

FCC Launching 2018 Quadrennial Review

This month, the FCC is issuing a *Notice of Proposed Rulemaking* in Docket 18-349 to begin the 2018 Quadrennial Regulatory Review of the Commission's broadcast ownership rules. The Telecommunications Act of 1996 directs the FCC to conduct a review of its media ownership rules every four years to determine whether they remain "necessary in the public interest as the result of competition." The regulations subject to this review are the local radio ownership rule, the local television ownership rule, and the dual network rule. In conducting these reviews of its ownership rules, the Commission seeks to foster a regulatory environment that will support its policy goals of competition, localism and viewpoint diversity.

The Commission is also taking up in this proceeding some items of old business from the last quadrennial review. In its order concluding the combined 2010/2014 quadrennial review, the agency committed to consider proposals offered on the record of that proceeding that were not completely examined then. These include extending cable procurement requirements to broadcasters, developing a model for market-based, tradeable "diversity credits" as an alternative to ownership limits, and adopting formulas for media ownership limits that promote diversity.

The FCC invites public comment on the usefulness of the existing rules and on a broad range of issues related to potentially modifying those rules as described below.

Local Radio Ownership Rule

Under the current local radio ownership rule, an entity is permitted to have attributable interests in:

- (1) a maximum of eight commercial radio stations in markets with at least 45 radio stations, no more than five of which may be in the same service (AM or FM);
- (2) a maximum of seven commercial radio stations in markets with 30 to 44 radio stations, no more than four of which may be in the same service;
- (3) a maximum of six commercial radio stations in markets with 15 to 29 radio stations, no more than four of which may be in the same service;
- (4) a maximum of five commercial radio stations in markets with 14 or fewer radio stations, no more than three

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Media Bureau Begins Checking Online Public Inspection Files

In November, the FCC's Media Bureau issued a Public Notice to remind radio broadcasters that their public inspection files should have been completely uploaded to the Commission's website for online public files as of March 1, 2018. The Bureau said that it planned to activate all online public file accounts by November 15 for radio stations that had not yet done so.

Now, the Media Bureau staff has begun reviewing online radio station public files and contacting stations by email where deficiencies are discovered, including stations whose files were activated prior to November 15. The email messages have identified the items missing from the public file. References and links are provided to helpful FCC resources that explain the public file obligations and process. The email asks for an acknowledging response from the station, including a commitment for the date by which the station will complete the upload of all required information.

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Hurricane Response To Be Evaluated

The FCC's Public Safety and Homeland Security Bureau has issued a Public Notice (DA 18-1176) to request comments about the Commission's preparation for and response to Hurricane Michael, which hit the Gulf Coast of the United States on October 10.

In coordination with the Federal Emergency Management Agency, the FCC activated the Disaster Information Reporting System ("DIRS") across the affected region. DIRS is a voluntary, web-based system that communications companies, including broadcast, wireless, wireline and cable service providers, can use to report communications infrastructure status and situational awareness information in times of crisis. Each day that DIRS was active, the Commission released a report on the status of various communications platforms in the disaster area. DIRS was deactivated for Michael on October 26, 2018.

The Bureau is now seeking public comment to inform

its understanding and awareness of stakeholders' readiness, preparation and response with respect to Hurricane Michael. The agency invites comment from all segments of the communications industry. Specifically regarding broadcasters, it asks for responses to these questions:

- What was the impact of Hurricane Michael on television and radio stations?
- Did broadcasters face any unique challenges?
- What was unique about this impact compared to previous hurricanes?
- To what extent did broadcast-specific best practices exist prior to this hurricane, and what were they? Were they implemented? If so, did they prove effective?

The deadline for submitting comments in Docket 18-339 is December 17.

Mic Manufacturer Proposes Wireless Multi-Channel Audio System

Electronics equipment manufacturer Sennheiser Electronic Corporation has filed a Petition for Rulemaking with the FCC to propose the use of digital multiplexing technology to increase the capacity for wireless microphone facilities operating on vacant television channels and on the 600 MHz duplex gap (the guard band between wireless uploading and downloading channels). Sennheiser asks the FCC to amend Sections 74.801 and 74.861(e)(5) of its rules to permit implementation of the technology that Sennheiser calls a Wireless Multi-Channel Audio System ("WMAS").

The FCC permits the unlicensed operation of wireless microphones and other devices related to the production of movies, television programs, theatrical performances, and media coverage of news and sports events. In addition to high-quality performance microphones, these systems often also include intercoms for off-stage crews and cuing functions. Sennheiser explains that the performance microphones typically need 200 kHz of bandwidth to produce high-quality audio. Intercom and cue devices can get by with 25 kHz. To support these functions, significant amounts of spectrum are needed for television coverage of large news or sports events, or in areas that feature concentrations of theatrical venues, such as Broadway in New York or the Strip in Las Vegas. In every case, these operations must protect broadcast television stations.

Section 74.861(e)(5) of the Commission's rules currently limits wireless microphone transmissions to a bandwidth of 200 kHz. Sennheiser states that, even with the best wireless microphones available, the channel spacing required to prevent interference allows, at most, 12 performance-quality wireless mic channels, or up to 36 intercom-quality channels to operate simultaneously within a six-MHz vacant television channel. (Of course, most productions employ a combination of such devices.) The proposed WMAS digitally combines the

signals from multiple devices into a single six-MHz channel. To accomplish this technologically, the bandwidth for these devices must be expanded from 200 kHz to six MHz. To accomplish this legally, Sennheiser proposes an amendment to Section 74.861(e)(5) so that "a wireless multi-channel audio system may have an operating bandwidth not exceeding 6 MHz when transmitting the signal of not fewer than 12 conventional low power auxiliary station devices." The requirement for a minimum of 12 operating stations is to prevent a low-volume user from monopolizing an entire six-MHz channel and the wasteful underexploitation of the spectrum.

Sennheiser describes the technical benefits that would result from the use of WMAS to include:

- By spreading each connected device over the full width of the channel, WMAS eliminates the problem of multiple receivers each picking up adjacent frequencies, and thereby permits denser use of the channel.
- The fully digital, single-channel character of WMAS eliminates intermodulation, further increasing the practical density of use.
- Average power spectral density across the channel is lower.
- Spreading each device's signal over a broader band mitigates the impact of damaging narrowband interference.

Sennheiser asserts that implementing these efficiencies would increase the capacity of a six-MHz vacant television channel to 18 performance-quality microphone channels or 96 intercom-quality channels. Sennheiser posits that this increase in spectrum efficiency is badly needed in view of recent losses of UHF frequencies in the 700- and 600-MHz bands.

The Commission has invited public comment on this Petition in RM-11821. The deadline for filing comments is December 28. Reply comments are due January 14.

Station Fined \$5K for Installing Antenna Too Soon

The FCC's Media Bureau has issued a *Notice of Apparent Liability for Forfeiture* in the amount of \$5,000 to the licensee of low power FM station KJJG-LP, South Houston, Texas, for constructing modifications to the station prior to the grant of a construction permit for those modifications.

KJJG-LP filed an application on January 30, 2017, proposing to relocate its antenna to a new site. On February 2, 2017, the licensee of nearby translator station K233CW filed a petition to deny the application. In addition to claims that the proposed facilities would cause impermissible interference to other stations, the petitioner alleged that KJJG-LP had already installed its antenna on a tower at the site proposed in the modification application—just three days after the application had been filed. A flurry of pleadings by both parties ensued. The petitioner subsequently reported that KJJG-LP dismantled the antenna. Although KJJG-LP amended its application to address the interference issues, it did not deny that it had installed the antenna. The application remains pending and no construction permit for this proposal has yet been issued.

The Bureau quoted Section 319(a) of the Communications Act in which the statute states that “no license shall be issued under the Authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission.” The Bureau said that this provision of the law forecloses the Commission from issuing a license when the entire station has been constructed prior to the grant

of a construction permit. The Bureau noted however that this prohibition on premature construction is not absolute. Construction activities that the Commission has allowed include site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment, and other preliminary steps having no intrinsic broadcast use. Nonetheless, before the issuance of a construction permit, the construction of towers or installation of radio antennas is strictly prohibited.

The FCC's *Forfeiture Policy Statement* and Section 1.80 of its rules prescribe a base forfeiture amount of \$10,000 for construction and/or operation of a station without an instrument of authorization. The Bureau has the discretion to adjust this amount as may be justified in each case. In this case, the Bureau decided to reduce the amount of the fine to \$5,000 because the licensee of KJJG-LP had no history of prior offenses, and because the violation lasted less than three weeks – i.e., the period of time while the illegal antenna was in place.

The Bureau determined that KJJG-LP's technical amendment eliminated the interference problem. In the absence of any other issue that would preclude granting the application, the Bureau said it would grant the application upon resolution of the forfeiture matter. KJJG-LP had 30 days to pay the fine or petition for its cancellation or reduction.

DBS Freeze To Be Lifted

The FCC has proposed to lift the current freeze on the filing of applications for new Direct Broadcast Satellite (“DBS”) services, and has proposed revised rules to govern the DBS application process in a *Second Notice of Proposed Rulemaking* (FCC 18-157) in Docket 06-160. Existing operators in this service are DIRECTV and DISH Network. The filing of DBS applications has been frozen since 2005. The Commission says that these proposed rules would align DBS processing procedures with recently adopted streamlined processing procedures used for satellites in the geostationary orbit fixed satellite service.

These proposed rules would pertain both to applications for new U.S.-licensed space stations and to requests for access to the U.S. market via space stations licensed in other countries. The Commission would process these proposals on a “first-come, first-served” basis. They would be placed in a single processing queue in the order in which they are received. The Commission would grant the first-in-line application if the operation it proposes is compatible with previously authorized space station operations and the applicant is otherwise qualified. Later filed applications that are incompatible with authorized space station operations would be dismissed. After the rules adopted in this proceeding become effective, the International Bureau would release a public notice to announce a date on which it would begin to accept applications.

The Commission proposes that applicants for U.S. licenses would have the option to use a two-step application process. Under this plan, an applicant could secure a place in the queue by filing a draft Coordination Request on a simplified application Form 312, paying the full application fee (which presently is \$38,555), and posting a \$500,000 bond. The applicant would have to file a complete application within two years. Failure to meet this deadline would result in a forfeiture of the applicant's place in the queue and the bond. Applicants could elect to file a complete application at the outset and forgo the need for a draft Coordination Request and the bond. The two-step process would not be available to the proponent of service on a non-U.S.-licensed space station.

Presently, the term for a non-broadcast DBS license is 10 years. The Commission proposes to increase this license term to 15 years. The license term for a free DBS broadcast service is eight years. The existing DBS operators are considered non-broadcast because they offer programming for subscription fees rather than free services.

Under international regulations administered by the International Telecommunications Union (“ITU”), the United States has been assigned eight orbital slots for DBS at 61.5, 101, 110, 119, 148, 157, 166 and 175 degrees west longitude. The

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DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

- December 1, 2018 Deadline to place EEO Public File Report in public inspection file and on station's Internet website for all nonexempt radio and television stations in **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, North Dakota, South Dakota, New Hampshire, Rhode Island** and **Vermont**.
- December 3, 2018 Deadline to file EEO Broadcast Mid-term Report for all television stations in employment units with five or more full-time employees in **Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island** and **Vermont**.
- December 3, 2018 Deadline for all broadcast licensees and permittees of stations in **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, North Dakota, South Dakota, New Hampshire, Rhode Island** and **Vermont** to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).
- December 3, 2018 Deadline for television stations that provided ancillary or supplementary services during the 12-month period ending September 30, 2018, to file annual Ancillary/Supplementary Services Report.
- January 10, 2019 Deadline to place Issues/Programs List for previous quarter in public inspection file for all full service radio and television stations and Class A TV stations.
- January 10, 2019 Deadline to file quarterly Children's Television Programming Reports for all commercial full power and Class A television stations.
- January 10, 2019 Deadline to file quarterly Transition Progress Reports for television stations subject to modifications in the repack.
- January 10, 2019 Deadline for noncommercial stations to file quarterly report re third-party fundraising.
- February 1, 2019 Deadline to place EEO Public File Report in public inspection file and on station's Internet website for all nonexempt radio and television stations in **Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York** and **Oklahoma**.

- February 1, 2019 Deadline to file EEO Broadcast Mid-term Report for all television stations in employment units with five or more full-time employees in **New Jersey** and **New York**.
- February 1, 2019 Deadline for all broadcast licensees and permittees of stations in **Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York** and **Oklahoma** to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).

Deadlines for Comments in FCC and Other Proceedings

DOCKET	COMMENTS	REPLY COMMENTS
(All proceedings are before the FCC unless otherwise noted.)		
Docket 18-339; Public Notice Hurricane Michael preparation and response	Dec. 17	N/A
Docket 17-105; FNPRM Deregulation of cable television framework for setting rates	Dec. 27	Jan. 28
RM-11821; Petition for Rulemaking Spectrum efficient wireless microphone equipment	Dec. 28	Jan. 14
Docket 13-249; 2nd FNPRM Protection of Class A AM stations	Jan. 22	Feb. 19
Docket 06-160; 2nd NPRM Processing applications in the Direct Broadcast Satellite Service	FR+45	FR+75
Docket 18-314; NPRM Streamlining rules governing satellite services	FR+45	FR+75
Docket 18-349; NPRM 2018 Quadrennial Review of broadcast ownership rules	FR+45	FR+75

FR+N means the filing deadline is N days after publication of notice of the proceeding in the Federal Register.



DEADLINES TO WATCH



Paperwork Reduction Act Proceedings

The FCC is required under the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection with certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

TOPIC	COMMENT DEADLINE
Requests for Special Temporary Authority	Dec. 14
Licensee-conducted contests, Section 73.1216	Dec. 14
Applications for satellite space and earth stations, Forms 312, 312-EZ, 312-R	Dec. 27
Implementation of Satellite Home Viewer Improvement Act of 1999, Section 76.66	Dec. 27
Broadcast incubator program	Jan. 2
Non-Duplication and syndicated exclusivity, Sections 76.94, 76.95, 76.105, 76.106, 76.107, 76.109	Jan. 9
Carriage of television broadcast signals, Sections 76.56, 76.57, 76.61, 76.64	Jan. 9
Digital low power TV and TV translator stations, Sections 74.787, 74.790, 74.794, 74.796, 74.798	Jan. 9
Incentive auction implementation, Sections 73.3700(b)(4)(i)-(ii), (c), (d), (h)(5)-(6) and g(4)	Jan. 9
Applications for FM translator and booster license, Form 350	Jan. 14
Applications to make changes, Sections 73.3538, 73.1690, 74.751	Jan. 14
DTV interference agreements	Jan. 14
Open video systems, Form 1275	Jan. 14
Class A television service	Jan. 22
Carriage of television signals, Part 76	Jan. 22
Application for consent to assignment or transfer of control of FM or TV translator or low power television station, Form 345	Jan. 28

Cut-Off Date for AM and FM Applications to Change Community of License

The FCC has accepted for filing the AM and FM applications identified below proposing to change each station's community of license. These applications may also include proposals to modify technical facilities. The deadline for filing comments about any of the applications in the list below is **January 14, 2019**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL	FREQUENCY
Fairhope, AL	Africa Town, AL	WERM(AM)	n/a	1220
Marathon, FL	Cudjoe Key, FL	WAVK	249	97.7
Colstrip, MT	Hardin, MT	KPNC	203	88.5
Livingston, MT	Churchill, MT	KXLB	264	100.7
Indian Springs, NV	Sunrise Manor, NV	KRGT	257	99.3
Bradford, RI	North Stonington, CT	WWRX	299	107.7

**DEADLINE TO RESOLVE
MUTUALLY EXCLUSIVE CONFLICTS
AMONG LPTV DISPLACEMENT APPLICATIONS**

JANUARY 10, 2019

TELEVISION REPACK

STATIONS ASSIGNED TO PHASE 2

TESTING PERIOD BEGINS: **DECEMBER 1, 2018**

COMPLETION DEADLINE: **APRIL 12, 2019**

STATIONS ASSIGNED TO PHASE 3

TESTING PERIOD BEGINS: **APRIL 13, 2019**

COMPLETION DEADLINE: **JUNE 21, 2019**

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of which may be in the same service, provided that the entity does not own more than 50 percent of the radio stations in the market unless the combination comprises not more than one AM and one FM station.

For the purposes of these rules, the Commission has adopted the market definitions used in the Nielsen Audio Metros where applicable. The contour-overlap methodology is used to define markets outside of the Nielsen markets. The station count for each market includes both commercial and noncommercial stations.

Until now, the local radio market has been defined to include only terrestrial over-the-air radio broadcast stations. The Commission asks whether the definition of the market should be revised to include direct competition from satellite radio and online audio sources.

Ownership limits are based on market size tiers which are determined by the number of stations in the market (i.e., 45+, 30-44, 15-29, and 14 or fewer). The Commission requests comment about whether it would be appropriate to change the number of tiers and/or the number of stations defining each tier. The National Association of Broadcasters (“NAB”) has proposed a two-tier system. The top tier would be the 75 largest Nielsen markets, and all other markets would be in the other tier. Should markets be defined and ranked by other factors, such as advertising revenues? If other sources of audio (such as satellite radio or online services) were to be included in the evaluation, how would that affect market rankings? What impact, if any, would redefining the tiers have on the use of the contour overlap method for determining markets not measured by Nielsen? Is there a better alternative for defining unranked markets than the contour overlap method?

The Commission intends to examine the current numerical limits. It asks whether these limits adequately prevent a radio broadcaster from amassing excessive local market power, or whether they adequately permit sufficient growth to enable radio broadcasters to obtain the additional assets they need to improve the quality of their service. Do the subcaps, limiting AM and FM ownership within the overall limit, continue to serve any purpose? If any of the current limits are inappropriate, how should they be revised?

The agency raises the novel question of whether a station’s power should be a weighted factor in setting the ownership limit. For instance, should a Class A AM station be counted as two stations, while a Class D station could be counted as a half of a station?

The Commission invites comment on the NAB’s proposal to maintain the eight-station limit for the 75 largest markets, but to apply it only for FM stations, and to allow common ownership of an unlimited number of AM stations. For all other markets, the NAB would eliminate limits altogether.

During the 2010/2014 review, the Commission was asked to amend its rules to provide that the analysis for the ownership limit within an embedded market should consider only the stations in the embedded market, and not others in the parent market. In the end, in cases where there are multiple embedded Nielsen markets within a larger Nielsen market,

the Commission adopted a presumption in favor of waiving the limitation for qualifying radio stations. (There are presently only two markets with multiple embedded markets – New York and Washington.) There is a two-prong test to qualify for this presumption. First, the owner must comply with the limit appropriate for the embedded market using the Nielsen Audio Metro methodology. Second, it must demonstrate that it complies with the same limit using the contour-overlap analysis. If the proponent can meet both of those criteria, it will enjoy a presumption that a waiver of the rule would be in the public interest. The Commission adopted this waiver standard on an interim basis, subject to review again during the 2018 review. The Commission solicits comment about this policy and asks whether it is needed, or whether it should be continued or modified. The NAB has suggested that a station in an embedded market covering less than 50 percent of the parent market’s population should not be considered part of the parent market for purposes of calculating the ownership limits.

Local Television Ownership Rule

The rules presently in effect for local television ownership provide that an entity may have attributable interests in a maximum of two television stations in the same Nielsen Designated Market Area (“DMA”) if: (1) the digital noise limited service contours of the stations do not overlap, or (2) at least one of the stations is not ranked among the top four stations in audience share in the DMA.

The Commission asks whether rules focused on maintaining competition continue to be warranted. If so, what forms of competition should be considered – competition for viewers, advertisers, retransmission consent fees, network affiliations, the provision of local news, the production or acquisition of programming, innovation, or something else? Do competition-based rules promote the production or provision of local programming? What effect do non-broadcast sources of video programming have on competition? Do non-broadcast sources provide local content? Do viewers and advertisers consider broadcast and non-broadcast sources of video programming to be interchangeable?

The Commission asks whether the prohibition on owning more than one station among the top four market leaders remains necessary and solicits a complete reevaluation of the rule. Is there a different structural parameter that would be more useful to promote competition? In the 2010/2014 review, the agency acknowledged that a rigid imposition of the Top-Four Prohibition in all DMAs might not be best everywhere. Accordingly, it adopted a hybrid approach to allow applicants to request on a case-by-case basis an examination of a proposed combination that would otherwise not be allowed. Such a request must include an analysis to show that the public interest benefits resulting from the combination would outweigh any reduction in competition. Is this case-by-case approach still useful or necessary? If so, what factors should be included in the analysis?

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The rise of multicasting has allowed individual stations to offer a variety of program streams, including the programming of more than one of the Big Four networks. The Commission seeks to learn what effect this development has on competition in the local market, and, in the context of the ownership rules, what its regulatory reaction should be, if anything.

Low power television stations and satellite stations are excluded from the calculations for implementing the ownership rules. The Commission has come to understand that there are markets where such stations carry one of the Big Four networks. That can have a positive effect on the ranking of such stations. Should a low power station that is ranked among the top four stations in the DMA be counted for purposes of the Top-Four Prohibition?

The FCC also seeks to understand how retaining, modifying or eliminating the local television rule would affect minority and female broadcast television ownership, if at all.

Dual Network Rule

The Dual Network Rule essentially prohibits a merger between or among the Big Four television networks – ABC, CBS, Fox and NBC. The Commission concluded in the 2010/2014 review that this rule continued to be necessary to promote competition and localism. The agency seeks comment on whether recent developments in the video programming and national advertising markets suggest that this rule should be modified to promote competition or eliminated. If the rule were eliminated, would the antitrust statutes or any other laws or policies serve as a sufficient backstop to prevent undue consolidation? Should any networks be removed from or added to the list of those that cannot be combined?

Today, online video distributors reach millions of consumers. Advertising on these platforms reaches steadily increasing shares of audiences and advertising. The Commission asks what effect these developments have had on competition for national broadcast television advertising.

The Commission seeks comment on whether the Dual Network Rule continues to promote localism by maintaining a balance of power between the Big Four networks and their local affiliates. Has the growth of retransmission consent fees had an impact on this dynamic? If so, what?

Diversity Proposals

As well as addressing its structural media ownership rules in the 2010/2014 review, the Commission is considering proposals put forward by the Multicultural Media, Telecom and Internet Council, Inc. (“MMTC”) intended to foster minority and female participation in the broadcast industry. Three of those proposals have been carried forward for consideration in the 2018 review. They include (1) extending the cable procurement program to broadcasting; (2) developing a model for market-based tradeable “diversity credits;” and (3) adopting formulas for creating media ownership limits that promote diversity.

Procurement Program

Following the lead of legislation in the 1992 Cable Act, the FCC adopted Section 76.75(e) of its rules which provides that a cable television system must “encourage minority and female entrepreneurs to conduct business with all parts of its operation.” The proposal under consideration is to adopt a similar rule for broadcasters.

The Commission invites comment on this proposal beginning with the threshold question of whether the agency has authority to adopt such a procurement requirement for broadcast licensees. The cable system requirement in Section 76.75(e) flows directly from a statutory mandate in the Cable Act. There is no similar statutory provision for broadcasters. The Communications Act includes equal employment opportunity obligations for broadcast licensees, but these requirements do not extend to procurement. The Commission welcomes suggestions as to any potential source of authority for it to adopt such a regulation.

The Commission queries whether specifically identifying and classifying minority and female entrepreneurs in the proposed rule for special attention would induce heightened judicial scrutiny. The agency has previously found that it lacked the evidence to satisfy the heightened scrutiny needed to justify race- and gender-based broadcast regulations. If the procurement rule as proposed for broadcasters would trigger heightened judicial scrutiny, could it be modified to be race- and gender-neutral? If so, would it then be effective as a race- and gender-conscious broadcast procurement rule?

MMTC asserts that Section 76.75(e) “has been a springboard for the migration of minority and women entrepreneurs into operating and ownership positions in the cable and satellite industries.” The Commission asks for data to support this claim.

Tradeable Diversity Credits

In the 2010/2014 review proceeding, MMTC advocated for the creation of a program of tradeable diversity credits, but did not offer many specific details. Consequently, for the purposes of this review, the Commission reached back to a 2004 proposal that came out of the agency’s Advisory Committee on Diversity in the Digital Age.

Under that plan, diversity credits would be linked to broadcast licenses, commensurate with the extent to which the licensee was considered to be “socially and economically disadvantaged.” When a transaction occurs that would be deemed to promote diversity (such as the break-up of a local ownership cluster, or the sale of a station to a socially or economically disadvantaged business), the FCC would award the seller additional diversity credits commensurate with the extent to which the transaction promoted diversity. On the other hand, when a transaction reduces diversity, the buyer would be required to submit diversity credits to the Commission. If a company wished to pursue a transaction costing more diversity credits than it possessed, it would need

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to purchase credits from one or more third parties with credits to sell. The 2004 proposal did not define what it meant by either “promoting” or “reducing” diversity, or how the impact of a particular transaction would be measured and quantified.

The 2004 proposal suggested that minority status could be a factor in qualifying as a socially disadvantaged business if the Commission were to find through a rulemaking proceeding that minorities may be socially and economically disadvantaged in the broadcasting industry. This runs counter, however, to a more recent decision by the Commission declining to adopt a standard for the socially disadvantaged business that would recognize any race- or gender-conscious measure. The Commission questions whether a diversity credit program based on race or gender could withstand Constitutional equal protection review in the courts.

The Commission asks commenters to address these legal impediments, as well as the basic question of whether the agency even has the authority to create such a program.

Diversity Formulas

At various times in the past, formulas have been proposed that could ostensibly be used to establish media ownership limits while also promoting broadcast ownership diversity. MMTC asked that two of these be given consideration again and the Commission has agreed to look at them in this proceeding.

The Tipping Point Formula was proposed in 2002 by MMTC. This formula would preclude a broadcaster from acquiring competing stations in a market if as a result that broadcaster would hold stations controlling combined revenue so large as to leave insufficient revenue for the independent station(s) in the market to provide a meaningful local service. The formula includes a number of variables which must be defined, such as “independent” and “meaningful local service.” The Commission asks commenters to define these terms, and to address the validity

of the underlying premise that retaining independent stations in a market helps maintain diversity.

The second formula under review is called the Source Diversity Formula. It was developed by a group of commenters in 2003 in a rulemaking proceeding. This formula seeks to measure the level of consumer welfare derived from viewpoint diversity in the broadcast market. This formula is not limited to radio sources. While not clearly stated, it appears that the authors of this formula were suggesting it could be used in place of the “number of voices” test. This test required a minimum number of post-transaction independent voices to remain in the market before a new combination could be approved.

This formula also relies on vague terms that need definition. The Commission will rely on commenters to suggest those definitions.

This article was written on the basis of an advance draft of the *Notice of Proposed Rulemaking*. The final version as adopted by the Commission may vary. Comments will be due 45 days after notice of this proceeding is published in the Federal Register. The deadline for reply comments will be 75 days after publication.

Media Bureau Begins Checking Online Public Inspection Files

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The email also includes the advisory that “Failure to comply with the online public inspection [file] requirements may subject your station(s) to monetary penalties in the future and may have an impact on your next station license renewal.”

DBS Freeze To Be Lifted continued from page 3

downlinks for this service operate in the 12.2-12.7 GHz band, while the uplinks are assigned to the 17.3-17.8 GHz band. The Commission’s current rules provide for a minimum spacing of nine degrees between DBS space stations using the same frequency band. In an earlier stage of this proceeding, the agency deliberated rules for accepting requests to operate stations with reduced spacing. Now, while the Commission has tentatively concluded that the public interest would be served by granting requests for new DBS service on stations with reduced spacing on the orbital arc, it will not adopt rules

different from those in the ITU Radio Regulations. Instead, it will consider such requests on a case-by-case basis, using its first-come, first-served procedures. Such proposals will need to include coordination with other operators so as to mitigate interference for consumers.

The Commission invites comments on these proposals, which must be filed within 45 days of publication of notice of this proceeding in the Federal Register. Replies will be due 75 days after publication.

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