PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended under Wisconsin, by adding Channel 244C2 and removing Channel 244A at Ashland.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-5468 Filed 3-8-89; 8:45 am]

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47 CFR Parts 73 and 76

[MM Docket No. 87-154; FCC 89-344]

Broadcast Television and Cable Television Service; Cross-Interest Policy

AGENCY: Federal Communications Commission.

ACTION: Policy statement.

SUMMARY: Through this decision the Commission reduces the scope and applicability of its cross-interest policy. The cross-interest policy essentially prevents individuals or entities from having "meaningful" relationships in two competing media outlets serving the same area. The meaningful relationships which have been considered by the Commission to be encompassed by this policy include: (1) Consulting positions; (2) joint ventures; (3) time brokerage arrangements; (4) advertising agencies; (5) nonattributable equity interests; and (6) key employee relationships. The cross interest policy was originally developed as a supplement to the Commission's duopoly rule and, in later years, was extended through case-by-case adjudication as a corollary to the Commission's other ownership rules. Like these rules, the cross-interest policy was aimed at ensuring the public's access to a diversity of viewpoints and at preventing undue concentration of economic power in broadcast licensees.

The Commission believes, for a variety of reasons, that the cross-interest policy, as it has applied to consulting positions, time brokerage arrangements and advertising agency relationships, is not longer essential to maximize diversity of viewpoints or to prevent undue concentration of economic power in broadcast markets. First, the substantial growth of media outlets across markets of all sizes has vastly emeliorated diversity concerns. Second, the new attribution provisions in the ownership rules amply define those relationships which create program and economic diversity concerns and those which do not. In many respects, these new rules duplicate, or are more extensive than the cross-interest policy, thereby rendering it superfluous. Third, other legal remedies exist that reduce or deter potential anticompetitive consequences which the cross-interest policy is designed to curb. Finally, our analysis indicates that the cross-interest policy imposes costs and burdens on the public, as well as the Commission, that are especially difficult to justify given the reduced need for the policy. At the same time that the Commission issues this decision reducing the scope of the cross-interest policy, it is also issuing a separate *Further Notice of Inquiry/Notice of Proposed Rulemaking* inviting further comment for a more extensive record before determining whether to eliminate the cross-interest policy as it applies to key employees, certain nonattributable equity interests and joint ventures. Thus, until this proceeding is completed, the cross-interest policy remains in effect as it applies to these relationships.

EFFECTIVE DATE: April 6, 1989.

ADDRESS: Federal Communication Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Douglas Minster, Mass Media Bureau, Policy and Rules Division, (202) 632-7792.

List of Subjects

47 CFR Part 73

Radio broadcasting, Television broadcasting.

47 CFR Part 76

Cable television.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

Policy Statement

Adopted: October 27, 1988; Released: February 28, 1989.

By the Commission:

Introduction

1. On May 14, 1987, we instituted a *Notice of Inquiry* (*Notice*) into the cross-interest policy, which essentially prevents individuals or entities from having "meaningful" cross-interests in two broadcast stations, or a daily newspaper and a broadcast station, or a cable television system and a television broadcast station, serving substantially the same area.[1] As a result of our comprehensive review of the cross-interest policy, we are today issuing this Policy Statement reducing the scope and applicability of that policy. A careful review of the record, our considerable regulatory experience in administering this policy, and our analysis of the public interest costs and benefits, convince us that continued review of many relationships within the cross-interest policy can no longer be justified as a matter of sound policy. Because issues remain with respect to the policy as it applies to key employee relationships, certain nonattributable equity interests and certain joint ventures, we are issuing a *Further Notice of Inquiry/Notice of Proposed Rulemaking* requesting additional comment on those matters.

Purpose and Scope of Inquiry

2. In the *Notice* in this proceeding, we sought comment on the possible elimination of the cross-interest policy.[2] Based on our experience in applying the policy and the developments in the communications marketplace, we expressed skepticism that the cross-interest policy, as applied on an *ad hoc* adjudicatory basis, continued to serve the public interest. Our *Notice* solicited comment on whether retention of the cross-interest policy is necessary to prevent anticompetitive abuses from occurring, whether alternative policing mechanisms exist to assure competition, and whether continued regulation of relationships not specifically addressed by the Commission's rules is necessary. More specifically, we requested commenters to discuss the role of market forces, private remedies, and the antitrust laws to deter anticompetitive misconduct and to ensure competitive communications markets. In addition, we asked whether we should amend our attribution rules to include key employees.

3. In the *Notice*, we identified certain relationships to be within the ambit of the cross-interest policy. These relationships involve key employees, consulting positions, advertising agency representative relationships, time brokerage arrangements, sales representative relationships, nonattributable equity interests, and joint ventures. We observed that the concerns relating to certain cross-interest relationships had either been eliminated or specifically addressed by the Commission's rules. In particular, we

[1] *Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987).

[2] *Id.* at 3702.

noted that sales representative relationships had been stricken from the cross-interest policy because we found the examination of such relationships unnecessary to promote economic competition and that, to the extent that abuses arose, they could be addressed more adequately by remedies other than regulatory intervention. We further noted that certain minority stock interests and positional interests, such as officers and directors, were now encompassed by the local ownership rules and, therefore, the need to address these interests in the context of our existing cross-interest policy was unnecessary. Accordingly, based upon the considerations described above, we proposed to eliminate most of the remainder of the existing policy.

4. We conclude that retention of our policies relating to consulting positions, advertising agency representative relationships and time brokerage arrangements are no longer warranted in the public interest.[3] Before discussing the reasons for this determination, we shall initially describe the different types of cross-interests addressed in this *Policy Statement* which have created regulatory concern under our existing policy, provide an overview of the policy's evolution, and summarize the comments filed in this proceeding. We shall then focus our attention on the reasons which, considered together, persuade us that these parts of our cross-interest policy are no longer essential to promote economic competition or diversity of viewpoint or otherwise necessary to serve the public interest.

Background

1. Cross-Interests Proscribed Under Policy

5. The cross-interest policy is designed to address instances in which an individual or entity has a "meaningful" relationship in two competing media outlets serving substantially the same area. The meaningful relationships which the Commission has determined to be encompassed under the policy are set forth below.[4]

6. *Consulting Positions.* The Review Board has applied the cross-interest policy where a consultant who provides advice and/or has what would now be an attributable interest in one media outlet in the market also provides advice to other competing stations in the same market.[5] For example, the policy was applied where a spouse of the sole owner of one radio station was to serve as an accountant/bookkeeper or program director for that station as well as serve in a consulting capacity for competing radio stations in the same market. The Review Board reasoned that the consultant had access to confidential finanical or programming information of competitors and, therefore, had the potential to impair arms-length competition.[6]

7. *Time Brokerage Arrangements.* The cross-interest policy has also been considered in instances where a radio station proposes to enter into a "time brokerage" arrangement to purchase varying amounts of time from a competing station in the same market in order to air programming and sell advertising during those segments. Generally, the Commission has found that such proposals implicate the cross-interest policy because of the potential for diminution of competition arising from owning and programming one station and making programming decisions at an independently-owned station.[7]

8. *Advertising agencies.* The cross-interest policy is also triggered when an individual has ownership interests in both a broadcast station and an advertising agency, and the ad agency purchases advertising time on behalf of its clients on other stations in the same service in the same market as the commonly owned station. In these instances, the Commission reasoned that the ad agency may be in a position to favor the commonly-owned station as against competing stations in the placement of advertising. In the past, hearings were held to determine whether such cross-interests implicated the policy.[8]

2. Development of the Cross-Interest Policy

9. The cross-interest policy has evolved almost entirely through case-by-case adjudication. The cross-interest policy was developed in the 1940's as a supplement to the "duopoly" rule, which then prohibited the common ownership, operation, or control of two stations in the same broadcast service covering substantially the same area.[9] At that time, either actual working control or ownership of fifty percent or more of the stock of the licensee were necessary to meet the "ownership, operation or control" requirement of the "duopoly" rule.[10] This phrase, therefore, did not

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[3] As indicated above, our inquiry also included examination of our cross-interest policy as it relates to joint ventures, key employee relationships, and nonattributable equity interests. In order to develop a fuller record, however, we are issuing a separate notice requesting additional comment on these issues.

[4] In addition to determining what constitutes a "meaningful" cross-interest, it is also necessary to ascertain when media outlets serve substantially the same area. Generally, the policy applies to stations or media outlets located in the same community or substantially in the same market. *See, e.g., Farmville Broadcasting Co.*, 47 FCC 2d 463, 464 (1974); *Guy S. Erway*, 90 FCC 2d 750, 752 (Rev. Bd. 1980). The cross-interest policy has not been applied, however, in situations that merely involve a minimal overlap of the 1 mV/m contours of the stations because such stations are not considered to be in the same market. *See, e.g., United Community Enterprises, Inc.*, 37 FCC 2d 953 (Rev. Bd. 1972).

[5] Consultants, as distinguished from key employees, usually involve relationships with the licensee that are limited in duration and scope and generally confined to providing advice, which can either be accepted or rejected by the licensee. In general, consultants are not considered, and hence do not serve, as "employees" of the licensee but rather as independent contractors who are hired for their expertise in one or a number of areas. For example, a consultant may be hired to prepare audience surveys and, based on these surveys, report findings and recommend a course, of action. Thus, while consultants may be engaged by licensees to make findings and recommendations regarding aspects of a station's management, operations or direction, they would not have the final say as to whether the recommendations should be implemented. Rather, such matters would usually be undertaken by officers or directors of the licensee.

[6] *See, e.g., Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973); *Guy S. Erway*, 90 FCC 2d at 750.

[7] *WCVL, Inc.*, 55 FCC 2d 879 (1975); *Station WWSM*, 31 FCC 2d 584 (1971).

[8] *Eastern Broadcasting Corp.*, 30 FCC 2d 745 (Rev. Bd. 1971) (specific allegations of fact were sufficient to raise questions as to whether applicant's interest in an advertising agency and proposed broadcast station serving the same area were contrary to the public interest). *Cf. Atlantic Broadcasting Co. (WUST)*, 5 FCC 2d 717 (1966) (cross-interest issue not warranted because of absence of specific allegations of fact that the interest would be contrary to the public interest).

[9] The "duopoly" rule currently prohibits the common ownership, operation, or control of two commercial broadcast stations in the same broadcast service which serve the same local area. It accomplishes this goal by prohibiting the overlap of the 3.16 mV/m contours of commonly-owned FM stations, the 5 mV/m contours of commonly-owned AM stations, or the Grade B contours of commonly-owned television stations. *See* 47 CFR 73.3555(a) (1986). The "duopoly" rule, as well as the one-to-a-market rule (47 CFR 73.3555(b) (1987)), *see infra* note 19, have recently been reexamined in a separate proceeding. *See Amendment of § 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, ___ FCC Rcd ___ (1988) *(First Report and Order* in MM Docket No. 87-7, adopted October 27, 1988) (Radio Duopoly Rule). *Amendment of § 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, ___ FCC Rcd ___ (1988) (*Second Report and Order* in MM Docket No. 87-7, adopted December 12, 1988) (One-to-a-Market-rule).

[10] *Rules Governing Standard and High Frequency Broadcast Stations*, 5 Fed. Reg. 2,382, 2,384 (1940) (FM and Television Duopoly); *Rules Governing Standard and High Frequency Broadcast Stations*, 8 Fed. Reg. 16,065 (1943) (AM Duopoly).

encompass minority stock interests or positional interests such as being an officer, a director or a manager.[11] Thus, situations in which the owner of one station obtained an interest in another station in the same area through a position as an officer, director, manager or minority stockholder were not prohibited by the "duopoly" rule then in effect. Even though these cross-interests were not covered by the "duopoly" rule, they were perceived to create the same kind of anticompetitive concerns addressed by the rule. To address these concerns, the Commission applied a policy which went beyond the scope of the "duopoly" rule by limiting "cross-interests" in more than one broadcast service covering substantially the same area.

10. One of the earliest cases where this new policy was applied involved an entity which had a controlling interest in one television station and a minority stock interest at another television station in the same community.[12] In a similar vein, this policy was invoked by the Commission where principals proposed to be officers or directors of competing stations in the same market.[13] In both instances, the Commission noted that the underlying purpose served was to promote and maintain full competition between stations located in the same city.[14] Further, the Commission indicated that prevention, not correction, of anticompetitive practices was the goal sought. In subsequent decisions, the Commission expanded the purpose underlying the cross-interest policy beyond its original intent by stating that it was designed to restrict not only those relationships having the potential to threaten economic competition but also those having the potential to lessen diversity of viewpoint.[15]

11. In an effort to promote the dual goals of competition and diversity, the cross-interest policy was invoked, in 1969, to prohibit a national or regional sales representative company that was wholly or partially owned by a licensee of a broadcast station from representing and soliciting advertising for competing stations in the same service in the same area.[16] This policy known as the *Golden West* policy, was based upon the concern that such a "sales rep" could impair competition by colluding or price fixing in the sale of advertising time, or placing the station it did not own at a competitive disadvantage. The Commission also expressed concern that this type of relationship was antithetical to the promotion of diversity of viewpoint. In 1981, the Commission instituted a rulemaking proceeding in which it questioned the regulatory wisdom underlying the *Golden West* policy. Finding that limiting these types of relationships did not appear necessary to further the goals of promoting diversity of viewpoint or economic competition, the Commission eliminated the policy.[17] The Commission concluded that the operation of market forces and application of the antitrust laws would be adequate to deter anticompetitive practices that the policy sought to address.

12. Although the cross-interest policy was originally developed as an intra-service supplement to the duopoly rule, it was subsequently extended to the Commission's other local ownership rules,[18] including the broadcast one-to-a-market rule,[19] and the broadcast/newspaper [20] and cable/television cross-ownership rules.[21] Subsequent case-by-case adjudications, under the cross-interest policy, have resulted in creation of additional restraints beyond those expressly prohibited by the local ownership rules.[22]

13. At the time the policy developed, and for much of its history, the attribution rules were narrow, leaving many relationships outside their purview.[23] Under the former rules only the duopoly provisions were in effect. Thus, only the cross-interest policy prevented an owner of one station from holding a position as an officer, director, manager, or minority stockholder in a competitor. In 1953, the attribution rules were revised, as they applied to the national ownership limit, to include all minority interests, partners, and officers and directors.[24] Recently, the attribution rules were further modified to exempt from their scope holders of less than five percent of the voting stock of the licensee and limited partners.[25] In addition, relief from attribution was provided to certain officers and directors whose duties are unrelated to broadcast operations. Thus, under the revised attribution rules, ownership of as little as five percent of the voting stock of a broadcasting station is treated

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[11] *See e.g., Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398 (D.C. Cir. 1968).

[12] *See Minnesota Broadcasting Corp.*, 13 FCC 672 (1949). *See also Macon Broadcasting Co.*, 10 FCC 444 (1945), in which the Commission conditioned its grant of a construction permit for a new AM station upon the applicant's two majority shareholders divesting themselves of "any connection" with a competing AM station in the same community.

[13] *Shenandoah Life Insurance Co.*, 19 RR 1 (1959). The cross-interests addressed in both *Minnesota Broadcasting* and *Shenandoah Life Insurance* are now prohibited by our local ownership rules.

[14] *Id.* at 2.

[15] *Compare Minnesota Broadcasting Corp.*, 13 FCC at 672 (singular purpose of economic competition) *with United Community Enterprises, Inc.*, 37 FCC 2d at 953 (dual purpose of economic competition and diversity of viewpoint).

[16] *Golden West Broadcasters*, 16 FCC 2d 918 (1969).

[17] *Golden West Policy*, 87 FCC 2d 668 (1981) (Report and Order in BC Docket No. 80-438).

[18] These rules, described below, including the duopoly rule, will be collectively referred to hereinafter as "the local ownership rules."

[19] *See, e.g., Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *rev. denied*, FCC 83-235 (released May 18, 1983), *affirmed sub nom. Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) (radio-television cross-interest case). Unlike the "duopoly" rule, the "one-to-a-market" rule restricts common ownership between commercial stations in different broadcast services. In essence, it restricts a party to one AM-FM combination or one television station in a market. *See* 47 CFR 73.3555(b) (1986).

[20] The broadcast/newspaper cross-ownership rule prohibits common interests in a broadcast station and a daily newspaper if the broadcast station's relevant service contour would encompass the entire community in which such newspaper is published. *See* 47 CFR 73.3555(c) (1986). *See Wisconsin Television, Ltd.*, 59 RR 2d 193 (1985) (television-newspaper cross-interest case). Although recent appropriations legislation circumscribes Commission authority in the area of newspaper cross-ownership, the legislation is inapplicable to the non-attributable relationships discussed herein. *See Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459 (signed October 1, 1988).

[21] *News International, PLC*, 97 FCC 2d 349, 367-71 (1984) (cross-interests between cable television systems and television stations in same market). The cable/broadcast cross-ownership rule prohibits, *inter alia*, the common ownership of a cable television system and a television broadcast station whose predicted Grade B contour covers any portion of the service area of the cable television system. *See* 47 CFR 76.501(a)(2) (1986). This provision of the cable/broadcast cross-ownership rule was recently codified in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2785 (codified at 47 U.S.C. 553(a) (Supp. II 1984)).

[22] For example, even though the multiple ownership rules permit the common ownership of colocated commercial AM and FM stations, the cross-interest policy has been invoked where cross-interests exist between separately controlled AM and FM stations in the same market. *See, e.g., Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973).

[23] The attribution provisions are contained in notes appended to the local ownership rules and, in essence, constitute the means by which the local ownership rules are implemented. Currently, they provide that, *inter alia*, partnership and direct ownership interests of voting stock of five percent or more will be cognizable as ownership interests significant enough to invoke the rule. They also provide that officers and directors of a licensee are positions which entail an amount of control great enough to require prohibition under the rule. 47 CFR 73.3555, Note 2(a) (1986). Exempted from attributable interest are passive investor interests under ten percent, holders of nonvoting stock, limited partners and certain officers and directors who certify that they are not materially involved in the management or operation of the licensee. 47 CFR 73.3555, Note 2(c), (f), (g)(1), and (h) (1986).

[24] *Amendment of the Multiple Ownership Rules*, 18 FCC 288 (1953).

[25] *See* 47 CFR 73.3555, 76.501, Notes 1, 2 (1986).

the same as majority ownership for purposes of applying the local ownership rules. As a result of these intervening revisions, the attribution rules now proscribe many of the interests that originally led to the adoption of the cross-interest policy.[26] For example, interests of officers and directors, and of minority stockholders that were originally prohibited by the cross-interest policy alone now come within the purview of Commission rules. Similarly, where voting ownership interests at or above five percent are involved, the rules, instead of the policy, now apply.

Summary of Comments

14. The majority of commenters agree with the initial views expressed in the *Notice* that the cross-interest policy no longer serves the public interest and should be eliminated.[27] Commenters supporting elimination of the policy, including NAB, Group W, Morgan Stanley, and Cox, cite the confusion and uncertainty created by the cross-interest policy as it relates to the multiple ownership rules. They express concern with the *ad hoc* application of the policy that fails to provide the kind of clear guidelines which the rules provide in this area. They maintain that the unpredictable application of the cross-interest policy may require evaluation whether a relationship permitted by the Commission's rules will be transformed into one which is prohibited pursuant to the cross-interest policy. Such a determination is difficult for a licensee to make in light of the varying case law, and any conclusion in this area often lacks certainty, thus impeding efficient decision making. Commenters further assert that the concerns underlying the policy are now addressed by either market forces or alternative rules and remedies. They argue that market pressure creates incentives for licensees to meet the needs and desires of the public rather than enter into relationships which would have a deleterious effect on competition and diversity. Audience reaction aside, commenters maintain that state and federal antitrust actions, as well as remedies based on contracts between parties, will discourage abuses and provide relief should any such abuse occur. Thus, they conclude that the public interest can be protected through means less restrictive and more certain than the cross-interest policy.

15. Specifically, these commenters argue that retention of the policy harms the public interest through delay and, in many instances, discouragement of investment in media properties. They assert that the risk of a cross-interest challenge always exists even if the relationship is structured to comport with Commission rules. They stress that this uncertainty hampers the ability of broadcasters to enter into relationships which may improve existing facilities or provide new facilities.

16. These commenters assert that the policy is no longer necessary to promote competition and viewpoint diversity due to the growth of the marketplace. They maintain that the proliferation of media outlets has attenuated the need for Commission-imposed restraints to ensure against anti-competitive abuses. They assert further that, in the event such abuses do occur, marketplace forces should correct the misconduct without Commission intervention. They argue that the cross-interest policy is an artificial and unnecessary impediment to the functioning of the marketplace which, due to competitive pressure, polices itself. They conclude that practices that are anticompetitive and reduce diversity are simply too difficult to coordinate due to the number of outlets and, therefore, will be ineffective. Further, stations must try to optimize performance in order to retain a share of the market, and that effort could be thwarted by an adverse reaction, from their audience or competitors, to any anticompetitive practices.

17. All commenters who support elimination of the cross-interest policy also argue that the local ownership rules, particularly the attribution provisions, include the majority of relationships sought to be addressed by the cross-interest policy. They point out that the local ownership rules and the attribution provisions are the product of extensive rulemaking proceedings designed to determine which interests create a level of concern sufficient to require proscription. They maintain that relationships falling outside of the rules are of minimal significance and have, therefore, been deemed nonattributable. They further assert that the cross-interest policy undercuts the purpose of these rulemakings by creating uncertainty where the rules strive for clarity. Commenters, therefore, conclude that the local ownership rules and the attribution provisions should stand as the Commission's determination of what relationships are inconsistent with the public interest. To the extent that the multiple ownership rules do not address all relationships contemplated by the policy, commenters reiterate their contention that alternative policing mechanisms exist in the marketplace which would discourage anticompetitive misconduct before it occurs, or provide a remedy in the event such abuse arises.

18. In opposing elimination of the cross-interest policy, CFA/TRAC argue that while streamlining the policy is desirable, elimination is unwarranted. They point to what they characterize as an overwhelming desire of the Commission to eliminate all multiple ownership rules as demonstrated by a recent rule making proceeding inquiring into the duopoly and one-to-a-market rules.[28] These commenters specifically take issue with the Commission's assertion, in the *Notice*, that revisions of the attribution rules have abrogated the need for the cross-interest policy in many instances. They argue that, in light of the duopoly rulemaking proceeding, it is disingenuous for the Commission to rely on the local ownership rules and the attribution provisions as support for eliminating the cross-interest policy. CFA/TRAC points out that the Commission has previously predicated repeal of one policy on the existence of another even as the latter faces repeal, and is following a similar course in the instant proceeding. They assert that repeal of the one-to-a-market rule[29] has already been accomplished through a liberal policy of granting stays of outstanding divestiture obligations. Thus, in conjunction with the Commission's lack of commitment to the ownership rules, repeal of the cross-interest policy will leave unchecked relationships which will lead to an increase in predatory practices resulting in a diminution of competition and a reduction in program options. They conclude that retention of the policy in a clarified form is, therefore, required to promote the public interest.

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[26] *See Attribution of Ownership Interests*, 97 FCC 2d at 999 n.4.

[27] Comments supporting elimination of the cross-interest policy were filed by the National Association of Broadcasters (NAB), Westinghouse Broadcasting, Inc. (Group W), Morgan Stanley & Co., Inc. (Morgan Stanley), and Cox Enterprises, Inc. (Cox). London Bridge Broadcasting, Inc. (London Bridge) filed comments which generally support elimination of the cross-interest policy except as it applies to key employee positions. Comments opposing elimination of the policy were filed jointly by the Consumer Federation of America and Telecommunications Research and Action Center (CFA/TRAC). Amherst Broadcasting, Inc. (ABI), in a reply to the comments of NAB, opposed elimination of the policy. To the extent these comments and reply comments address the subject of cross-interests involving key employees nonattributable equity interests or joint ventures, they will be incorporated by reference in the record of the new proceeding instituted today.

[28] *Amendment of § 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 2 FCC Rcd 1138 (1987) (*Notice of Proposed Rulemaking* in MM Docket No. 87-7).

[29] 47 CFR 73.3555(b) (1988).

19. Similarly, in reply comments, ABI maintains that the NAB relies too heavily on the attribution provisions as support for elimination of the cross-interest policy. ABI argues that the policy is designed to supplement the attribution provisions and provide the Commission with the means by which to promote, independent of other government agencies, arms-length competition. It further asserts that the NAB points to no instance in which the antitrust laws have addressed competitive abuses of the type encompassed by the cross-interest policy, thus failing to demonstrate that reliance on antitrust laws to cope with cross-interest concerns is either an effective deterrent or remedy. Arguing that the cross-interest policy is necessary to promote arms-length competition, ABI concludes that the Commission's rules, without more, are inadequate to protect against certain anticompetitive practices. ABI contends that where specific rules are applicable the cross-interest policy should not apply, but where there are gaps in the rules the cross-interest policy is required to stem abuses. ABI concludes that the policy should, therefore, be clarified and retained for use only on an "as needed" basis.

Discussion

20. Although, as indicated, there are aspects of this policy with respect to which further comment is being sought, the analysis that follows provides not only the justification for the changes we are adopting but establishes a background against which the remainder of the policy should eventually be judged. After a careful review of the record in this proceeding, we find that the public interest would be better served by reducing the scope of the cross-interest policy.[30] While this policy may have been at one time regarded as necessary to preserve competition and diversity of viewpoint, a number of different factors, including changes in the mass media marketplace, modifications of the attribution rules, and the adequacy of other legal remedies, convince us that a substantial part of this policy is not essential to maximize diversification of viewpoints to the public or to prevent undue concentration of economic power. Similarly, we are further convinced that, with respect to the interests addressed herein, the costs associated with continued case-by-case review outweigh the minimal public interest benefits that might be derived therefrom. As we explain below, we are confident that the public's access to a multiplicity of programs, information, and viewpoints will not be adversely affected as a result of our removal of these unnecessarily restrictive aspects of the policy. We are also equally confident that economic competition in mass media markets will not materially diminish, but, on the contrary, will continue to flourish to the overall benefit of the public.

Growth of Media Outlets

21. Since the implementation of the cross-interest policy, there has been rapid and widespread growth in mass media outlets. This growth has led to a significant increase in diversity nationwide and, of even more relevance to the instant proceeding, locally. While we do not rely upon these changes alone to reach the determinations herein, we do believe that, together with the other factors presented below, they undercut the notion that any single entity or individual is capable of manipulating or otherwise skewing competition in the marketplace of ideas or in the economic marketplace to the detriment of the public through the cross-interests mentioned above.

22. *National Growth.* To the extent that the logic behind the cross-interest policy was appropriate when first developed, the substantial growth in broadcast services across all markets, and the resulting increase in competition and diversity have reduced our concerns about the relationships addressed by the policy. For example, between 1950 and 1988, the total number of AM, FM, and TV broadcast stations authorized increased from 3,144 to 12,207 outlets, an increase of 288.3%.[31] Moreover, continued growth in the broadcast services can be expected as a result of recent Commission actions designed to foster growth of the industry.[32] In addition, there has been substantial expansion of alternate media services such as cable television, low power television (LPTV), and video cassette recorders (VCRs).[33] The potential for even further growth of media outlets exists from other developing technologies, including multipoint distribution systems (MDS) and satellite master antenna television systems (SMATVs).[34]

23. *Local Growth.* This growth of media outlets on a national level is paralleled by the growth of such outlets on the local level. In analyzing the need for the cross-interest policies, the number of outlets at the local level is more relevant than national growth because the policy was developed as a supplement to the local ownership rules. With this in mind, we note that a study submitted by the NAB [35] assessed the number of media outlets, including publications, within all television markets (Designated Market Areas). The study shows that there are a large number of media outlets and information sources in local markets of all sizes. For example, whereas the top 25 markets average about 72 radio and television stations per market, even the smallest television markets average

[30] As stated earlier, exempted from this policy statement shall be cross-interests involving certain joint ventures not otherwise addressed by the attribution rules, key employees, and certain nonattributable equity interests. Subject to the outcome of our *Further Notice of Inquiry/Notice of Proposed Rulemaking*, these cross-interests will continue to be subject to review.

[31] In 1950 there were 2,302 AM, 732 FM, and 109 television stations. *Sixteenth Annual Report of the Federal Communications Commission—FY 1950*, at 102. The 1988 station totals are based on Commission records as of October 31, 1988, which indicate that there are 4,923 AM, 5,4930 FM, and 1,791 television stations.

[32] *See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 FCC 2d 152 (1983) (*Report and Order* in BC Docket No. 80-90), *recon. denied*, 97 FCC 2d 279 (1984); *see also FM Broadcast Assignments*, 100 FCC 2d 1332, 1340-1379 (1985) (implementation of BC Docket No. 80-90) (the Commission established 689 new commercial FM allotments, the majority of which are in medium and small radio markets, and created three new classes of FM channels); *Preparation for an International Telecommunication Union Region 2 Administrative Radio Conference for the Planning of Broadcasting in the 1605-1705 kHz Band*, 50 FR 33,844 (1985) (First Report in Gen. Docket No. 84-467); *Preparation for an International Telecommunication Union Region 2 Administrative Radio Conference for the Planning of Broadcasting in the 1605-1705 kHz Band*, 51 FR 8,706 (1986) (Second Report in Gen. Docket No. 84-467) (international agreement provides for more spectrum use by AM radio service, potentially stimulating a significant number of new AM stations in the future).

[33] The number of cable television systems has increased from 300 in 1954 to about 8,000 in 1987. *See Twentieth Annual Report of the Federal Communications Commission—FY 1954*, at 90. Of all television households, 79% are passed by cable television systems. "Cable Stats," *CableVision*, Aug 31, 1987, at 88. Approximately 49.5% of all television households subscribe to cable. Nielsen Media Research estimate, quoted in "July Numbers," *Broadcasting*, Sept 21, 1987, at 78. Currently, there are about 410 licensed LPTV stations, and we estimate that this service may ultimately increase by an additional 4,000 stations. *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 143, 212 (1985). The percentage of television households with VCRs has increased from 19% in 1984 to 48.7% in 1987. See A.C. Nielsen estimate, quoted in Comments of NAB, "An Analysis of Media Outlets by Market" ("NAB Media Outlet Study"), Appendix B at 1 (June 1987), filed in MM Docket 87-7, which NAB incorporates by reference in comments filed in the current proceeding. *See* Comments of NAB at 8 n. 16 (July 1987) (MM Docket No. 87-154).

[34] As of June 30, 1986, MDS systems reached approximately 260,690 subscribers and estimates suggest the number of subscribers could reach more than nine million. Paul Kagan Associates, Inc., *Multicast Newsletter*, No. 322, November 10, 1986.

[35] NAB Media Outlet Study, *supra* note 33.

about 9 radio and television outlets per market.[36] In addition, our own analysis of Arbitron data by Metropolitan Statistical Area, the geographic market measure that may be more appropriate for radio reception, shows that while the top 25 radio markets average approximately 35 total AM and FM stations, even the smallest radio markets average approximately 10 commercial AM and FM stations. As these figures demonstrate, there are a significant number of commercial broadcast outlets throughout markets of all sizes. Further, if cable and VCRs are taken into account, listeners and viewers have even more sources of programs. Cable penetration actually increases as the size of television markets decreases,[37] and VCR penetration appears to be relatively constant across market sizes.[38] This multitude of media sources provides audiences with a wide diversity of choices, and also encourages broadcasters to provide service in the public interest.

24. We believe the competitive and diverse market which has developed since the initial implementation of the cross-interest policy substantially attenuates the need for our regulatory oversight of the interests at issue here to promote diversity and economic competition. As suggested by Cox, market conditions have reduced diversity concerns because stations are under strong market pressure to maximize performance and typically do so through providing service desired by the public.[39] With many competing media outlets available to the public, consumers can easily switch from one station to another if the first station's programs do not suit their tastes. Hence, stations have strong incentives to take into account the tastes and needs of viewers or listeners. Moreover, we recognized, in a previous proceeding eliminating regulations which encroached on licensee's business practices, that the increased number of stations and the increase in facilities give new importance to the uniqueness of a program format in an effort to attract advertising dollars.[40] This plethora of media services, and the resulting increase in the diversity of voices, therefore, strongly undercuts, in our view, any underlying need for restraints on consulting agreements, advertising agencies, and time brokerage arrangements to enhance diversity.

25. Moreover, the considerable choice which exists in the marketplace creates incentives for service providers to compete as vigorously as possible. Because of the many competing stations, they are more likely to be acutely aware of their audience's desires, and to attempt to meet those desires in order to compete successfully. For example, it is doubtful that consulting agreements would continue to be a legitimate concern, since the station entering into such an agreement must continue to remain responsive to the needs and interests of its audience or risk losing a portion of that audience. Thus, a station would likely disregard advice from a consultant which would only serve to protect the consultant's cross-interest and would not improve the outlet's competitive stance. If a station is unresponsive to its audience, its ratings will drop, and the resultant decrease in earnings will influence the station as much as, if not more than, Commission policy. Accordingly, we believe that the remarkable growth in the broadcast market, and the mass media marketplace generally, are important factors which suggest that continued review of interests such as these is not needed to achieve its original and primary goal of preserving diversity and competition among media voices in a given market.

Costs/Burdens Imposed By Operation Of The Cross-Interest Policy

26. We have also evaluated the costs and burdens imposed on the public by continuing to scrutinize consulting arrangements, advertising agency arrangements, and time brokerage agreements. We conclude that these aspects of the cross-interest policy impose costs and burdens on the public, as well as the Commission, which are difficult to justify given the reduced need for continued oversight of these relationships. As discussed below, these costs vary in character, but are alike in that they are not counterbalanced by any significant concomitant public interest benefits.

27. *The Policy Creates Uncertainty in Broadcasters and Other Media Entrepreneurs.* First, the *ad hoc* development of the policy has had the unintended effect of surrounding certain media transactions with a cloud of uncertainty. In the line of cases from which the policy has evolved the Commission has tried to determine whether particular relationships are "meaningful" and whether the media outlets at issue serve "substantially" the same area. Inconsistencies among these cases render difficult, if not impossible, a definitive determination by broadcasters, in advance of adjudication, as to whether an overlap in service areas is substantial enough or a relationship sufficiently meaningful to warrant regulatory intervention. For example, it is unclear, from an examination of the case law, how the cross-interest policy would be applied to time brokerage arrangements. In one case, the Commission permitted this type of relationship relying, in part, on the large number of radio stations in the market.[41] The Commission indicated that the small percentage of local stations programmed by the same licensee reduced concern that the time brokerage relationship would have a negative effect on the pubic interest. In another decision, the Commission found no violation of the cross-interest policy even though the time brokerage agreement resulted in one licensee programming the only two nighttime radio stations operating in the area during the brokered time period.[42]

28. As commenters assert, the inconsistency in the case law complicates the business planning of inherently complex media transactions. In spite of bona fide efforts to avoid any actual control in another media entity through the use of relationships which are clearly permitted by our cross-ownership rules, broadcasters may unintentionally run afoul of our policy.[43] Further, the fact that the cross-interest policy addresses potential rather than actual harm, together with the absence of a requirement that specific allegations of fact be demonstrated,[44] leave broadcasters particularly vulnerable to cross-interest challenges by competitors, even if groundless. It is, therefore, possible that parties might decide not to enter into a particular relationship merely because of the absence of clear-cut guidelines about whether the relationship would pass muster under the cross-interest policy.[45] In fact, Morgan Stanley asserts that there are numerous situations in which unobjectionable relationships will not be undertaken due to uncertainty regarding potential effects of the policy. In short, the policy places burdens on outside sources and on the Commission's resources which must be

[36] *Id.* at Figure 1.

[37] *Id.* at Figure III.

[38] *Id.* at Figure 6.

[39] Comments of Cox Enterprises at 10.

[40] *Second Report and Order in Re Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d 1500, 1517 (1986) (MM Docket No. 83-842).

[41] *Dual-Language TV/FM Programming in Puerto Rico*, 33 RR 2d 515 (1975).

[42] *Station WWSM*, 31 FCC 2d 584 (1971).

[43] *See* Comments of Morgan Stanley at 5-11.

[44] *Cleveland Television Corp.*, 732 F.2d at 970.

[45] *See* Comments of Morgan Stanley at 11-12.

borne by the public. Even if it is quite likely that the relationship would be approved, the affected parties have no way of reliably predicting that result in advance.[46] Past cases construing the policy afford some general guidance, but do not approach the specificity required for parties to determine, in advance, the propriety of the anticipated relationship. Thus, relationships which might benefit licensees and the public often may be avoided or aborted because of the policy's lack of clarity.[47]

29. *Limitations on Use of Qualified Personnel.* A second burden imposed by the cross-interest policy is that it hinders the ability of media outlets to attract and utilize, in consulting positions, qualified personnel with substantial broadcast experience. Barring contract provisions to the contrary, the absence of the cross-interest policy would permit experts to work at, or have interests in, multiple outlets. This would allow a station to attract and utilize personnel who are cognizant of the requirements of station management and the programming needs and unique characteristics of the particular market. In turn, this may enable a station to increase revenues or decrease costs. The increased profits obtained from such efficiencies could then be recycled into improved programming or facilities, providing more resources to stations suffering from declining revenues and ratings. As a result, a previously unpopular format or station, rather than succumbing to competition, may experience new life and viability in the market through the expertise of a consultant. Thus, the use of qualified personnel, now potentially barred by our cross-interest policy, may "rescue" the station, avoiding a diminution in local diversity and competition.

30. Some would argue that allowing the same person to be employed by two outlets will only contribute to a diminution of diversity and competition. To the contrary, permitting common ownership of media outlets, in certain circumstances, does not detract from diversity of viewpoint but may, in fact, enhance diversity and competition, providing benefits which inure to the public interest.[48] Given the trend towards counterprogramming and narrowcasting, it is reasonable to assume that this same result may occur by permitting broadcast stations to attract and utilize all qualified personnel. Consultants and similar professionals have a clear business incentive to provide advice and assistance that address the individual needs of their clients. Viewed in that light, a consultant will counsel each client station according to its particular situation. For this reason, a consultant serving different broadcasters in the same market might well give each client different advice regarding the type of programming that will effectively maximize its audience. The consultant might recommend, for example, a "top-forty" format to one radio station while advising another competing outlet to use an all news format, thereby stimulating diversity in the market. Furthermore, as a general proposition, freed of the cross-interest policy, broadcasters will have more flexibility to enter into relationships which may strengthen their viability and thus preserve existing levels of diversity of viewpoint and competition. We, therefore, believe it is in the public interest to permit the use of qualified personnel between competing media outlets.

31. *Imposition of Administrative Costs.* A third burden imposed by the continued application of the cross-interest policy results in administrative costs placed upon affected parties as well as the Commission. Such costs could be justified, but only if the review process involved was likely to lead to discovery of significant public interest concerns not otherwise remediable. Where a potential cross-interest issue is raised, the Commission must review the facts and allegations and determine if a *prima facie* case has been presented under the policy. Where the facts of a case are such that a cross-interest issue is designated for hearing, this process can be even longer and more complex. Often, an individual must go through administrative review in order to show that his proposed relationship does not violate the cross-interest policy.[49] This process is often time consuming and costly to the participants and the Commission. As we recognized in a prior proceeding, even one investigation culminating in a hearing significantly increases the resources required to administer our policies.[50] Further, in addition to the costs of investigation and enforcement, countless staff hours may be spent responding to inquiries relating to the applicability and interpretation of the policy.[51] In view of the lack of benefits involved in continued retention of the policy to address consultancies, advertising agency relationships and time brokerage agreements, the costs of applying the policy to these relationships are unjustifiably high. Given the questionable value of continued oversight of these relationships in the current competitive market, these cost may be reduced, and the public better served, by reliance on methods other than the policy to protect the public interest.

Adequacy of Existing Regulatory Prohibitions

32. We also believe that the need for the existing cross-interest policy has decreased with the adoption of new attribution provisions in the ownership rules that have superceded the cross-interest policy in several respects. Originally, the cross-interest policy was developed to fill the interstices left by the early ownership rules. Since then, we have amended the ownership rules[52] and adopted new attribution provisions[53] to encompass a greater number of relationships that previously were addressed only by the cross-interest policy. At the time the Commission adopted the new attribution rules, we stated that the duopoly and one-to-a-market rules would be applied, in lieu of the policy, "where voting ownership interests at or above the relevant benchmarks [five

[46] For example, although the Commission intended to apply the cross-interest policy to ownership interests in newspapers, *see Multiple Ownership*, 50 FCC 2d 1046, 1076–77 (1975), the Commission declined to do so when it approved a transfer which resulted in a nonattributable stock interest in the licensee of a television station being held by the owner of a daily newspaper which served the same market. *Evening Star Broadcasting Co.*, 68 FCC 2d 129 (1978). Although the Commission discussed the impact on competition in that case, the cross-interest policy was not invoked to ban the transaction.

[47] We recognize that vagueness is not fatal to the cross-interest policy. However, even if the policy were clarified in an effort to cure this uncertainty, our decision to delete the policy, for the reasons stated herein, would not be altered.

[48] *Amendment of § 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules,* ——— *FCC Record* ——— *(1988) (Second Report and Order* in MM Docket No. 87–7, adopted December 12, 1988) ¶¶ 51–64. *See also* P. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Quarterly J. Economics 194; FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation*, Volume I, at 365–66.

[49] *See, e.g., Metromedia Broadcasting Corporation*, 1 FCC Rcd 1022 (1986); *Wisconsin Television, Ltd.*, 102 FCC 2d at 1001.

[50] *Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d at 1509.

[51] ABI argues that these administrative burdens can be minimized by applying the policy only on an "as needed" basis where it is necessary to ensure free competition. This approach, however, would in no way preclude the need for case-by-case adjudication and might further complicate the process by requiring the Commission to make findings or establish guidelines as to when the policy should be invoked.

[52] *Amendment of the Multiple Ownership Rules*, 18 FCC 288 (1953).

[53] *See Attribution of Ownership Interests*, 97 FCC 2d at 1032–33.

percent stock ownership or officers or directors] are involved." [54] Thus, for example, cross directorships and substantial minority interests, which, until amendment of the ownership rules only fell within the purview of the policy, are now expressly covered by these rules.

33. In developing the local ownership rules, in the 1940s, and modifying the scope of our attribution provisions in the 1980s, the Commission identified those relationships which were of genuine concern because of their potential for abuse. We concluded that ownership of five percent or more of a station's stock or a position as an officer or director of a licensee were situations which would be deemed attributable for purposes of the multiple ownership rule.[55] Conversely, nonvoting stockholders and limited partners, we decided, do not take part in control and, therefore, would not be considered attributable for the purposes of the ownership rules.[56] These actions reflected our informed policy judgment on the types of relationships which would detrimentally affect diversity and competition and should, therefore, be restricted in order to promote the public interest.[57] As for CFA/TRAC's argument that our reliance on the multiple ownership rules is misplaced because we are proposing to repeal those rules,[58] we think it is sufficient to note that our recent decisions only modestly revised the duopoly and one-to-a-market rules.[59]

34. Further reducing our concern with respect to the need for the existing cross-interest policy are remedies in the form of federal and state antitrust laws, which may be available to reduce or deter potential anticompetitive consequences which the cross-interest policy is designed to curb. Antitrust analysis will take into account the market sizes and the number of competitors when determining if a violation has occurred. The potential for anti-competitive consequences perceived to be present in such relationship as consulting agreements, time brokerage arrangements, and relationships involving advertising agencies is reduced by the presence of these laws. The existence of such laws and remedies has supported modification or elimination of other rules and policies.[60] To the extent that they reduce anticompetitive effects, these remedies may also have an ancillary effect which, in conjunction with the substantial market growth, discussed *supra* paras. 21–25, reduces our concern over diversity. We believe that reliance on such alternative forms of deterrence will more effectively serve the public interest and preclude the need for a stringent policy to insure against anticompetitive consequences.[61]

35. Also, contractual arrangements into which the parties enter may provide further protection from anticompetitive activity. For example, the improper use of consultants or advertising agencies could conceivably give rise to a cause of action for breach of contract. Alternatively, such actions might give rise to a breach of a fiduciary duty imposed by either the contracting party or by the entity with which the cross-interest relationship exists. Further, a station that wishes to hire a consultant may insert into the terms of the contract a provision to require that any confidential business information obtained during the consultancy period not be disclosed to a rival station for which the consultant also worked.[62] Similarly, contracts can protect stations in situations in which an advertising agency with a cross-interest in one station in a market contracts to purchase time on competing stations. As part of the contractual relationship, a client may require the agency to spread advertising among competing stations in order to reach a larger audience or a broader demographic base. Thus, if the agency favors the station with which it shares a common interest by directing advertisers exclusively to that station, an action for breach of contract may lie. Notwithstanding the legal remedies available, the harm to the reputation of one who breaches these types of contractual requirements acts as a strong incentive to conduct themselves in a forthright manner. The existence of these alternative prohibitions further reduces our concern that permitting cross-interest relationships will result in harm to the public interest.

Summary

36. *Consulting Positions and Advertising Agencies.* The vast changes in the media marketplace reduce our concern that these interests will result in harm to the public interest. Current market conditions require consultants and advertising agencies to represent clients vigorously in order to remain competitive. Thus, it would not avail representatives to favor one client over any other. Our concern with the possible anticompetitive effects of these interests is further attenuated by the availability

[54] *Id.* at 999 n.4 (parenthetical statement added).

[55] *Id.* at 1025.

[56] *Id.* at 1020, 1022.

[57] At the time of modifying the attribution provisions, we stated that "[t]he attribution rules . . . are designed to measure what ownership interests will confer that amount of influence or control which must be limited." The scope of that proceeding, however, did not encompass the cross-interest policy, which addresses business relationships of broadcasters that do not rise to the level of attributable interests. Therefore, we did not revisit in that rulemaking whether the relationships covered by the cross-interest policy continued to confer sufficient influence or control to warrant limitations comparable to those governing attributable interests. Although we stated that the attribution rulemaking proceeding was not intended to affect the cross-interest policy and that the policy would continue to be applied except where, as a practical matter, it overlapped with specific provisions of the new attribution rules, *see id.* at 1000 n.4, it was not our intent to foreclose reexamination of the continued validity and effectiveness of the cross-interest policy. We note that any relationship covered by the cross-interest policy that is deemed to pose a serious threat to viewpoint diversity or competition, should be treated, if possible, as an attributable interest under the local ownership rules rather than subjecting it to *ad hoc* review as is our current practice. As noted previously, we are inviting further comment with respect to the appropriate regulatory treatment of key employees and certain joint ventures and nonattributable equity interests in a separate proceeding. With respect to nonattributable equity interests and joint ventures, however, if we decide in our separate proceeding that they require continued oversight, it may not be possible to incorporate them in the ownership rules. The multiplicity of possible relationships makes it difficult to forecast definitively all the relationships which threaten diversity or competition. Thus, should we decide at the conclusion of our separate proceeding that these interests continue to warrant Commission scrutiny, our current *ad hoc* review may be necessary for such interests. We would nonetheless like to develop, if possible, any guidelines that might identify, at least in general terms, those nonattributable equity and other interests that require continued oversight to minimize uncertainty caused by continued case-by-case review.

[58] *See Amendment of § 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules,* 2 FCC Rcd 1138 (1988) (*Notice of Proposed Rulemaking* in MM Docket No. 87–7).

[59] *See Amendment of § 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules,* ——— FCC Rcd ——— (1988) (*First Report and Order* in MM Docket No. 87–7, adopted October 27, 1988) (Radio Duopoly Rule); *Amendment of § 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules,* ——— FCC Rcd ——— (1988) (*Second Report and Order* in MM Docket No. 87–7, adopted December 12, 1988) (One-to-a-Market-Rule). These decisions were adopted concurrent with, or shortly after, the Commission adopted the instant *Policy Statement,* but prior to its release.

[60] *See, e.g., Elimination of Unnecessary Broadcast Regulation,* 59 RR 2d at 1500; *Golden West Policy,* 87 FCC 2d at 668.

[61] The fact that broadcasters are subject to Federal licensing and regulation, of course, does not immunize them from antitrust oversight. In this regard, we note that, in addition to possible governmental enforcement actions in this area, the private parties injured by Federal antitrust law violations are entitled to bring a private action for treble damages against the defendant. Clayton Act, ch 323, Section 4, 38 Stat. 731 (1914) (15 U.S.C. 15 (1982)).

[62] In fact, it is within the discretion of the licensee, prior to retaining a consultant, to require disclosure of the consultant's other media interests, permitting the licensee to make an informed judgment regarding possible conflicts of interest.

of alternative methods to prevent and remedy abuses. Specifically, contract provisions can create enhanced duties of care, confidentiality requirements, or affirmative obligations in the method of conducting business. These agreements can protect the rights of the parties as well as deter anticompetitive conduct. In the event of abuse, less speculative remedies are available in the form of federal and state antitrust laws or, if the relationship is contractual, an action for breach. These alternatives serve both deterrent and remedial purposes and will address actual abuses, should they occur, rather than circumscribe potentially beneficial relationships in an effort to prevent speculative abuses.

37. *Time Brokerage Arrangements.* The substantial increase in media outlets, and the corresponding increase in diversity and competition, since the implementation of the cross-interest policy, reduces the need to prohibit time brokerage arrangements to protect the public interest. Competitive conditions require a station that decides to broker its time to another to remain alert to the needs of its audience or risk losing some of that audience to a competitor, with a resultant decrease in ratings and revenue. Thus, the amount of choice available to listeners and viewers insures that competition will be vigorous in order for a station to retain its share of the audience. Should an anticompetitive arrangement occur, the antitrust laws are equally applicable to remedy this situation as they are to remedy abuse of relationships involving consulting positions and advertising agencies. Moreover, since a licensee entering into a time brokerage arrangement must continue to maintain control over its programming, the fact that some of its programming may be provided by another station in the market does not raise the same viewpoint diversity questions that may be raised if stations in the market were under common ownership or shared key employees.

38. Our decision to narrow the scope of the cross-interest policy is further based on the fact that revisions to the attribution rules now directly address a number of interests previously limited only by the policy. Moreover, our action here will reduce the number of *ad hoc* determinations required, thus making it easier for broadcasters and others to determine when a relationship will be circumscribed. This will, in turn, reduce the chilling effect on potentially beneficial relationships because of the lack of specificity on which to base a determination whether the relationship will ultimately be permitted.

39. In our view, wherever feasible it is more efficient and effective to confront whatever cross-interest problems arise by applying the various remedies (*e.g.*, breach of contract and federal and state antitrust provisions) which are designed to discourage activities that may be inimical to the welfare of the public. Our present policy ignores the fact that every cross-interest covered by the policy is not certain to harm the public; in fact, we conclude that some might be beneficial. We will thus allow parties affected by particular cross-interests and, as to antitrust issues, the Justice Department and the Federal Trade Commission, to identify and take appropriate action as those cross-interests emerge.

40. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval of the Office of Management and Budget as prescribed by the Act.

41. Accordingly, *it is ordered*, That the cross-interest policy, except as applied to joint ventures, key employee relationships, and nonattributable equity interests as discussed herein, *is eliminated* effective *April 6, 1989.*

42. Authority for the policy decisions herein is contained in sections 4(i) and 303 of the Communications Act of 1934, as amended.

43. For further information on this proceeding contact Douglas Minster, Mass Media Bureau, (202) 632-7792.

[FR Doc. 89-5494 Filed 3-8-89; 8:45 am]
BILLING CODE 6712-01-M

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47 CFR Part 80

[PR Docket No. 87-491, FCC 89-48]

Amendment of the Maritime Services Rules Concerning the Use of Digital Selective Calling (DSC) Equipment

AGENCY: Federal Communications Commission.

ACTION: Final rules.

SUMMARY: These amended rules provide for modified DSC equipment characteristics and for the use of a shipboard sensor-activated VHF alarm system for moored vessels using DSC technology. New international DSC equipment standards and the capability of VHF DSC equipment to accommodate a safety alarm system have created a need for this action. The amended rules will better serve the communications interests of the maritime community and tend to encourage early implementation of the DSC system.

EFFECTIVE DATE: April 14, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Robert E. Mickley, Federal Communications Commission, Private Radio Bureau, Washington, DC 20554, (202) 632-7175.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* in PR Docket No. 87-491 adopted February 10, 1989 and released February 28, 1989. The full text of the Commission's decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Summary of Report and Order

1. Digital selective calling (DSC) is a signalling system that can be used to establish contact with a station or group of stations in the maritime radio services. DSC provides an improvement over the old method of establishing radio contact which required a ship operator to (1) be on duty, and (2) be monitoring for a call. The DSC system, therefore, promotes additional safety and more efficient use of the spectrum. DSC will eventually be an integral part of the Global Maritime Distress and Safety System (GMDSS) planned for implementation in the 1990's.

2. In 1985 the Commission amended its maritime services rules to provide for the optional use of DSC equipment. These rules were based on the then effective International Radio Consultative Committee (CCIR) Recommendation 493-2 which was developed primarily for large, ocean-going ships. In 1986 CCIR revised its recommendation in a document entitled "Digital Selective Calling System for Use in the Maritime Mobile Service" (CCIR Recommendation 493, Dubrovnik, 1986). This Recommendation provided for three levels of DSC equipment. The first level would be used by compulsorily fitted vessels that are required to have a sophisticated radio installation for safety purposes. Two simpler versions of DSC equipment specifications were also developed to fill the needs of the smaller vessel operators.

3. The rules were amended to remove the minimum operational characteristics

from our current rules to permit all classes of DSC equipment to be used on U.S. vessels in conformance with CCIR Recommendation 493, Dubrovnik, 1986. The three classes of DSC equipment contained in the revised CCIR Recommendation are:

- Class A—DSC equipment intended for large, ocean-going ships to meet the GMDSS carriage requirements.
- Class B—DSC equipment applicable to small ships equipped only with VHF and/or MF two-way communications equipment.
- Class C—DSC equipment intended as an add-on for VHF communications equipment to provide DSC alerting, transmitting ship identification only.

4. The rules authorize the use of shipboard sensor-activated VHF alarm systems using DSC technology to transmit brief digital messages that relate to the condition or safety of vessels while moored. Such systems utilize sensors capable of detecting fire, explosion, grounding, listing, sinking and the like. In the past, the use of marine frequencies for safety purposes on board unoccupied ships has been barred because of rule provisions that prohibit unattended transmitter operations and the lack of a frequency that could be dedicated to this purpose. However, Article 60 of the International Radio Regulations authorizes the use of marine frequencies in the port operations service for communications related to the safety of ships. Channel 70 (156.525 MHz) is already dedicated to VHF DSC and the rules are amended to use it for this purpose. The transmission of a VHF DSC message would take approximately 0.5 second and if a call is not acknowleged by the addressed coast station, the call sequence from the ship station is to be repeated after five seconds. Any subsequent repetitions of the call sequence cannot be made until at least fifteen minutes have elapsed and the number of repetitions of sensor-activated DSC transmissions are limited to no more than three after the fifteen minute waiting period.

Ordering Clauses

5. The Commission hereby certifies pursuant to section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) that this rulemaking proceeding will not have a significant economic impact on a substantial number of small entities. The new rules replace the minimum operational characteristics contained in our current Rules.

No U.S. manufacturer is known to be manufacturing DSC equipment under the rules proposed to be deleted in this proceeding. No new equipment carriage requirements are imposed.

6. The Rule amendments adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public. See 5 CFR 1320.7(c)(2).

7. *It Is Ordered* that Part 80 of our Rules *is amended* as shown at the end of this document. The authority for this action is contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r).

8. *It Is Further Ordered* that these rule amendments shall become effective April 14, 1989.

9. *It Is Further Ordered* that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

10. *It Is Further Ordered* that this proceeding *is Terminated.*

List of Subjects in 47 CFR Part 80

Coast stations, Ship stations, Marine safety, Radio communications equipment.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

Amended Rules

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 80—STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.153 is amended by revising paragraph (a) to read as follows:

§ 80.153 Coast station operator requirements.

(a) Except as provided in § 80.179, operation of a coast station transmitter must be performed by a person holding a commercial radio operator license of the required class, who is on duty at the control point of the station. The operator is responsible for the proper operation of the station.

* * * * *

3. Section 80.155 is revised to read as follows:

§ 80.155 Ship station operator requirements.

Except as provided in §§ 80.177 and 80.179, operation of transmitters of any ship station must be performed by a person holding a commercial radio operator license or permit of the class required below. The operator is responsible for the proper operation of the station.

4. A new § 80.179 is added to read as follows:

§ 80.179 Unattended operation.

The following unattended transmitter operations are authorized:

(a) EPIRB operations when emergency conditions preclude attendance of the EPIRB transmitter by a person.

(b) Automatic use of a transmitter during narrow band-direct printing (NB–DP) operations in accordance with CCIR Recommendation 476 or 625.

(c) Automatic use of a transmitter during digital selective calling (DSC) operations in accordance with CCIR Recommendations 493 and 541.

(d) Automatic use of transmitter when operating as part of the Automated Maritime Telecommunications System (AMTS) or an automated multi-station system for which provisions are contained in this Part.

(e) Automatic use of a VHF transmitter to send brief digital communications relating to the condition or safety of vessels while moored when all of the following conditions are met:

(1) The equipment must be using DSC in accordance with CCIR Recommendations 493 and 541 as modified by this section.

(2) Sensors must automatically activate the transmitter only under one or more of the following conditions:

(i) Fire, explosion;
(ii) Flooding;
(iii) Collision;
(iv) Grounding;
(v) Listing, in danger of capsizing;
(vi) Sinking;
(vii) Disabled and adrift; and
(viii) Undesignated condition related to ship safety.

(3) The "ROUTINE" DSC category must be used.

(4) Communications must be selectively addressed to an individual station.

(5) Transmitter output power must not exceed one watt.

(6) The call must employ a fixed format and must be in conformity with Recommendation 493 as follows:

Format specifier: Individual call—symbol 120 sent twice.

Address: 9 digit maritime mobile service identity of called station.

Category: Routine—symbol 100.

Self-identification: 9 digit ship station identity.

Message 1: Telecommand symbol 126 sent twice.

Message 2: Telecommand symbol 126 sent 6 times.

End of sequence: Symbol 127.

Error-check character: Check sum.

(7) Such transmissions are permitted only on channel 70 and the transmitter must be inhibited automatically whenever there is another call in progress on Channel 70.

(8) The call sequence for any one alarm must not be repeated until after an interval of at least five seconds. Further repetition is permitted only after intervals of at least fifteen minutes each. Repetitions following fifteen-minute waiting intervals must not exceed three.

5. Section 80.225 is revised to read as follows:

§ 80.225 Requirements for digital selective calling (DSC) equipment.

This section specifies the requirements for optional DSC equipment installed in ship and coast stations. Reference to any CCIR Recommendation in this section is to the most recent CCIR approved Recommendation that does not prevent the use of existing equipment.

(a) DSC equipment installed in coast and ship stations must be designed in accordance with CCIR Recommendation 493. Classes A, B, and Class C DSC equipment must not be used with the sensors referred to in § 80.179(e)(2).

(b) Manufacturers of Class C DSC equipment to be used on United States vessels must affix a clearly discernible permanent plate or label visible from the operating controls containing the following:

Warning. This equipment is designed to generate a digital maritime distress and safety signal to facilitate search and rescue. To be effective as a safety device, this equipment must be used only within communication range of a shore-based VHF marine channel 70 distress and safety watch system. The range of the signal may vary but under normal conditions should be approximately 20 nautical miles.

(c) Selective calling equipment, other than that designed in accordance with CCIR Recommendation 493, is authorized as follows:

(1) Equipment used in conjunction with the Automated Maritime Telecommunications System (AMTS) in the band 216–220 MHz,

(2) Equipment used to perform a selective calling function during narrow-band direct-printing (NB–DP) operations in accordance with CCIR Recommendation 476 or 625, and

(3) Equipment functioning under the provisions of § 80.207(a) until at least three years after mandatory DSC requirements become effective.

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DEPARTMENT OF TRANSPORTATION

49 CFR Parts 1 and 7

[OST Docket No. 1; Amdt. 1–228; Docket No. 43466; Amdt. 7–1]

Organization and Delegation of Powers and Duties

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This delegation transfers Departmental responsibility for functions related to the Freedom of Information Act from the Office of Public Information, Office of the Assistant Secretary for Public Affairs to the Office of the General Counsel. It also makes technical corrections to 49 CFR Part 7 to reflect the change in delegations.

EFFECTIVE DATE: February 27, 1989.

FOR FURTHER INFORMATION CONTACT: Samuel E. Whitehorn, Office of the General Counsel, C–50, (202) 366–9307, Department of Transportation, 400 Seventh Street, SW., Washington, DC, 20590.

SUPPLEMENTARY INFORMATION: The Departmental responsibility for ensuring uniform implementation of the Freedom of Information Act (FOIA) (5 U.S.C. 552) and responding to requests for records of the Office of the Secretary, including the Office of the Inspector General, currently is exercised by the Office of the Assistant Secretary of Public Affairs under authority delegated by the Secretary to that office (49 CFR 1.63 (a)). The Office of the General Counsel currently has the responsibility for reviewing and taking final action on applications for reconsideration of initial decisions not to disclose unclassified records of the Office of the Secretary under FOIA (49 CFR 1.57(m)). The General Counsel, or his or her designee, also reviews any final determination by the head of an operating element within the Department not to disclose a record (or a denial of a request for a fee waiver or reduction) under 49 CFR Part 7 (53 FR 30265, August 11, 1988). Appendix A to Part 7 also sets out, among other things, where documents may be inspected (paragraph 2), where requests for records should be submitted (paragraph 4), and the official that has authority to make determinations on requests (paragraph 5).

By this delegation, the Associate General Counsel, or his or her designee, will now be responsible for the functions currently exercised by the Office of the Assistant Secretary for Public Affairs. As a result of this change, all FOIA requests will be handled within the Office of the General Counsel. The requests should be submitted to the Associate General Counsel. In the event the position of Associate General Counsel is vacant, and no designation by the Associate General Counsel has been made, the General Counsel shall designate another person to make the determination on requests.

The review functions will continue to be exercised by the General Counsel, or his or her designee. This process will maintain a two-tiered approach to FOIA issues. The review procedures set forth in 49 CFR Part 7 generally remain intact. However, a technical correction to Part 7 is needed. Section 7.1(d) will be changed to reflect the reorganization of function. Appendix A to Part 7 will be amended as follows:

—Paragraph 2 explains, among other things, that document inspection facilities are maintained by the Office of the Assistant Secretary for Public Affairs. This facility remains unchanged, but the office designation will be changed to Office of the General Counsel.

—Paragraph 4 will be changed to the Associate General Counsel.

—Paragraph 5 will be changed to the Associate General Counsel, or his or her designee.

Since this amendment relates to Departmental management, procedures, and practice, notice and comment on it are unnecessary and it may be made effective in fewer than thirty days after publication in the **Federal Register**.

List of Subjects

49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).