broadcast stations by minorities have declined steadily.[31] Minorities acquired 26 stations in 1993, as compared to 19 stations in 1994, and only nine stations in 1995.[32] Many factors contribute to the underrepresentation of minority owners in broadcast, including the elimination of incentives for financing minority enterprises and the changes to the national and local ownership limits for radio imposed by the 1996 Act.[33] The resulting trend toward consolidation in the radio market has also reduced the ability of small, independent radio stations to compete against larger

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[31] NTIA, Minority Telecommunications Development Program, Report on Minority Commercial Broadcast Ownership, April 1996, p. 3.

[32] Id. at 20.

[33] Since 1985, the FCC's multiple ownership rules for broadcast services permitted non-minority owners to exceed the national ownership limits where they held non-controlling interests in minority-controlled stations and permitted minority owners to exceed the limits outright. Memorandum Opinion and Order, 100 FCC 2d 74 (1985). These rules, commonly known as the minority "bump-up" rules, provided much needed incentives for non-minority owners to help finance minority-controlled businesses and made minority-owned stations more attractive to financing institutions.

By removing the national ownership limits for radio and increasing the number of radio stations a group owner can hold in a single, local market, Congress inadvertently removed these minority ownership incentives. See supra note 18. As a consequence, minorities and women now experience greater barriers to entry into the radio market, primarily for lack of available financing. Not only do financing institutions continue to discriminate against them, but non-minority owners no longer have an economic incentive to finance minority ownership.

group owners.[34] Relaxation of the newspaper/radio cross-ownership waiver policy will lead to increased consolidation and raise market entry barriers even higher.

In 1995, the Commission issued a Notice of Proposed Rule Making addressing the need to eliminate entry barriers for women and minorities; that rulemaking is still pending.[35] Congress also recognizes that substantial barriers to entry for small businesses still exist and, in the 1996 Act, directed the Commission to identify and eliminate those barriers.[36] Black Citizens et al., therefore, perceive a fundamental inconsistency between the instant proceeding which considers liberalizing the waiver policy applicable to newspaper/radio cross-ownership and these other proceedings that seek to eliminate barriers to entry for small businesses.

Because of spectrum scarcity and the prior allotment of broadcast frequencies, purchasing an existing station is the only way for women and minorities

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[34] So Big, at 26. "The big conglomerated radio chains make it extremely hard 'for folks who are Black and Hispanic to have a place in radio. . . . Large corporations like [American Radio Systems Corp.] are such a dominant force that they can eliminate the small entrepreneur,'" maintains Andrew Langston, "owner of a small, independent African-American-oriented station (WDKX-FM) which he and his wife started from scratch in 1974." Id.

[35] In the Matter of Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket 94-149, 91-140 (released January 12, 1995).

[36] 1996 Act, §257. In August 1996, the Commission issued a Notice of Inquiry seeking ways to eliminate market entry barriers for small businesses, including minorities and women. See In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business, GN Docket No. 96-113, August 22, 1996 ("1996 Market Entry Proceeding")

to enter the broadcast market.[37] Statistics show that a substantial number of television station owners started as radio station owners, in part because start-up costs for radio stations are lower than for television. Radio is also a pivotal entry point for minorities and women into the telecommunications market because managerial experience in radio prepares individuals for ownership and is consequently a major criterion for obtaining financing for station acquisitions.[38] Therefore, relaxing the waiver policy in the current market climate would frustrate both the Commission's and Congress' objective of increasing diversity of viewpoint through diversity of ownership.[39]

IV. If the Commission Decides to Adopt a Presumptive Waiver Policy, it Should Adopt a Market Rank/Independent Voice Standard, Place Limits on the Number of Cross-Owned Properties a Licensee Can Own, and Condition Waivers on the Licensee's Promise of Specific and Quantifiable Public Interest Benefits.

At paragraphs 10 - 13 of the Notice, the Commission queries whether it should adopt objective criteria for evaluating waiver requests. Specifically, the Notice seeks comment on which factors the Commission should consider and asks

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[37] See Comments of Black Citizens et al. In the Matter of Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket Nos. 94-149 and 91-140, FCC 94-323 (released January 12, 1995), at p. 32.

[38] Comments of the Office of Communication of the United Church of Christ, 1996 Market Entry Proceeding, at 2, note 2 (citing "Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries," NTIA, April 1995).

[39] While Black Citizens et al. recommend that the Commission not liberalize the waiver policy, if it were to be relaxed, we propose that one way for a waiver applicant to show significant offsetting benefits would be to adopt an incubator program similar to the one described in section IV.

whether waivers should be limited to markets of specific numerical rank, whether a specified number of independent voices should remain after the waiver, and whether media ownership limits affecting eligibility for waiver should be imposed. The Commission also requests comment on several proposed combinations of these factors.

Assuming that the Commission decides to adopt a presumptive waiver policy, Black Citizens et al. propose that the Commission only consider granting a waiver if the licensee meets the following criteria:

(a) Market rank/independent voice — The waiver is sought in one of the top 25 markets, and if it were granted, 30 independently-owned and controlled broadcast voices would remain in the market; and

(b) Ownership limit — Post-waiver, the licensee would own no more than one AM station, one FM station, and one daily newspaper in any local market; and

(c) Offsetting benefits — The waiver applicant has demonstrated specific and quantifiable public interest benefits that would offset the loss of diversity and the Commission has affirmatively determined that the loss of diversity will likely be offset.

The foundation of our proposal is the belief that the Commission should maintain a strong presumption against granting waivers.

A. Waivers Should Only be Granted in the Top 25 Markets, Where a Minimum of Thirty Independently-Owned, Broadcast Licensees Would Remain in the Market after the Waiver.

Our proposed waiver standard is modeled after both the test that the Commission has used to evaluate requests for waiver of the one-to-a-market rule and Congressional intent expressed in the legislative history to the 1994

Appropriations Act.[40] We recognize that the 1996 Act relaxed the one-to-a-market waiver standard to include the top 50 markets.[41] However, in order to ensure that only the most diverse and competitively robust markets will be affected, we strongly oppose reducing the minimum below thirty. The primary justification for adopting a "presumptive waiver" standard is the assumption that "a large number of broadcast outlets and separate voices will remain" in the local market,[42] and therefore, that viewpoint diversity is not threatened. Reducing the minimum independent voice requirement undercuts the presumption.

One key question the Notice poses is which media outlets in the local market should count when computing the number of independent voices that will remain after the waiver.[43] The Notice also seeks comment on whether non-broadcast media like cable and other video-delivery services should be included.[44] We propose the following approach that will enable the Commission quickly to assess the robustness of the diversity present in the local market. First, it is crucial that, as in the one-to-a-market context, only "separately owned, operated and controlled

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[40] See section 1.B. supra.

[41] 1996 Act, §202(d).

[42] WSB Inc. v. Federal Communications Commission, 85 F.3d 695, 701 n.15 (1996)("The 'presumptive waiver rule' is 'based on the fact that a very large number of broadcast outlets and separate voices will remain in these large markets, thereby preventing any single outlet or firm from obtaining undue economic power or undue sway over the public opinion.'")(citing 4 FCC Rcd. at 1751)

[43] Notice at ¶11.

[44] Notice at ¶12.

broadcast licensees"—that is, both commercial and non-commercial radio and television stations—be counted. Therefore, stations that are involved in joint sales agreements (JSAs) or local marketing agreements (LMAs) would not count as independent voices.[45] Black Citizens et al. urge the Commission to consider these increasingly popular arrangements indicia of common ownership. If one partner in the JSA or LMA controls other voices in the market, that person poses the same threat to local diversity as would a nominal owner.[46]

Non-broadcast media should also be excluded.[47] At paragraph 12 of the Notice, the Commission tentatively concludes that most non-broadcast services should not be counted because the cross-ownership rule is about local diversity and these media do not generally provide local programming.[48] We agree. Most non-broadcast media do not have the capacity to reach a general, mass audience and do not broadcast programming on local issues. The Internet merely expands the power of existing media like newspapers (through electronic publishing), but is not itself a new, competing medium of mass communication. As we explained in Part

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[45] See 47 C.F.R. §73.355, note 2.

[46] To assist with enforcing this restriction, Black Citizens et al. urge the Commission to require all waiver applicants to disclose JSAs and LMAs to which they are a party. Licensees who hold waivers should also be prohibited from entering into such agreements without Commission approval.

[47] Congress clearly intended that "waivers . . . be granted only in the top 25 markets where at least 30 independent broadcast voices remain in the market . . .". 1994 Appropriations Act, supra note 13 and accompanying text.

[48] Id.

II.C., cable, the Internet and other technologies also require subscription fees or technical expertise to which many segments of society do not have access.[49] In addition, waiver applicants have an incentive to inflate the count of independent media voices and to include national and niche media that either cover few local issues or add little diversity, claiming, for example, that magazines advertising used cars for sale, high school publications, or PTA newsletters add to diversity.[50]

B. Waivers Should not be Granted to Licensees who Already Own an AM station, FM station and a Daily Newspaper, Absent Unusual Circumstances.

In addition, after grant of the waiver, a licensee should only own one AM station, one FM station, and one daily newspaper in any local market.[51] This

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[49] The importance of these technologies as distribution outlets for local programming and as fora for debate on local issues is yet to be seen. At this point, there is little indication that they will become media of mass communication as opposed to more narrowly focused media. Section 202(h) of the 1996 Act provides for biennial review of the Commission's cross-ownership rule and will give the Commission an opportunity to revisit these findings if warranted and to determine whether the technologies are at that time ubiquitous and local enough to be counted.

[50] The Commission also asks whether other daily newspapers which are published in the radio station's community should count as an independent voice. Notice at para. 12. Markets with competing local daily newspapers of general circulation are rare, but an exception to general rule excluding non-broadcast media might be made in those markets since diversity of viewpoint is not as severely threatened. Therefore, we propose that a daily newspaper not count as an independent voice, unless it is separately owned, directly competes with the newspaper to be sold, and has a substantial geographic overlap in subscribership with the other daily newspaper at issue.

[51] Waivers should not be granted to a licensee who also owns a television station in the local market. This proceeding only considers the newspaper/radio cross-ownership restriction waiver policy. For television stations, the old policy remains in effect.

restriction will prevent cross-ownerships where a common owner controls such a large number of radio stations that it could unduly influence the market. It also is consistent with Congress' vision, which lifted local ownership limits for radio but refused to repeal the cross-ownership restriction. If an applicant already owns an AM, FM and a daily newspaper, a waiver should only be considered in very unusual circumstances.[52] For example, waiver might be permissible where (a) an intensive examination reveals that the applicant fulfilled the promises it made in order to receive the earlier waiver and (b) more extensive promises, for example to provide greater offsetting benefits, are made for the new waiver.

C. The Commission Should Carefully Scrutinize Waiver Requests as Part of a Cautious Application of the "Offsetting Benefits" Approach.

An essential part of our proposed waiver policy is that applicants for waiver promise to provide public interest benefits to offset the inevitable loss of diversity and that the public should have a meaningful opportunity to comment. As we explained in section 1.B., in 1994 Congress contemplated that waiver applicants would make offers of "specified benefits" and that the Commission would make a "separate affirmative determination" in each case that the benefits would offset the reduction in diversity. We also believe that the Commission should facilitate meaningful public participation in the waiver process by issuing (or requiring the

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[52] Commission precedent in evaluating cross-ownership waiver requests should inform this standard. For example, the Commission has refused to grant waivers absent "highly unusual facts," News America Publishing, Inc v. FCC, 844 F. 2d 800, 803 (1988), or "extraordinary circumstances," Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1163 (1995).

applicant to issue) a public notice that the members of the affected community would likely see. In this regard, public notice on the FCC World Wide Web site or in a legal periodical is insufficient.[53]

1. The Commission should require a licensee seeking a waiver to demonstrate specific and quantifiable public interest benefits.

The Commission asks what offsetting benefits should be considered.[54] It is vital that promises for offsetting benefits be concrete and demonstrable, whether they are quantitative or qualitative in nature. If vague promises are enough to obtain a waiver, it is likely that the offsetting benefits will never materialize.

Valid offsetting benefits include:

1. implementing a minority/female incubator program;
2. specific promises to expand or introduce coverage of local news and public affairs;
3. commitments to enhance local political coverage by providing free air time to local candidates and accepting political advertising from all local candidates;
4. producing or airing additional children's educational programming;
5. hiring additional reporters and news staff dedicated to local news coverage; and
6. encouraging and providing a forum for public access/citizen speech.

Black Citizens et al. believe that a minority/female incubator program is one particularly worthy way of attempting to achieve "offsetting benefits" because such a

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[53] Meaningful public notice and participation is crucial, especially if the FCC is going to rely on objections by members of the public to the waiver request to help guide its decision about whether the waiver benefits or harms the public interest.

[54] Notice at ¶10.

program directly attacks the barriers to market entry that waivers and consolidated radio station ownership produce. While diversity at the local level might temporarily suffer from the waiver, increasing minority or female ownership in that same market could directly offset that loss.[55]

Conversely, because licensees are already required to serve the public interest, it is not sufficient for a licensee to offer benefits that it currently provides as part of its duty as a Commission licensee or to make promises that primarily benefit the station and only indirectly benefit the public. Insufficient offsetting benefits might include:

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[55] The Commission originally proposed the concept of an incubator program in 1992 in the context of relaxing national and local radio ownership rules, Revision of Radio Rules and Policies, NPRM, MM Docket No. 91-140, 7 FCC Rcd 6387 (1992), but the concept was never implemented. The Commission also sought comment on the incubator concept in its 1995 review of minority and female ownership. Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, NPRM, MM Docket NO. 94-149 and 91-140, FCC 94-323 (released January 12, 1995) ("Minority and Female Ownership NPRM"). The Commission reasoned that these programs would operate as

> [arrangements] whereby existing broadcasters share their talent, experience and financial resources with minorities and [women] . . . seeking to enter the mass media industry in exchange for regulatory concessions such as relief from certain multiple ownership restrictions. Minority and Female Ownership NPRM at para. 16.

The Center for Media Education ("CME") and the United Church of Christ ("UCC") filed comments and reply comments in that proceeding. See Comments of Black Citizens for a Fair Media, et al., May 17, 1995 and Reply Comments filed July 10, 1995. CME and UCC endorsed the incubator concept and urged the Commission to adopt structural safeguards. For example, eligibility should be linked to a net worth cap; "incubation" must include both financial and technical assistance for the newcomer; the existing broadcaster should incubate the newcomer for one year before having its waiver approved; the newcomer should be required to own its station for a specified minimum period; and the newcomer's station must be of comparable value to competing broadcasters.

1. purchasing new equipment like sound trucks and weather radar or new technological advances that any owner would probably need in order to remain competitive;
2. unspecified administrative and economic efficiencies or efficiencies and cost savings gained through access to a common national advertising sales group;
3. increasing the number of legal, human resources, accounting, technical and public affairs personnel (unless the increase in staff is devoted to local matters as indicated above); and
4. claims that the applicant's public service record is stronger than the previous owner's,

The Commission should refuse to consider waiver requests premised on this type of showing .

2. Waivers should be conditioned on a licensee's good faith efforts to achieve offsetting public interest benefits and the Commission should periodically review the licensee's success and assess whether the waiver continues to serve the public interest.

Further, these promises of public interest benefits must be enforceable by the Commission. We propose that the waiver be conditioned on the licensee's good faith efforts to achieve public interest benefits. Not only would that approach signal to the licensee the seriousness of its commitment, but also it would give the Commission the authority to assess at license renewal whether the licensee has made a good faith effort to fulfill its promises. At license renewal, the Commission should re-examine the underlying public interest basis for the waiver, and the broadcaster should make a specific showing that it has complied with the commitments on which the waiver was based. If the waiver no longer serves the public interest or the licensee has failed to keep its promises, the Commission should revoke the waiver.

However, given the increase in the license term for radio from five to eight years, a system of enforcement based solely on review at license renewal is insufficient. First, the Commission would not be able to respond to changes in the ownership pattern of the local market, nor would it be able to identify licensees who fail to make good faith efforts to achieve offsetting benefits. Also, review at license renewal would not allow a licensee to correct its approach to achieving public interest benefits. To avoid these problems inherent in delayed review, licensees should be required to inform the FCC by filing a notice of modification, and advise listeners through on-air announcements, of any significant deviation from the public interest commitments it made in connection with the waiver. Of course, the licensee may also explain the deviation and propose an alternative way of fulfilling its obligations. This notification procedure would allow the Commission easily to monitor the success of its waiver policy.

The Commission should also retain its current policy which requires a licensee to seek a new waiver before purchasing cross-owned broadcast properties.[56] The newspaper/radio cross-ownership restriction applies "to new ownership patterns however created."[57] Black Citizens et al. believe that continued application of this aspect of the rule is particularly important because, in a rapidly

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[56] See e.g., Capital Cities Order, at 5848 ("previously granted waivers are not automatically granted with the subsequent transfer of stations, however, Disney's assumption of control of CC/ABC requires it to re-justify any waivers previously granted. . .").

[57] Second Report and Order, 50 FCC 2d at 1076.

changing market, the circumstances which justified a waiver at one point in time may no longer exist at a later date. For example, the number of independent voices in the market may fall below the 30-voice benchmark. And even if a waiver can be justified under the new market circumstances existing when a buyer seeks control of a waivered combination, it is important that the buyer itself seek a new waiver. The waiver process would serve as an important reminder to the new owner of the promises made to achieve offsetting benefits, and would give the Commission the chance to evaluate whether those promises have been kept and the offsetting benefits achieved.

V. Waiver requests that are based on other factors like "saving a failing voice" should only be granted if the licensee can substantiate the objective claims on which the waiver request is based.

In paragraph 19, the Notice seeks comment on whether "saving a failing voice" might be one situation justifying a waiver of the newspaper/radio cross-ownership restriction. Indeed, one of the four original grounds for obtaining a waiver would require a showing that separate ownership of a newspaper and radio station were not possible in the locality.[58] Although Black Citizens et al. does not object in principle to basing waivers on "saving a failing voice," we are skeptical of claims that a waiver applicant is the only possible buyer interested in a particular property. In some circumstances, it is probably more likely that the seller has set too high an asking price and that lowering the price could create new interest from the market. We urge the Commission to heighten the evidentiary standard for

[58] Id. at 1085.

proving that a waiver applicant is the only available party to "save a failing voice." We believe that the test has been applied too loosely in the past, relying, for example, on self-serving, in-house analyses of the market conditions.

In addition, the standard of proof is not parallel to similar grounds for waiver such as "inability to sell." In the context of waivers based on the "inability to sell," the Commission requires precise documentation:

> [W]e shall not give any weight to a showing that does not include a full description of the effort made to sell . . . the price at which it was listed and a certification of a station (or if it applies, newspaper) broker that in his view this price is consistent with the fair market value of the station (or newspaper) in question.[59]

Specifically, we recommend that the Commission only grant a waiver based on "saving a failing voice" if the waiver applicant substantiates its claim with an independent study describing the potential market for a property and its actual market value.

Conclusion

For the foregoing reasons, we urge the Commission not to adopt sweeping changes to its newspaper/radio cross-ownership waiver policy. If the Commission decides to change its policy at all, we recommend that waivers only be granted in the top 25 markets, where 30 independent voices would remain after the waiver and where specific and quantifiable public interest benefits will offset the loss of

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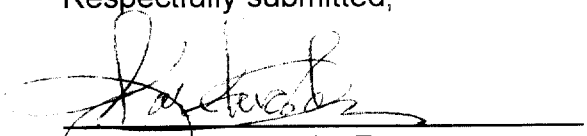
[59] Id. at 1084.

diversity. We believe that such policy would help preserve competition and strengthen local diversity of viewpoint.

Respectfully submitted,



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