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

In the Matter of	)	
	)	
Rules and Policies Concerning	)	
Attribution of Joint Sales Agreements	)	MB Docket No. 04-256
In Local Television Markets	)	
	)	
	)	
	)	
	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: July 13, 2004 **Released: August 2, 2004**

Comment Date: 30 days after date of publication in the *Federal Register*
Reply Comment Date: 45 days after date of publication in the *Federal Register*

By the Commission:

I. INTRODUCTION

1. In its *Report and Order and Notice of Proposed Rule Making*, arising from the third biennial review of its broadcast ownership rules, the Commission attributed the "brokered station" to the "broker" in certain radio joint sales agreements (JSAs).[1] A JSA is an agreement with a licensee of a brokered station that authorizes a broker to sell some or all of the advertising time for the brokered station in return for a fee or percentage of revenues paid to the licensee.[2] Because the broker normally assumes much of the market risk with respect to the station it brokers, radio JSAs generally give the broker authority to hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time, subject to the licensee's preemptive right to reject the advertising. As a result of the Commission's decision, its attribution rules, which define what interests are counted for purposes of applying the Commission's broadcast ownership rules, now state that a party with a cognizable interest in a radio station that brokers more than 15 percent of the weekly advertising time of another radio station in the same local market is considered to have an attributable interest in the brokered station.[3] In this *Notice of Proposed Rule Making*, we invite comment on whether comparable, same-market TV JSAs

[1] *In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) ("*Report and Order"*), *affirmed in part, remanded in part, Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 2004 WL 1405975 (3rd Cir. 2004) ("*Prometheus v. FCC"*). While the court affirmed the Commission's decision to attribute radio JSAs, as well as other Commission decisions, it remanded a number of decisions in the biennial proceeding to the Commission for additional justification or modification. The court had earlier stayed the effectiveness of the Commission's decision pending review, and, in a separate Partial Judgment, the court continued the stay pending its review of the Commission's action on remand, over which the court retained jurisdiction.

[2] 47 C.F.R. § 73.3555, Note 2(k).

[3] *Id*.

should also be attributable.

2. Although the Commission attributed radio JSAs in the *Report and Order,* it did not address TV JSAs or its other attribution rules. The biennial, now quadrennial, review requirement of Section 202(h) of the Telecommunications Act of 1996 does not encompass attribution.[4] The attribution rules merely determine what interests are cognizable under the Commission's broadcast ownership rules; they are not ownership limits in themselves. Moreover, the basis of the attribution rules differs from the statutory factors we apply in the biennial reviews. The Commission addressed the attribution of radio JSAs in the *Report and Order* only because the issue was raised in the local radio ownership proceeding, which was incorporated into the 2002 biennial review. Since prior notice had not been given regarding the issue of whether we should attribute TV JSAs, the Commission said that it would seek comment on whether to attribute TV JSAs in a future NPRM.[5] We have no reason to believe that the terms and conditions of TV JSAs differ substantively from those of radio JSAs, and, in this *Notice*, we tentatively conclude that JSAs have the same effect in local TV markets that they have in local radio markets and should be treated similarly.

II. BACKGROUND

3. Our attribution rules seek to identify those interests in licensees that confer on their holders a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[6] Influence and control are important criteria with respect to the attribution rules because, as noted above, these rules define which interests are significant enough to be counted for purposes of the Commission's multiple ownership rules.

4. In its 1999 attribution proceeding, the Commission considered whether to attribute several types of business arrangements, including JSAs and TV local marketing agreements (LMAs).[7] The Commission acknowledged that same-market JSAs could raise competitive concerns but said it did not believe that such agreements conveyed a sufficient degree of influence or control over station programming or core operations to warrant attribution, adding that JSAs could promote diversity by "enabling smaller stations to stay on the air."[8] The Commission required that JSAs be placed in the station's public inspection file, and specifically noted that it retained the discretion to conduct a public

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[4] *In the Matter of 2002 Biennial Regulatory Review,* 17 FCC Rcd 18503, 18506 ¶ 7 n.13 (2002).

[5] *Report and Order,* 18 FCC Rcd at 13743 ¶ 316 n.691.

[6] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry;* 14 FCC Rcd 12559 ¶ 1 (1999) *("1999 Attribution Order"), on recon.,* 16 FCC Rcd 1097 (2001). For purposes of the multiple ownership rules, the concept of "control" is not limited to majority stock ownership, but includes actual working control in whatever manner exercised. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry;* 10 FCC Rcd 3606, 3609 ¶ 4 (1995).

[7] LMAs are sometimes called time brokerage agreements, or TBAs. "Time brokerage" (also known as "local marketing") is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it. A joint sales agreement, on the other hand, is an agreement with a licensee of a "brokered station" that authorizes a "broker" to sell advertising time for the "brokered station." 47 C.F.R. § 73.3555, Notes 2(j), (k); *see also 1999 Attribution Order,* 14 FCC Rcd 12559, 12591 ¶ 66.

[8] *1999 Attribution Order,* 14 FCC Rcd at 12612 ¶ 122.

interest review of specific JSAs, if warranted, on a case-by-case basis.[9]

5. In 1999, the Commission distinguished JSAs from LMAs, holding that JSAs are contracts that affect primarily the sale of advertising time, as distinguished from LMAs, which may affect programming, personnel, advertising, physical facilities, and other core operations of radio stations.[10] Although the Commission did not adopt a rule attributing TV or radio JSAs, it did attribute same-market TV LMAs, stating that its rationale in the *1992 Radio Ownership Order* for attributing same-market radio LMAs -- *i.e.,* to prevent their use to circumvent its ownership limits -- applies equally to same-market TV LMAs. The Commission also repeated its concern that LMAs among stations serving the same market could undermine broadcast competition and diversity.[11] After the *1999 Attribution Order* took effect, the Commission's rules specified that a party with a cognizable interest in either a radio or a TV station that brokers more than 15 percent of the weekly broadcast time of another radio or TV station in the same local market is considered to have an attributable interest in the brokered station.[12]

6. In 2001, the Commission reopened the issue of whether to attribute radio JSAs in the *Local Radio Ownership NPRM*.[13] As part of its larger inquiry into possible changes to local radio ownership rules and policies, the Commission asked whether it should reconsider its blanket exemption of JSAs from attribution, and whether radio JSAs and LMAs or TBAs should be treated similarly.[14] In its 2002 *Ackerley* decision, the Commission interpreted the language in the *1999 Attribution Order*, in which it reserved the ability to conduct a review of specific JSAs on a case-by-case basis. It concluded that the parties' TV JSA, which was intertwined with the parties' non-attributable TBA, should be attributable due to the level of influence it permitted the broker to exercise over the brokered station's programming decisions.[15] In *Ackerley*, Ackerley Group, Inc. (Ackerley) had both a TBA and a JSA with KCBA(TV). The TBA expressly limited the amount of programming to be provided under the TBA to 15 percent of the licensee's weekly programming hours, which was the permissible limit without triggering the Commission's attribution rules. However, the brokered station, under the terms of the combined agreements, did not have the right to collect advertising revenue from non-network programming not included within the 15 percent provided under the TBA, and so did not have an economic incentive to refuse programming suggestions by the broker.[16]

7. The Commission explained in *Ackerley* that it had, in the *1999 Attribution Order,* declined to impose new rules attributing JSAs "as long as they deal primarily with the sale of advertising time and do

[9] *1999 Attribution Order,* 14 FCC Rcd at 12612-13 ¶ 123.

[10] *1999 Attribution Order,* 14 FCC Rcd at 12612 ¶ 122.

[11] *1999 Attribution Order,* 14 FCC Rcd at 12598 n.181 (citing *1992 Radio Ownership Order*, 7 FCC Rcd at 2788).

[12] 47 C.F.R. § 73.3555, Notes 2(j)(1), 2(k)(1).

[13] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* 16 FCC Rcd 19861 (2001)(*"Local Radio Ownership NPRM"*). This proceeding was incorporated into the 2002 biennial review.

[14] *Local Radio Ownership NPRM,* 16 FCC Rcd at 19893-94 ¶¶ 81-83.

[15] *Shareholders of the Ackerley Group, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee) For Transfer of Control of the Ackerley Group, Inc., and Certain Subsidiaries,* 17 FCC Rcd 10828 (2002) (*"Ackerley"*).

[16] *Ackerley*, 17 FCC Rcd at 10839-42 ¶¶ 28-33.

not contain terms that materially affect programming or other core operations of the stations such that they are substantively equivalent to LMAs."[17] The Commission concluded in *Ackerley* that the TBA and related agreements did not provide the licensee with an economic incentive to control the 85 percent of programming not provided by the broker under the LMA. It concluded that, as a result, the agreements together were "substantively equivalent" to an LMA for more than 15 percent of KCBA(TV)'s weekly broadcast hours and were therefore attributable.[18]

8. In 2003, we decided to attribute radio JSAs.[19] In the *Report and Order*, we reiterated that the attribution rules seek to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under the ownership rules.[20] Where the Commission has referred to an interest that confers "influence" it has viewed it as an interest that is less than controlling, but through which the holder is likely to induce a licensee to take actions to protect the interests of the holder, and where a realistic potential exists to affect a station's programming and other core operational decisions.[21] We found that the use of in-market radio JSAs may undermine our interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rules.[22]

9. Prior to 2003 the Commission distinguished JSAs from LMAs, finding that only LMAs have the ability to affect programming, personnel, advertising, physical facilities, and other core operations of stations.[23] In the *Report and Order*, however, we found that because the broker controls the advertising revenue of the brokered radio station, JSAs have the same potential as LMAs to convey sufficient influence over core operations of a radio station to raise significant competition concerns warranting attribution. We found that the threat to competition and the potential impact on the influence over the brokered station outweighed any potential benefits that non-attribution of radio JSAs may have on the radio industry.[24]

10. When we attributed JSAs involving radio stations, we said that, where an entity owns or has an attributable interest in one or more stations in a local radio market, joint advertising sales of another station in that market for more than 15 percent of the brokered station's advertising time per week will result in counting the brokered station toward the brokering licensee's ownership limits.[25] Additionally, attributable radio JSAs must be filed with the Commission, and placed in the public file. We gave

[17] *Ackerley*, 17 FCC Rcd at 10842 ¶ 33 (citing *1999 Attribution Order*, 14 FCC Rcd at 12612-13).

[18] *Ackerley*, 17 FCC Rcd at 10842 ¶ 33.

[19] *Report and Order*, 18 FCC Rcd at 13743 ¶ 317. We also revised the local radio ownership rules.

[20] *Report and Order*, 18 FCC Rcd at 13743-44 ¶ 318 (citing *Attribution of Ownership Interests*, 97 F.C.C.2d 997, 999, 1005 (1984), ("*1984 Attribution Order*") *on recon*., 58 R.R.2d 604 (1985), *on further recon*., 1 FCC Rcd 802 (1986); *1999 Attribution Report and Order*, 14 FCC Rcd at 12612).

[21] *Report and Order*, 18 FCC Rcd at 13743-44 ¶ 318; *Attribution NPRM*, 10 FCC Rcd 3606, 3610 (1995).

[22] *Report and Order*, 18 FCC Rcd at 13743-44 ¶ 318*; see also 1992 Radio Ownership Order*, 7 FCC Rcd at 2788; *Attribution NPRM*, 10 FCC Rcd 3606, 3609 (1995) (*quoting 1984 Attribution Order*, 97 F.C.C.2d at 999).

[23] *Report and Order*, 18 FCC Rcd at 13744-45 ¶ 320; *see also 1999 Attribution Report and Order*, 14 FCC Rcd at 12612.

[24] *Report and Order*, 18 FCC Rcd at 13744-45 ¶ 320.

[25] 47 C.F.R. § 73.3555, Note 2(k); *Report and Order*, 18 FCC Rcd at 13743 ¶ 317.

parties two years from the effective date of the new rule to terminate agreements, or otherwise come into compliance with the applicable media ownership rules.[26]

11. In *Prometheus v. FCC*, the Third Circuit Court upheld our decision to attribute radio JSAs. The court held that we had adequately explained our change in policy with respect to attribution of radio JSAs. The court accepted "that the Commission's determination upon 'reexamination of the issue' that the JSAs convey (and always have conveyed) a potential for influence – sufficiently rationalizes [the Commission's] decision to jettison its prior nonattribution policy and replace it with one that more accurately reflects the conditions of local markets."[27] The court also held that attribution of JSAs is not a regulatory taking in violation of the Fifth Amendment. According to the court, in deciding to attribute JSAs, the Commission has not invalidated or interfered with any contracts, but has merely determined that stations subject to JSAs should, in certain circumstances, count toward the regulatory limit in determining how many stations the broker may own in a market. The court also held that stations have no vested right in the continuation of any regulatory scheme.[28]

III. DISCUSSION

12. In this *Notice*, we seek comment on whether or not to attribute TV JSAs. We tentatively conclude that we should. We ask for comments on the similarities and differences between TV and radio JSAs. Are there differences between TV and radio JSAs such that we should not attribute TV JSAs?

13. A licensee assumes all of the market risk associated with a broadcast TV station's programming when the licensee receives all of the advertising revenue generated by a program. The assumption of all market risk provides a licensee with strong incentives to select the station's programming and oversee other core operations of the station. Our experience with the *Ackerley* case suggests that TV JSAs may reduce a licensee's incentive to select programming and oversee other core operations of the station whose ad time is brokered. For example, a JSA providing a licensee with a fixed monthly fee, regardless of the advertising sales or audience share of the TV station, transfers all market risk from the licensee to the broker. With the JSA, it is the broker's profits that are directly affected by the advertising revenues generated by a program. As such, the broker has strong incentives to induce a licensee to select programming to protect the broker's interests, and the brokered station has little incentive to resist such influence.

14. In the context of radio JSAs, we found that licensees of radio stations subject to JSAs typically receive a monthly fee regardless of the advertising sales or audience share of the station and, therefore, may have less incentive to maintain or attain significant competitive standing in the market. We concluded that, because the broker controls the advertising revenue of the brokered radio station, JSAs have the potential to convey sufficient influence over core operations of a radio station to raise significant competition concerns warranting attribution.[29] Is the same fee structure typical for TV JSAs? If not, are the incentives different and does this have implications for our decision? In this *Notice*, we seek comment on whether broadcast TV JSAs have a similar potential to influence program selection and other core operations of a TV station.

[26] However, if a party sells an existing combination of stations within the two-year grace period, it may not sell or assign the JSA to the new owner if the JSA causes the new owner to exceed any of our ownership limits; the JSA must be terminated at the time of the sale of the stations. *See Report and Order*, 18 FCC Rcd at 13746 ¶¶ 324-25.

[27] *Prometheus v. FCC*, supra note 1, at *42.

[28] *Id.*

[29] *Report and Order*, 18 FCC Rcd at 13744-45 ¶ 320.

15. Beyond the issue of potential influence by a JSA broker over a brokered station's operations, which alone may warrant attribution, the unattributable nature of JSAs could lead to the exercise of market power by brokering stations and raise related competition concerns. In the *Report and Order*, in addressing local TV ownership, the Commission stated, "[o]ur competition goal seeks to ensure that for each TV market, numerous strong rivals are actively engaged in competition for viewing audiences."[30] In the context of radio, JSAs raise concerns regarding the ability of broadcasters who are not in a JSA or LMA combination to compete, and may negatively affect the health of the local radio industry generally. In any given radio market, a broker may own or have an ownership interest in stations, operate stations pursuant to an LMA, or sell advertising time for stations pursuant to a JSA. Instead of stations competing with one another, we said that radio JSAs put pricing and output decisions in the hands of one firm that sells packages of time for all stations that are party to the agreement. As such, radio JSAs have the potential to lessen competition in the market.[31] Do TV JSAs raise the same competitive concerns as radio JSAs? In situations where a party would exceed our ownership limits if a TV JSA is attributed, does the TV JSA provide the broker with the ability to exercise market power, or raise concerns regarding the ability of smaller broadcasters to compete? Is there a difference in the radio and TV markets that would justify treating TV JSAs differently from radio JSAs? What benefits and harms from JSAs have occurred in the radio context that could occur in the TV context?

16. We seek concrete information on the terms and conditions of TV JSAs. We ask commenters that are parties to TV JSAs to answer the following questions, which can help us to assess the typical terms and significance of TV JSAs. What is the duration of the agreement? What terms and conditions are associated with TV JSA agreements besides advertising terms? We wish to know the nature of the other terms as well. How are the station owner and broker compensated? Are there package deals among several stations? Does the broker get involved in the operation of the station, including programming and finances, either directly or indirectly? As a practical matter, do typical TV JSAs differ from TV LMAs? Are TV JSAs also usually accompanied by program agreements, or are they mostly solely advertising agreements? What other arrangements typically occur between parties in terms of station operations or joint use of production facilities? For example, are TV JSAs often accompanied by shared services or joint services agreements? If so, what terms are involved and what services or facilities are shared? What is the impact of these attributes of JSAs and terms of these contracts on our concerns about influence or control? Are TV JSAs typically accompanied by non-attributable financial investments? If such combinations occur, what are their terms?

17. Why do parties enter into TV JSAs? What are the benefits they enjoy? Do these benefits differ from those of LMAs? What kind of efficiencies arise with TV JSAs? How are these shared among parties to the TV JSAs? What benefits accrue to the public from TV JSAs? We have seen TV JSA agreements that are accompanied by non-attributable TV LMAs, sometimes involving a situation where a stronger station provides local news programming to a weaker station in the market as part of the agreements. This may enable such stations to provide news that they were not able to provide previously. Is this a frequent occurrence and, if so, what impact should it have on our decision? What effect, if any, might attribution of TV JSAs have on the digital transition?

18. What impact do TV JSAs have on competition? What are the disadvantages of having a TV JSA? Under what circumstances, if any, should the interest of the broker/JSA holder be held attributable? We particularly ask station owners who compete with stations that are parties to TV JSAs, as well as other commenters, to speak to the effects of any TV JSAs in their market.

19. If we do decide to attribute TV JSAs, are there any compelling reasons why the Commission

[30] *Report and Order*, 18 FCC Rcd at 13675 ¶ 150.

[31] *Report and Order*, 18 FCC Rcd at 13744-45 ¶¶ 319-20.

should not apply the existing radio JSA attribution guidelines, including the filing requirements, to TV JSAs? If a rule similar to the radio JSA attribution rule is applied to TV JSAs, should the Commission use the fifteen percent benchmark that it used in the radio context, or is some other percentage more appropriate? Alternatively, should TV JSAs be examined only on a case-by-case basis, and be attributed only if their likely degree of influence is similar to that of an LMA, as in *Ackerley*?

20. The Commission did not grandfather existing radio JSAs. Parties having existing, attributable JSAs that would cause them to exceed relevant ownership limits were required to file a copy with the Commission, and were given two years from the effective date of the *Report and Order* to terminate those JSAs or otherwise come into compliance with the local radio ownership rules. Should these same transition provisions apply to TV JSAs? What effects, if any, should JSAs have on the renewal expectancy of TV stations? Information contained in the parties' comments is essential to the Commission's assessment of whether to grandfather existing TV JSAs in the event they are deemed attributable, and the form this grandfathering should take. Parties to existing JSAs are the best source of this information. It is critical that the Commission be provided the information it needs to make a reasoned decision, and to fashion appropriate grandfathering rights, if any, in the event we deem JSAs attributable. For parties to TV JSAs, we ask that the licensee of the brokering station and/or the licensee of the brokered station include the information described above in their comments, along with any other information that they think is relevant.

21. Finally, while this Notice concerns TV JSAs, we note that TV LMAs entered into before November 5, 1996 were grandfathered until the conclusion of the 2004 biennial review of the broadcast ownership rules. As part of that review, the Commission was to reevaluate these grandfathered TV LMAs, on a case-by-case basis, using specified factors, to determine whether they should continue to be grandfathered.[32] On January 22, 2004, President Bush signed into law the Appropriations Act.[33] Section 629 of the Appropriations Act amends Section 202(h) of the Telecommunications Act of 1996, modifying the biennial review requirement of the 1996 Act to a quadrennial review requirement.[34] According to the amended statute, the next ownership review will commence in 2006. Since we will not undertake an ownership review in 2004, we invite comment as to whether we should nonetheless commence the reevaluation of the grandfathered LMAs in 2004 or postpone it till the next quadrennial ownership review in 2006.

IV. ADMINISTRATIVE MATTERS

22. *Ex Parte Rules.* This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

23. *Comments and Reply Comments*. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[35] interested parties may file comments on the notice of proposed rulemaking on or before [30 days after date of publication in the *Federal Register*,] and reply

[32] *Review of the Commission's Regulations Governing TV Broadcasting, TV Satellite Stations Review of Policy & Rules*, 14 FCC Rcd 12903, 12964-66 ¶¶ 144-48 (1999) ("*Local TV Ownership Report and Order*"), *clarified in Memorandum Opinion & Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001).

[33] Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004).

[34] *Id.*, § 629(3).

[35] 47 C.F.R. §§ 1.415 and 1.419.

comments on or before [45 days after date of publication in the *Federal Register*.] Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998). All comments should reference MB Docket No. 04-256.

24. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, M.D. 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

25. Parties must also serve either one copy of each filing via e-mail or two paper copies to Best Copy and Printing, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (800) 378-3160 or (202) 488-5300, or via email to fcc@bcpiweb.com. In addition, parties should serve one copy of each filing via email or three paper copies to Brenda Lewis, 445 12th Street, S.W., 2-C266, Washington, D.C., 20554. Parties should also serve one copy of each filing via email or one paper copy to Debra Sabourin, Media Bureau, 445 12th Street, S.W., 2-C165, Washington, D.C., 20554.

26. *Availability of Documents.* Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. These documents also will be available electronically from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (800)378-3160 or (202) 488-5300, facsimile (202) 488-5563, or via e-mail at fcc@bcpiweb.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

27. *Regulatory Flexibility Act*. As required by the Regulatory Flexibility Act,[36] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *Notice of Proposed Rulemaking*. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

[36] *See* 5 U.S.C. § 603.

28. *Paperwork Reduction Act*. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due ***[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].*** Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

29. *Additional Information*. For additional information on this proceeding, please contact Debra Sabourin, Industry Analysis Division, Media Bureau at (202) 418-0976.

V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and Section 202(h) of the Telecommunications Act of 1996, this *Notice of Proposed Rule Making* IS ADOPTED.

31. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.[37]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[37] *See* 5 U.S.C. § 603(a).

APPENDIX

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[38] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[39] In addition, the Notice and the IRFA (or summaries thereof) will be published in the Federal Register.[40]

A. Need for, and Objectives of, the Proposed Rules

The Commission, in a *Report and Order and Notice of Proposed Rulemaking* (*R&O*), arising from the third biennial review of its broadcast ownership rules, adopted a rule attributing the "brokered station" to the "broker" in certain radio joint sales agreements (JSAs).[41] A JSA is an agreement with a licensee of a "brokered station" that authorizes a "broker" to sell advertising time for the "brokered station" in return for a fee paid to the licensee. The Commission's attribution rules seek to identify those interests in licensees that confer on their holders a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[42] Influence and control are important criteria with respect to the attribution rules because the rules define which interests are significant enough to be counted for purposes of the Commission's multiple ownership rules.

In the 2003 *R&O*, the Commission decided to attribute radio JSAs but found the issue as it relates to TV stations was beyond the scope of the proceeding. In extending the attribution rule to include radio JSAs, the Commission found that the use of in-market radio JSAs may undermine our interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rules. Accordingly, in the *R&O*, the Commission revised the attribution rules, which define what interests are counted for purposes of applying the Commission's media ownership rules, to state that a party with a cognizable interest in a radio station that brokers more than 15 percent of the weekly advertising time of another radio station in the same local market is considered to have an attributable interest in the brokered station. These new rules have been stayed. The Notice invites comment on whether same-market TV JSAs should also be attributable under the same terms. The Notice invites comment on whether the factors that led the Commission to attribute radio JSAs apply as well in the context of TV JSAs. For example, the Commission asks whether TV JSAs have a similar potential to influence core operations of the brokered TV station and whether TV JSAs raise similar competitive concerns as radio JSAs.

B. Legal Basis

This Notice is adopted pursuant to sections 1, 2(a), 4(i), 303, 307, 309, 310, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, and

[38] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[39] *See* 5 U.S.C. § 603(a).

[40] *See id*.

[41] *See supra* footnote 1.

[42] *1999 Attribution Order,* 14 FCC Rcd at 12559 ¶ 1.

Section 202(h) of the Telecommunications Act of 1996.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[43] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[44] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[45] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[46]

In this context, the application of the statutory definition to television stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which the rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

Television Broadcasting. The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business.[47] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[48] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of June 26, 2004, about 860 (68%) of the 1,270 commercial television stations in the United States have revenues of $12 million or less. We note, however, that in assessing whether a business entity

[43] 5 U.S.C. § 603(b)(3).

[44] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

[45] *Id.*.

[46] 15 U.S.C. § 632.

[47] *See* OMB North American Industry Classification System: United States, 1997 at 509 (1997) (NAICS code 513120, which was changed to code 515120 in October 2002).

[48] OMB, North American Industry Classification System: United States, 1997, at 508 (1997) (NAICS code 51320 which was changed to 51520 in October 2002). This category description continues, "These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See id.* at 502-505, NAICS code 512110. Motion Picture and Video Production; code 512120, Motion Picture and Video Distribution, code 512191, Teleproduction and Other Post-Production Services, and code 512199, Other Motion Picture and Video Industries.

qualifies as small under the above definition, business control affiliations[49] must be included. Our estimates, therefore, likely overstate the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which these estimates are based do not include or aggregate revenues from affiliated companies.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Notice in paragraph 19 invites comment as to whether, if the Commission adopts a rule attributing same-market TV JSAs, it should adopt a requirement that attributable TV JSAs must be filed with the Commission.[50]

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[51]

The Commission invites comment on the options of leaving TV JSAs unattributable, attributing same-market TV JSAs under certain circumstances or examining TV JSAs on a case-by-case basis. The Commission tentatively concludes that we should attribute TV JSAs. The Notice, however, invites comment on the various harms and benefits of TV JSAs, including whether TV JSAs may hinder the ability of smaller broadcasters and broadcasters who are not in a JSA to compete. The Commission has previously recognized that JSAs can have benefits. For example, the Commission, in the *Report and Order* in MM Docket Nos. 94-150, 92-51, and 87-154,[52] while acknowledging concern with the possible competitive consequences of business agreements such as JSAs, noted that "some JSAs may actually help promote diversity by enabling smaller stations to stay on the air."[53] Also, the Notice refers to JSAs accompanied by non-attributable LMAs, sometimes involving a situation where a stronger station provides local news programming to a weaker station in the market as part of the agreements and allowing such stations to provide news that they were not able to provide previously.[54] The Notice invites comment on whether this is a frequent occurrence and if so, what impact it should have on the Commission's decision. The Commission also invites comment on the impact of attribution of TV JSAs on the digital transition.

Finally, the Notice considers whether, if TV JSAs are made attributable, the Commission should grandfather existing TV JSAs. As discussed in the Notice, the *R&O* did not grandfather radio JSAs, but gave licensees two years from the effective date of the *R&O* to terminate those JSAs or otherwise come

[49] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[50] See *supra* para. 19.

[51] 5 U.S.C. § 603(c).

[52] 14 FCC Rcd 12559 at 12612.

[53] *See supra* note 5.

[54] *See supra* para. 17.

into compliance with the Commission's ownership rules.[55] The Notice invites comment on whether the same provisions should apply in the context of TV JSAs. We invite comment on the effects of the Commission's alternatives and proposals in the Notice on small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

[55] *See supra* para. 20.