they comport with marketplace realities. Although I have reached no final conclusions, commenting parties will have a heavy burden to justify modification of the ownership limits. The reason I have reservations regarding modification of the ownership rules is my concern for diversity of media ownership.

"Diversity of media" ownership is one of the principle components embodied in the Commission's public interest mandate. 47 U.S.C. Section 309(a). Diversity of media ownership also is an important underpinning to accomplishing our First Amendment goals. See, e.g. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 390 (1969). Because of the Commission's diversity goals, we have opened the door for new entrants into the broadcasting industry through our comparative hearing process, and the limitations on the number of stations any one party may own.

In the comparative hearing process, the Commission has determined that "diversification is a factor of primary significance."[1] New applicants are preferred over those applicants with other mass media ownership interests when competing for new broadcast stations. The comparative hearing process has helped structure the broadcast industry so that ownership of stations is not concentrated in the hands of a few entities. In addition, the Commission's adoption of multiple ownership rules and its cross-ownership policies promotes diversity and competition among broadcast interests. By limiting the number of stations that can be owned by parties on a national and local level, the Commission has created opportunities for new entrants to purchase existing broadcast properties. In fact, many of the stations currently owned by minorities or women came about after mergers and the need to spin off stations under the Commission's multiple ownership limitations. The ownership limits have ensured that more than a handful of people own this nation's broadcast stations.

Minorities and women have just begun to make inroads into the broadcast industry. Since the adoption of our minority ownership policies in 1978, the percentage of stations owned by minorities is barely above three percent. The existing AM and FM broadcast bands offer few opportunities for new allotments. In many instances, increases in the percentage of minority or female ownership islikely to come from the purchase of existing broadcast properties.[2] Because of the decreased opportunities for new stations, it is important that the Commission consider the ramifications of ownership limit changes upon new entrants, including minorities and women.

In light of my views on the need to maintain and promote diversity of media ownership, I am concerned about the direction the Commission may be heading in this proceeding. I do not oppose permitting some concentration of media ownership, I am well aware of the benefits gained from joint efficiencies brought about through economies of scale from the ownership of more than one station in a market, or the ownership of numerous stations on a national level. I write separately out of my desire to ensure, that in allowing increased ownership, the Commission remains fully cognizant of the public interest and diversity concerns we have long supported.

I question elimination or substantial relaxation of the multiple ownership rules without some potential public interest benefit. In the past, the Commission justified relaxation of the ownership restrictions by demonstrating the benefits to the public from increased concentration in terms of service to local communities. The national ownership limits of 14 AM and 14 FM stations was justified by the fact that it encouraged minority ownership through the requirement that at least two of the stations be minority owned or controlled. In this case, concern for concentration was outweighed by the other public interest benefits of increasing minority ownership of stations. Without full consideration of the impact of increasing the maximum number of stations a party may own, the Commission could undermine our diversity and minority ownership goals. I encourage parties to comment on the effects of modifying the ownership restrictions on minorities and women.

I also am concerned that the Commission commences a reexamination of the radio ownership limits at a time when we are about to explore new technologies which could radically change the radio industry. The Commission has just begun a proceeding to examine digital audio broadcasting (DAB). DAB has the potential to equalize AM and FM radio from competitive and technical standpoints. The implementation of DAB could affect the financial viability of AM and FM radio. The values for stations could also be dramatically changed once DAB is implemented. In today's marketplace, the ownership of two or more AM stationsmay be appropriate. However, in the future, if one considers that these stations may soon be providing a CD quality sound, it may make less sense to allow too much concentration. In addition, without a full understanding of the impact of DAB, many small market radio stations may be encouraged to sell to speculators. I will be particularly interested in comments regarding the impact of DAB on the proposed modifications to our ownership restrictions.

Finally, I believe the ramifications of the Commission's action on local communities, new entrants, minorities and women must be considered in all the Commission's mass media proceedings. This proceeding, along with the two proceedings dealing with the comparative hearing process, has lead me to the conclusion that the Commission needs a process to more fully consider the impact of our rule revisions on these parties. I have held discussions with Chairman Sikes and my other colleagues regarding these issues. I am happy to announce three initiatives. The Commission plans to take the steps necessary (1) to form an Advisory Committee on Small Business, (2) establish an FCC Small Business office to provide information and interface actions for small business and (3) hold a Conference on entrepreneurial communications opportunities later this year. Although this initiative has been announced in this broadcast docket, our focus is much broader. We also need to examine the effects of our actions and provide information to small businesses in the telecommunications, private radio, and new technology fields.

### FOOTNOTES TO THE STATEMENT

[1] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

[2] While not a part of this proceeding, I also note that there currently is a freeze on new television station allocations.

## SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

**In re: Notice of Proposed Rule Making on the Revision of Radio Rules and Policies**

I vote for this item, but I do so with serious reservations. Nevertheless, I support asking the questions we pose in the *Notice* in an effort to bring attention to some of the serious problems plaguing the radio industry today.

Foremost is a glut of stations, caused in large part by the FCC's efforts in the recent past to increase diversity by multiplying the number of broadcast voices. Since 1984, the number of FM stations has increased 41%.[1] Radio Business Report, February 25, 1991, page 5. If all current FM applications should prove successful, the result will be a virtual doubling of FM stations in the near future. Industry sources suggest that only 30 to 40% of radio stations show any level of operating profitability, and that station values have dropped 30% in recent years.[2]

At a recent Annenberg seminar on digital audio broadcasting, one industry representative sketched the reality in stark terms: except in times of rapid economic growth, every new station divides the advertising pie into smaller pieces, creating a desperate feeding frenzy for limited revenues. A situation could result in which no one station will be able to deliver the critical mass of listeners necessary to attract advertisers at all. He also noted that less than 9/10 of 1% of all radio stations--- less than 100 stations in the U. S. --- billed $10 million, compared to the average revenue for local Washington, D.C. area supermarkets of $22 million. If the average neighborhood Giant store were a radio station, it would be the twelfth largest radio station in the nation.[3]

What do such figures imply for the public interest? For continued diversity of broadcast voices? For the ability of radio stations to engage in public service efforts and to serve local community needs?

The *Notice* presents a number of proposals designed to improve the current situation, including easing the FCC's national and local ownership rules and encouraging joint ventures. Frankly, however, some of these solutions disturb me. Increasing the local or national ownership limits and encouraging time brokerage, for example, could diminish marketplace diversity by rewarding station owners with the deepest pockets at the expense of those who can best serve their local communities.

Minorities, women, small station owners, and rural broadcasters, moreover--- those who provide the diversity we value so highly--- may have difficulty acquiring a broadcast license or keeping a struggling station alive in such an environment. Should we sacrifice our traditional concerns for localism and diversity in order to encourage consolidation and mergers, presumably to enhance the economic viability of the industry?

I am also concerned about time brokerage, which may tacitly permit consolidation without any change in our ownership rules. I believe that the Commission should take a serious look at this issue--- especially the extent to which stations in the same community might use time brokerage arrangements to simulcast the same programming 24 hours a day. Even more troublesome would be evidence that major market stations use this practice to extend their reach into neighboring smaller markets.

In view of these serious concerns, I favor a cautious, deliberate review of the comments received in this proceeding. In particular, we should evaluate the potential impact of digital audio broadcasting on the radio marketplace, an issue which seems to have been given short shrift in this *Notice*.

### FOOTNOTES TO THE STATEMENT

[1] While not a part of this proceeding, I also note that there currently is a freeze on new television station allocations.

[2] Comments of Randall T. Odeneal, Sconnix Broadcasting Company, Annenberg DAB Seminar, April 11, 1991.

[3] *Id.*