Dated: September 29, 1994.

Julia M. Stasch,

Acting Administrator of General Services.

[FR Doc. 94–29957 Filed 12–5–94; 8:45 am]

BILLING CODE 6820–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Public Health Service

42 CFR Part 493

[HSQ–217–FC]

RIN 0938–AG86

Medicare, Medicaid and CLIA Programs; Extension of Certain Effective Dates for Clinical Laboratory Requirements and Personnel Requirements for Cytologists

AGENCY: Health Care Financing Administration (HCFA) and Public Health Service (PHS), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule extends certain effective dates for clinical laboratory requirements in regulations published on February 28, 1992, which implemented provisions of the Clinical Laboratory Improvement Amendments of 1988 (CLIA) and announces our approval of a certifying organization for qualifying cytotechnologists. This rule extends the date by which an individual must enroll in an HCFA-approved cytology proficiency testing (PT) program and the date by which an individual with a doctoral degree must possess board certification to qualify as a director of a laboratory that performs high complexity testing. In addition, we are extending the phase-in of the quality control requirements applicable to unmodified, moderate complexity tests cleared for commercial distribution by the Food and Drug Administration (FDA). We are extending the date to meet applicable CLIA QC requirements for laboratories using commercial, nonmodified tests to fulfill certain quality control (QC) requirements.

These effective date extensions do not reduce the current requirements for quality test performance. The date extensions are necessary due to the limited number and scope of currently operating cytology PT programs, resource constraints that have prevented commencement of the substantial number of quality control reviews, and inability of many laboratory directors to complete certification requirements within the time period originally specified.

DATES: These regulations are effective on December 6, 1994. Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on February 6, 1996.

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HSQ–217–FC, P.O. Box 26676, Baltimore, MD 21207.

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses: Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, MD 21207.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HSQ–217–FC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

FOR FURTHER INFORMATION CONTACT: Josephine A. Simmons (410) 597–5882.

SUPPLEMENTARY INFORMATION:

I. Background

On February 28, 1992, we published in the **Federal Register** at 57 FR 7002, final regulations with an opportunity for public comment that set forth requirements for laboratories that are subject to CLIA.

These regulations established uniform requirements for all laboratories regardless of location, size or type. In developing the regulations, we included requirements that would ensure the quality of service and be in the best interest of the public health. We recognized that a rule of this scope required time for laboratories to understand and to implement the new requirements. Therefore, certain requirements were phased-in and given prospective effective dates. We also planned to address comments on the February 28 rule and make modifications, if necessary, in a successor final rule.

On January 6, 1994, we published a final regulation in the **Federal Register**, at 59 FR 682. This revision to the February 28, 1992 rule extended the time for individuals to meet the educational qualifications for a cytotechnologist by either completing a training program or being certified by an approved organization. These changes were made to prevent the loss of qualified personnel in the field of cytotechnology and to allow the Department the time necessary to recognize organizations that certify cytology personnel.

In the February 28, 1992 regulations, there are three prospectively set dates that need extensions to prevent disruption in implementation of the CLIA requirements. At § 493.855, Standard; Cytology: Gynecologic examinations, we required the laboratory, by January 1, 1994, to enroll each individual engaged in the examination of gynecologic preparations in a PT program approved by HCFA. At § 493.1202, Standard; Moderate or high complexity testing, or both: Effective from September 1, 1992, to September 1, 1994, we established quality control (QC) requirements for high complexity or moderate complexity tests including less stringent requirements for unmodified, moderate complexity testing cleared for commercial distribution by the FDA. At § 493.1203, Standard; Moderate or high complexity testing, or both: Effective beginning September 1, 1994, we established a mechanism for laboratories using commercial, non-modified tests to fulfill certain QC requirements by following manufacturer's instructions that have been reviewed and determined by the FDA to meet applicable CLIA QC requirements. At § 493.1443, Standard; Laboratory director qualifications, until September 1, 1994, an individual holding a doctoral degree may qualify with either (1) board certification, or (2) two years of laboratory training or experience, or both, and two years of experience directing or supervising high complexity testing. After September 1, 1994, all individuals qualifying with a doctoral degree must have board certification.

For each of these requirements, we allowed what we considered as adequate time for laboratories to enroll personnel in a HCFA-approved cytology PT program, for manufacturers to obtain a QC review from the FDA, and for individuals to obtain certifications, given our planned publication date of the final regulations. However, approximately 16,000 comments were received on the February 28 rule, which required reevaluation of numerous provisions.

As of January 1994, no cytology PT program had met the requirements for HCFA approval, we have not yet been able to implement the FDA review of QC instructions, and we do not anticipate that a final rule will be issued prior to the September 1994 date affecting the board certification requirement for an individual with a doctoral degree to qualify as a laboratory director. Therefore, we need to extend these prospectively set dates to allow time for laboratories and individuals to meet the CLIA requirements.

In the regulations published on February 28, 1992, we established a pathway at § 493.1483 that allows an individual to qualify as a cytotechnologist if she or he is certified in cytotechnology by an HHS-approved agency. In the preamble to this rule, we are announcing HHS approval of an agency to certify cytotechnologists.

In this rule we also address the comments we received in response to two major areas: Effective dates for implementation of the requirements mentioned above and approval of an agency to certify cytotechnologists. The comments on implementation effective dates focused on the need for phase-in periods, feasibility of achieving compliance with the requirements by the end of the phase-in periods, and alternatives to the phase-in periods. The comments on the cytology qualification requirements included recommendations that HHS approve an agency that certifies cytotechnologists.

II. Responses to Comments

A. Proficiency Testing of Individuals Who Examine Gynecological Preparations (§ 493.855)

Section 493.855 requires that a laboratory ensure that, as of January 1, 1994, each individual performing gynecologic cytology services is enrolled in a gynecologic cytology PT program approved by HCFA. A Request for Proposal was issued for a contractor to undertake procurement of glass slides necessary to operate the cytology PT program nationally. We received no responses. However, we did receive comments from the cytology societies and individuals indicating that the program was logistically and financially unworkable. The Centers for Disease Control and Prevention (CDC) cosponsored a cytology symposium in November 1993 to establish possible alternatives to providing a cytology PT program. In December 1993, the Clinical Laboratory Improvement Advisory Committee (CLIAC) established under § 493.2001 of our regulations recommended that legislative and regulatory changes be pursued to provide for an alternative program for cytology PT, including encouraging private or State-administered programs to meet current regulations. To date, only two cytology PT programs have applied for HCFA approval. The two programs are State-operated and enrollment capacity is limited.

Comment: One group of commenters believed that the PT requirements, as currently written, are impossible to implement. The commenters noted the limited availability of PT programs and believed that the timeframe for implementing cytology PT is unrealistic.

Response: We understand the commenters' concerns. Although a State program has been approved for calendar year 1995, it has not been possible to implement a national program within the timeframe specified in the regulations. Therefore, in this final rule, we are changing the effective date for individuals to enroll and participate in a HCFA-approved cytology PT program from January 1, 1994 to January 1, 1995. Enrollment by this date is required if an approved program is available in the State in which the individual is employed.

For individuals engaged in the examination of gynecologic preparations who are employed in a State in which an approved cytology PT program is available, cytology PT enrollment and participation is required beginning January 1, 1995. For individuals engaged in the examination of gynecologic preparations who are employed in a State in which a HCFA-approved cytology PT program is not available beginning January 1, 1995, enrollment and participation in cytology PT is required when a HCFA-approved program becomes available. We recognize that additional time is needed for development and approval of cytology PT programs that will apply nationwide. Presently, the major impediment in making cytology PT available on a national basis is the difficulty in obtaining a sufficient number of properly referenced glass slides. It has been suggested, and we agree, that programs using facsimiles of glass slides (for example, transparencies, computer images, etc.) should be considered for PT purposes. We plan to revise the regulations to allow approval of programs that employ testing media other than glass slides. The CDC is undertaking studies to evaluate alternative cytology PT programs. If alternative programs are feasible, we will ensure that such programs are comparable to glass side programs. Implementation of PT using alternative media will be phased-in to familiarize cytology personnel and evaluate the programs. During the phase-in, we will ensure that individuals are not penalized due to performance in an alternative program. We believe that this approach will meet the statutory mandate that PT be available nationwide to evaluate the performance of all cytology personnel.

B. Quality Control Requirements for Unmodified, Moderately Complex Tests (§§ 493.1202 and 493.1203)

Sections 493.1202 and 493.1203 provide for a 2-year phase-in period during which manufacturers could submit QC instructions relevant to their products to FDA for review and clearance. Under the regulations, laboratories would be in compliance with the QC provisions of part 493 subpart K by meeting less stringent QC requirements and following the manufacturer's instructions, as long as the laboratory has not modified the instrument, kit, or test system's procedure.

Comment: Of the approximately 16,000 letters of comment received in response to the February 28, 1992 regulations, nearly 300 were in reference to the general QC requirements of subpart K. Over 25 percent of these commenters were opposed to allowing a laboratory to meet the CLIA QC requirements by following the manufacturer's FDA-cleared QC instructions. The majority of commenters indicated that all laboratories should be subject to the same QC requirements. Less than two percent of the commenters agreed with the provision. Approximately two percent of the commenters expressed concern that a laboratory may be penalized if the FDA does not complete the assessment of a manufacturer's QC instructions prior to the end of the phase-in period.

Response: We acknowledge the commenters' concerns. Having encountered difficulties in commencing the review of manufacturers' QC instructions, we are extending the effective date of § 493.1203, which contains the quality control requirements for moderate or high complexity testing, or both, from September 1, 1994 to September 1, 1996. In addition, we are extending the September 1, 1994 sunset date until September 1, 1996 of § 493.1202, which contains the quality control standards for moderate or high complexity testing, or both.

C. Board Certification of a Laboratory Director With Doctoral Degree (§ 493.1443(b)(3))

Section 493.1443(b)(3) provides that a director of a laboratory performing high complexity testing who has an earned doctoral degree in a chemical, physical, biological or clinical laboratory science from an accredited institution must, as of September 1, 1994, be certified by a board recognized by HHS. The 2-year phase-in was designed to allow HHS additional time to review requests for approval of certification programs and to ensure that a laboratory director with a doctoral degree had sufficient time to successfully complete the requirements for board certification.

A number of commenters on the final rule suggested that board certification not be a mandatory requirement for currently employed individuals. In addition, CLIAC has suggested, and we are considering, development of alternative provisions to qualify currently employed individuals with a doctoral degree on the basis of laboratory training or experience, in lieu of requiring board certification. Furthermore, in at least one specialty, there is currently no board certification, but a program is being developed.

Comment: One commenter suggested that doctoral degree training and education were sufficient without requiring board certification to qualify as a laboratory director. One commenter agreed with requiring board certification.

Response: In reply to these comments and to the recommendations of CLIAC, we are allowing additional time to review the qualifications required to ensure that they are appropriate. We are extending the phase-in period in § 493.1443 from September 1, 1994, to September 1, 1996 to allow additional time for this evaluation.

Comment: One commenter suggested that the director be board certified in the specialty of testing that the laboratory performs.

Response: We recognize that, at this time, not all specialties have board certification programs. In at least one specialty, certification programs are being developed. To allow additional time for boards to request HHS approval, for us to review the requirements for appropriateness, and to ensure that laboratory directors can continue to meet the requirements as boards apply, we are extending the time period in § 493.1443 from September 1, 1994, to September 1, 1996.

D. Agency Approved by HHS To Certify Cytotechnologists (§ 493.1483(b)(2))

In the personnel requirements in § 493.1483(b)(2), an individual may qualify as a cytotechnologist if he or she is certified in cytotechnology by a certifying agency approved by HHS. In response to the regulations published February 28, 1992, numerous commenters suggested that the American Society of Clinical Pathologists (ASCP) be recognized by the Department since it is a national certifying agency for cytotechnologists in the United States. The ASCP applied for approval and provided materials in support of its request for recognition as a cytotechnologist certifying agency. The qualifications used by ASCP to qualify an individual as a cytotechnologist include both educational and training components that are similar to, or more stringent than, the current CLIA requirements for cytotechnologists. In addition, ASCP requires successful completion of a competency examination to measure skills in cytology. Since the ASCP's requirements for certifying individuals in cytotechnology meet the CLIA requirements, we are announcing that, effective on the date of publication of this rule, we have approved the ASCP as a certifying agency for cytotechnologists. Cytotechnologists certified by ASCP now meet the CLIA cytotechnologists personnel qualification requirements.

III. Waiver of Delayed Effective Date

As required by the Administrative Procedure Act, we generally provide for final rules to be effective 30 days after the date of publication unless we find good cause to waive the delay. We believe that these revisions are essential to the effective implementation of the CLIA program and should be implemented immediately. Delaying the effective date of this regulation would potentially disrupt public access to laboratory services and create unnecessary confusion among laboratories in understanding the standards they must meet. Accordingly, we find good cause to waive the delayed effective date as contrary to the public interest.

IV. Regulatory Impact Statement

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all laboratories are considered to be small entities. Individuals and States are not included in the definition of a small entity.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a final rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

This final rule extends the date by which an individual must enroll in an approved cytology proficiency testing program, the date by which an individual with a doctoral degree must obtain board certification to qualify as a director of a laboratory that performs high complexity testing, and the expiration date of the phase-in for quality control requirements for unmodified, moderate complexity testing cleared through the FDA 510(k) or PMA processes. Because controlling components of the regulations (for example, approved PT programs and approved board certification programs) are not yet fully in place, compliance with these existing regulations is unachievable for most laboratories and their personnel. Extending the phase-in periods will result in continuation of previously published requirements and will not result in changed costs, savings, burden or opportunities to manufacturers, laboratories, individuals administering tests, or patients receiving them.

This rule also announces the approval of ASCP as a certifying agency for cytotechnologists. The February 28, 1992 regulation added certification by an approved certifying agency as an optional method of qualifying as a cytotechnologist. The majority of those who commented on the cytotechnologist qualification requirements specified in the February 28, 1992 rule identified certification by ASCP as the preferred alternative method of qualifying and recommended that ASCP be approved by HHS as a certifying agency. The ASCP's certification requirements have been shown to meet or exceed CLIA requirements; therefore, the announcement of ASCP's approval should be well received by all affected entities.

We are not preparing an analysis for either the RFA or section 1102(b) of the Act since we have determined, and the Secretary certifies, that this final rule will not result in a significant economic impact on a substantial number of small entities and will not have a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Lists of Subjects in 42 CFR Part 493

Grant programs—health, Health facilities, Laboratories, Medicaid, Medicare, Reporting and recordkeeping requirements.

PART 493—LABORATORY REQUIREMENTS

Part 493 is amended as follows:

1. The authority citation for part 493 is revised to read as follows:

Authority: Sec. 353 of the Public Health Service Act, secs. 1102, 1861(e), the sentence following sections 1861(s)(14), 1861(s)(15), and 1861(s)(16) of the Social Security Act (42 U.S.C. 263a, 1302, 1395x(e), the sentence following 1395x(s)(14), 1395x(s)(15), and 1395x(s)(16).

§ 493.855 [Amended]

2. In § 493.855(a), "January 1, 1994." is revised to read "January 1, 1995, if available in the State in which he or she is employed."

3. Section 493.1202 is amended by revising the section heading to change the expiration date from September 1, 1994 to September 1, 1996 and reads as follows:

§ 493.1202 Standard; Moderate or high complexity testing, or both: Effective from September 1, 1992 to September 1, 1996.

5. In § 493.1203, the section heading is revised to change the effective date from September 1, 1994 to September 1, 1996 and read as follows:

§ 493.1203 Standard; Moderate or high complexity testing, or both: Effective beginning September 1, 1996.

§ 493.1443 [Amended]

6. Section § 493.1443 is amended as set forth below:

a. In § 493.1443(b)(3)(ii), "September 1, 1994" is revised to read "September 1, 1996".

b. In § 493.1443(b)(3)(ii)(C), "September 1, 1994," is revised to read "September 1, 1996,".

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: August 24, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: September 6, 1994.

Philip R. Lee,

Assistant Secretary for Health.

Dated: September 28, 1994.

Donna E. Shalala,

Secretary.

[FR Doc. 94-29914 Filed 12-5-94; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 7104

[AK-932-1430-01; AA-58374]

Partial Revocation of Executive Order Dated October 8, 1914, as Modified; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes an Executive order, as modified, insofar as it affects approximately 84 acres of public land withdrawn for the Bureau of Land Management's Powersite Reserve No. 460 at Salmon Creek, near Juneau. The land is no longer needed for the purpose for which it was withdrawn. This action also allows the conveyance of the land to the State of Alaska, if such land is otherwise available. Any land described herein that is not conveyed to the State is opened and will be subject to the terms and conditions of Public Land Order No. 5186, as amended, and any other withdrawal of record.

EFFECTIVE DATE: December 6, 1994.

FOR FURTHER INFORMATION CONTACT: Sue A. Wolf, BLM Alaska State Office, 222 W. 7th Avenue, No. 13, Anchorage, Alaska 99513-7599, 907-271-5477.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), and by Section 17(d)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1616(d)(1) (1988), it is ordered as follows:

1. The Executive Order dated October 8, 1914, as modified, which withdrew public land for the Bureau of Land Management's Powersite Reserve No. 460 in the Salmon Creek area, is hereby revoked insofar as it affects the following described land:

Copper River Meridian

T. 41 S., R. 67 E.,

Secs. 2, 3, 9, 10, 11, and 12, partly surveyed, and more particularly described as:

All lands within 1/2 mile of thet portion of the channel of Salmon Creek which lies between its point of discharge into Gastineau Channel about 3 miles northwest of Juneau, and a point 5 miles above said point of discharge; except such lands as are embraced in the joint Final Power Permit (Juneau 02879) granted to the Alaska-Gastineau Mining Company, under the Act of February 15, 1901 (31 Stat. 790), by the Secretary of Agriculture and the Secretary of the Interior on January 24, 1918, and lands within 50 feet of the marginal limits thereof; and except all lands within 100 feet of the center line of Salmon Creek from its mouth to the dam at Salmon Creek Reservoir, located and described in said permit. Excluded from the land described above is all land within the boundary of the Federal Energy Regulatory Commission Power Project No. 2307 (approximately 263 acres).

The area described, less the exclusion, contains approximately 84 acres.

2. The State of Alaska application for selection made under Section 6(b) of the Alaska Statehood Act of July 7, 1958, 48 U.S.C. note prec. 21 (1988), and under Section 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. 1635(e) (1988), becomes effective without further action by the State upon publication of this public land order in the **Federal Register**, if such land is otherwise available. Land not conveyed to the State is opened and will be subject to the terms and conditions of Public Land Order No. 5186, as amended, and any other withdrawal of record.

Dated: November 28, 1994.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 94-29978 Filed 12-5-94; 8:45 am]

BILLING CODE 4310-JA-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 91-140; FCC 94-267]

Revision of Radio Rules and Policies

AGENCY: Federal Communications Commission.

ACTION: Final rule; petitions for reconsideration.

SUMMARY: In the Second Memorandum Opinion and Order (Second Reconsideration Order), the Commission revises the national radio ownership limits to permit minority broadcasters to own a controlling interest in up to 25 AM and 25 FM stations, and to permit non-minority

broadcasters to hold a non-controlling interest in an additional five AM and five FM stations over the general national limits that are controlled by minorities or small businesses. The Commission declines to revise its local radio ownership limits or its rules and policies regarding time brokerage. The actions taken in the Second Reconsideration Order, in conjunction with the other actions taken in this proceeding, are needed to permit radio broadcasters to combine resources, as well as to provide greater opportunities for minority and small business broadcasters.

EFFECTIVE DATE: January 5, 1995.

FOR FURTHER INFORMATION CONTACT: Jane Hinckley Halprin, Mass Media Bureau, Policy and Rules Division, (202) 632–7792.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Second Reconsideration Order in MM Docket No. 91–140, adopted October 20, 1994, and released November 8, 1994.

The complete text of the Second Reconsideration Order is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC, and also may be purchased from the Commission's duplicating contractor, International Transcription Service, 2100 M Street, NW, Washington, DC 20036, (202) 857–3800.

Synopsis of Second Reconsideration Order

1. The *Second Reconsideration Order* resolves issues raised in three petitions for reconsideration of the *Memorandum Opinion and Order* in MM Docket No. 91–140, 7 FCC Rcd 6387 (1992), 57 FR 42701 (Sept. 16, 1992) (*First Reconsideration Order*). Those petitions were filed by the League of United Latin American Citizens (LULAC), the National Association of Black Owned Broadcasters, Inc. and the National Black Media Coalition (NABOB/NBMC), and the Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights (TRAC/WACC). The *Second Reconsideration Order* also addresses a Petition for Rule Making (RM–8414) filed by the National Association of Broadcasters (NAB), and denies a NABOB/NBMC request for stay and rescission of the previous increase in the national ownership rules.

2. The *First Reconsideration Order*, upon which the *Second Reconsideration Order* is based, revised the Commission rules governing the ownership of interests in multiple radio stations. The *First Reconsideration Order* revised § 73.3555 of the Commission's Rules (47 CFR 73.3555) to increase the national radio ownership limit from 12 AM and 12 FM stations to 20 AM and 20 FM stations. The Commission also revised the national minority ownership cap, which had permitted non-minority owners to take a non-controlling interest in an additional two AM and two FM stations that were minority-controlled, and permitted minority owners to hold a controlling interest in 14 AM and 14 FM stations. The *First Reconsideration Order* modified the rule to permit all owners to take a non-controlling interest in an additional three stations per service above the national caps if those stations were controlled by minorities or small businesses. It declined to adopt a provision allowing minority broadcasters to own more stations outright.

3. The *First Reconsideration Order* also relaxed the local ownership limit, which had been one AM and one FM station per area, to permit common ownership of up to two AM and two FM stations, depending on the size of the market. Specifically, in markets with 15 or more stations, an individual or group was permitted to acquire up to two AM and two FM stations provided that the combined audience shares of those stations did not exceed 25 percent of the local radio market. In markets with fewer than 15 stations, a single owner was permitted to acquire a total of three stations, no more than two of which may be in the same service (*i.e.*, AM/AM/FM or AM/FM/FM), provided that the group owner's stations represent less than half of the total number of stations in the market. The *First Reconsideration Order* also declined to revisit the Commission's prior determination that certain time brokerage arrangements would be treated as attributable ownership interests for purposes of the multiple ownership rules.

4. The *Second Reconsideration Order* generally affirms the rules adopted in the *First Reconsideration Order*, except that the Commission has decided to revise the national ownership rule with respect to minority and small business broadcasters. The *Second Reconsideration Order* increase the national limits for minority owners to 25 AM and 25 FM stations, and raises to five the number, in excess of the national limits, of minority or small business controlled AM or FM stations in which a non-minority broadcaster may hold a non-controlling interest.

5. In addition, because of concerns raised by a number of parties with respect to the effects of the revised rules on competition and diversity in radio markets, the Commission, on its own motion, reviews the radio ownership rules in light of relevant economic and antitrust principles. Pursuant to its analysis of these principles, the Commission concludes that the radio ownership rules are consistent with established principles of competitive analysis and at the present time provide adequate safeguards to ensure acceptable levels of diversity in the radio marketplace.

Local Ownership Limits

6. The *First Reconsideration Order* revised § 73.3555 to permit a single owner in a larger market to own up to two AM and two FM stations, subject to an audience share cap of 25 percent, and to permit an owner in a smaller market to own up to three stations, provided that no more than two are in the same service and that the stations represent fewer than half of the total number of stations in the area. A "market" is defined with respect to overlapping signal contours. For instance, the relevant market with respect to a combination of two stations in the same market would encompass those two stations as well as all other radio stations whose principal community contours overlap those of the two stations involved in the proposed transaction.

7. Urging reconsideration, LULAC argues that the new local rules disadvantage small stations, and reiterates its suggestion that, rather than change the local ownership rules, the Commission should allow greater consolidation for financially failing radio stations. NABOB/NBMC reiterate their previous argument that increased ownership limits will substantially reduce opportunities for increased minority ownership in broadcasting and will force minority broadcasters out of the radio industry. In opposition, NAB contends that adoption of LULAC's proposal would impede the positive effects of the new rules.

8. The Commission notes that it directly addressed LULAC's suggestion to adopt a failed station standard in the *First Reconsideration Order*. It concludes that LULAC's argument, that its "failing" station would permit a troubled station to obtain ownership relief well before it actually fails, does not adequately address the Commission's fundamental concern with the vitality of the industry generally. It therefore finds that LULAC has presented no new evidence or argument to revisit that review. The Commission also concludes that NABOB/NBMC likewise have not presented any new information that

would persuade it to further modify the local limits.

9. While it does not modify its local ownership rules, the Commission does make a minor correction. A reference to "the most recent published audience share data available at the time that the application is filed" was deleted from § 73.3555(a)(3)(iii) when that rule section was revised (and renumbered) pursuant to the *First Reconsideration Order*. That deletion was inadvertent, and the quoted provision was intended by the Commission to remain in the rules. Section 73.3555(a)(3)(iii) will be modified to reinsert that language, as set forth below.

10. In its petition for rule making, NAB suggests that when only one of the stations in a proposed combination has a principal community contour that would place the transaction in a market of 15 or more stations, the parties to the transaction should be permitted to elect whether to be governed by (1) the rules for small markets based on the number of stations overlapping the smaller facility's contour (thus avoiding the audience share limitation); or (2) the rules for large markets, but with the audience share calculated based on all counties receiving any one of the 15 or more stations counted as in the market pursuant to § 73.3555(a)(3)(ii).

11. NAB also proposes that the local ownership rule be modified so that ownership of "not greater than 50 percent" of the stations in a market would be permitted rather than the current "less than 50 percent" rule. In addition, NAB contends that any single station or AM/FM combination licensee should be allowed in all situations to add one additional station to common ownership.

12. Finally, in the event the above changes are not adopted, NAB believes that a clear and liberal set of criteria should be established for requests for waiver of the local ownership rule in traditionally small markets. Among the critical elements of any waiver policy according to NAB, would be the effort to save a dark or failing station.

13. Duke Broadcasting, commenting on the NAB petition, raises similar concerns with the contour-based market definitions in the new rules when applied in small markets, but proposes a different solution. Duke suggests a delineation of two tiers of markets based on Metropolitan Statistical Area (MSA) ranking, with "larger" markets still subject to the combined audience share limitation of 25 percent, and "smaller" markets not subject to the combined audience share limitation in the absence of a showing that the particular combined share exceeding 25 percent creates an excessively high concentration of audience. Duke proposes that MSAs ranked above 150 would be placed in the larger market tier, while those ranked 150 and below, as well as non-MSA markets, would be placed in the smaller tier.

14. The Commission declines to modify the local ownership rules. It notes that in designing the signal overlap standard, it specifically rejected suggestions that Arbitron data, MSAs (proposed by Duke here) or other narrow geographic designations be employed to count the number of stations in a market. It concludes that there is no evidence to suggest that the rationale underlying the adoption of the contour overlap approach—a more accurate measure of where a station's signal can be adequately received and, therefore, where it can compete for listeners—is any less appropriate for stations in smaller markets under the circumstances presented by NAB and Duke. It notes that a station combination with an aggregate principal community contour overlapped by 15 or more stations can be expected to compete for listeners with those stations, and the audience share cap is applied in such a case as an additional safeguard intended to identify potential concentration problems that may threaten diversity and competition.

15. The Commission states that it declines to, in effect, ignore those stations, such as Class C FM stations, with superior signal coverage. It also declines to redefine the area to which county-by-county audience share calculations apply in the manner suggested by NAB. The Commission believes that the suggested change would unduly dilute the diversity and competition safeguards adopted in its previous orders, and, in any event, would not reflect competitive conditions in the areas in which stations proposed to be combined provide the majority of their service, *i.e.*, within their principal community contours.

16. With respect to NAB's other proposals, the Commission notes that it already expressly rejected a change of the rule applicable to markets of fewer than 15 stations to permit ownership of half of the stations in a small market because it could result in an unwarranted level of consolidation in too many markets. Further, the Commission states that it is not persuaded that the specific changes NAB advocates are warranted as a means of rescuing failing or dark stations. The Commission is concerned that the proposed changes would be applicable without regard to the circumstances of an individual facility or its financial condition, and would have the potential to increase concentration signifcantly. It also believes that cases involving a genuine threat of station failure are best addressed via a waiver process that can appropriately account for the specific factual circumstances at hand. Moreover, the Commission states that because of the variety of circumstances that may be present in any given radio market, requests for waiver of the rule should not be limited to specific criteria.

Minority Ownership and Small Business Incentives

17. NABOB/NBMC urge the Commission to reinstate the aspect of the prior rule that permitted minority-owned companies to take a controlling interest in additional stations above the national ownership caps. NABOB/NBMC maintain that the change from the prior rule will decrease the total number of stations that can be controlled by existing minority licensees, and, with the increase of the national ownership limits generally, will lead to further concentration of ownership in the broadcast industry, diluting substantially the opportunities for increased minority ownership. NABOB/NBMC also contend that the *First Reconsideration Order* did not provide evidence with which to evaluate the effect of the rule changes on minority ownership, and they reiterate their argument that the Commission's appropriations legislation prohibits modification of the minority ownership incentive. Further, NABOB/NBMC reiterate their request, denied in the *First Reconsideration Order*, that the national ownership limits be returned to 12 stations per service. LULAC, NABOB/NBMC and NAB urge the Commission to repeal the small business incentive established in the *First Reconsideration Order*. LULAC and NAB argue that adoption of the small business incentive violated the Administrative Procedure Act (APA), 5 U.S.C. 553, because such an incentive was not proposed in the initial *Notice of Proposed Rule Making* in this proceeding. They also maintain that the small business incentive will dilute or otherwise undermine any incentive for group owners to invest in minority-controlled stations.

18. The Commission states that it continues to believe, as discussed both above and previously in this docket, that further expansion of the national ownership limits would not hinder diversity of viewpoint and could spur competition in the industry. The Commission notes that the arguments

raised by petitioners with respect to the increase in the general national ownership limits from 12 to 20 stations per service were fully addressed earlier in this proceeding.

19. The Commission is persuaded by petitioners, however, that permitting minority owners to hold a controlling interest in additional radio stations will serve the goal of increasing minority ownership without posing a significant threat to competition or diversity. It will therefore amend § 73.3555 of its rules to permit minority owners to own and control additional stations over and above the general national caps. Moreover, based on its belief that further national consolidation is appropriate, it will increase from three to five the number of additional stations per service that may be acquired pursuant to the incentive. The Commission's aim in making these modifications is to permit minorities to own more stations as well as to make the investment incentive aspect of the rule more attractive to large group owners.

20. The Commission is not persuaded to delete the small business incentive. It states that its current application processing standards, which involve a case-by-case analysis of each transaction, are sufficient to guard against sham small business applications. With respect to petitioners' arguments regarding notice, the Commission points out that the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 3275 (1991), 56 FR 26365 (June 7, 1991), invited commenters to discuss a range of issues regarding the national ownership caps, and some commenters emphasized that access to capital is a problem for new entrants and small businesses in general, not just minority-owned entities. The Commission further notes that it intends to explore minority ownership issues in an upcoming proceeding.

21. Pursuant to the rules adopted in the *First Reconsideration Order*, the national ownership limits automatically increased from 18 AM and 18 FM to 20 AM and 20 FM on September 16, 1994. On October 7, 1994, NABOB and NBMC filed a "Joint Motion for Rescission and Stay" asking the Commission to rescind the automatic increase and stay the effective date of that increase until the Commission has acted on their petition for reconsideration and evaluated the effect of the 18AM/18FM cap on minority ownership. The Commission notes that NABOB/NBMC's petition for reconsideration is resolved in the *Second Reconsideration Order*, and that the *Radio Station Ownership Report* released concurrently with that Order analyzes the effect that the increase in the national caps has had on minority broadcasters to the extent presently possible. The Commission finds the request for stay to be moot, and denies the request for rescission.

Time Brokerage Arrangements

22. The Commission defines time brokerage as a type of joint venture that generally involves the sale by a licensee of discrete blocks of time to a "broker" who then supplies the programming to fill that time and sells the commercial spot announcements to support it. The *First Reconsideration Order* affirmed the Commission's earlier holding that if a time brokerage agreement between two stations in the same market involves more than 15 percent of the brokered station's programming per week, the brokered station will be treated as if it was owned by the brokering station for purposes of the national and local ownership rules.

23. TRAC/WACC note that time brokerage decisions have been made by the Commission's staff and argue that the Commission should not be bound in future rulemakings by policy decisions of its staff made in *ex parte* informal adjudications. TRAC/WACC also note that members of the public are not given notice of, and may not have standing to participate in, declaratory rulings at the staff level. NAB counters that the revised time brokerage rules and policies, as adopted and applied by the staff in its rulings, are lawful and are designed to adequately ensure that licensees do not relinquish control of their stations and remain responsive to the obligations of a licensee.

24. The Commission states that the language of the *First Reconsideration Order* was intended to reflect the Commission's continuing view that particular situations are better resolved on a case-by-case basis. The Commission further finds that the specific aspects of time brokerage arrangements questioned by TRAC/WACC in its petition were thoroughly discussed previously in this proceeding, where the Commission adopted restrictions on time brokerage arrangements so that they will be counted as ownership interests where significant brokering between competing stations is involved. Furthermore, the Commission reiterates that a licensee must retain ultimate control over its station. The Commission concludes that TRAC/WACC has not introduced any new arguments to convince it that it needs to take further action in this proceeding with respect to time brokerage. It also states its belief that imposition of any additional restrictions on time brokerage arrangements would run counter to one of the objectives of this proceeding, which was to strengthen the radio industry by giving radio broadcasters more flexibility.

25. The Commission notes that it previously decided not to require the termination of an agreement that does not comply with the local ownership rules if the agreement was entered into prior to the effective date of the rules. These agreements were, in effect, "grandfathered." The Commission clarifies that when a brokering station is sold, an existing brokerage agreement that would be barred by the rules if entered initially at the time of the sale, may be transferred. The new owner may enjoy all rights and limitations with respect to the multiple ownership rules as the original owner, but only for the duration of the term of the agreement in effect at the time of transfer. The purchaser of a station or stations involved in a brokerage agreement, however, cannot create a new violation or exacerbate an existing rule violation by that acquisition. Thus, for example, a station combination that involves a brokerage agreement and that exceeds the 25 percent audience share limit, but is nonetheless permissible under the rules, could not be acquired by a party with another station in the same market. A similar station combination with an audience share of 24 percent could not be acquired by a licensee with a station enjoying a 3 percent share in the same market. In addition, parties will not be permitted to renew or extend time brokerage agreements, including those that are grandfathered, once the initial term expires if, at the time of expiration, the agreement would not be permissible under the rules.

Remaining Matters

26. There is an inconsistency between the language of the First Reconstruction Order and that of § 73.3555(a)(1)(ii) as published, as to the benchmark for permissible audience share. In order to remove any ambiguity on this point, the Commission states that it intended the language of the rule to be controlling. Thus, only audience shares that exceed 25 percent are to be considered *prima facie* inconsistent with the public interest.

27. Further, the Commission clarifies that while it is appropriate to exclude non-operational stations from calculation of the number of stations in the market where it cannot be presumed that they will add to the competition and diversity in a market, such as analysis is not appropriate when the

non-operational station is a part of the transaction under scrutiny, because the applicant has control over and can generally be presumed to intend to put the station on the air. Thus, if the non-operational station is one of the proposed commonly owned stations involved in the transaction, the principal community contour of the non-operational station will not be disregarded in calculating how many stations are counted as in the market or in determining the geographic area for which audience share is calculated.

28. The Commission also notes that current rules permit an AM licensee to own an existing AM station in the 535–1605 kHz band and apply for a construction permit for an AM station in the expanded band, 1605 kHz–1705 kHz, without regard to otherwise prohibited principal community contour overlap. Moreover, the national ownership restrictions are not applied when an entity with an attributable interest in an AM station in the existing band applies for an AM station in the expanded band. Note 10 to § 73.3555 specifies a five-year period during which joint ownership of existing band and expanded band AM authorizations will be acceptable; at the expiration of this five-year period, the licensee must elect to operate either the expanded band station or to operate the station on its former frequency in the existing band.

29. The Commission clarifies that if, during the five-year transition period, the licensee has not yet elected whether to move to the expanded band or retain its existing facility, the expanded band station will be disregarded for purposes of the local and national ownership rules. Thus, the principal community contour of the existing band station will be considered for purposes of determining the relevant market and for purposes of determining the number of stations in the market. Moreover, if it is necessary to determine whether the combination complies with the audience share cap, the Commission will consider only the audience share attributable in the relevant market to the existing band station.

Ordering Clauses

30. It is therefore ordered that, pursuant to the authority contained in section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. section 154(i), 303(r), part 73 of the Commission's rules, 47 CFR part 73 is amended as set forth below.

31. It is further ordered that the petitions for reconsideration filed in this proceeding are granted to the extent indicated herein and are denied in all other respects.

32. It is further ordered that, pursuant to § 1.401(e) of the Commission's rules, 47 CFR 1.401(e), the Petition for Rule Making filed on August 23, 1993, by the National Association of Broadcasters, RM–8414, is denied.

33. It is further ordered that the Joint Motion for Rescission and Stay filed October 7, 1994, by the National Association of Black-Owned Broadcasters and the National Black Media Coalition is denied.

List of Subjects in 47 CFR Part 3

Radio broadcasting.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Part 73 of title 47 of the U.S. Code of Federal regulations is amended to read as follows:

PART 73—RADIO BROADCAST SERVICES

1. The Authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334.

2. Section 73.3555 is amended by revising paragraphs (a)(3)(iii) and (e)(1)(i) to read as follows:

(a) * * *

(3) * * *

(iii) A station's "audience share" is the average number of persons age 12 or older on an average quarter-hour basis, Monday–Sunday, 6 a.m.–midnight, who listen to the station expressed as a percentage of the average number of persons listening to AM and FM stations in that radio metro market or a recognized equivalent, in which a majority of the overlap between the same service stations involved in the transaction takes place. The "combined audience share" is the total audience share of all AM or FM stations that would be under common ownership or control following a proposed acquisition. In situations where the majority of the overlap between the same service stations does not lie in a single metro market, the relevant audience share data is the data for all counties that are within the principal community contours of the mutually overlapping stations proposed for common ownership, in whole or in part, weighted based on the listening population, age 12 and older, and totalled to determine the average audience share. Audience share shall be calculated by using the most recent published audience share data available at the time that the application is filed, unless an alternative showing is submitted pursuant to the Note following 47 CFR 73.3555(a)(1)(ii).

* * * * *

(e) * * *

(1) * * *

(i) more than 20 AM or more than 20 FM stations, provided, however, that minority controlled entities may acquire an additional five stations per service above the national limit, and that multiple owners that are not minority controlled may hold an attributable, but not controlling, interest in five additional stations per service above the national limit that are minority controlled or small business controlled;

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[FR Doc. 94–29941 Filed 12–5–94; 8:45 am]
BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 94–56; RM–8459]

Radio Broadcasting Services; Borger, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Zia Broadcasting Company, allots Channel 294A to Borger, Texas. *See* 59 FR 37020, July 20, 1994. Channel 294A can be allotted to Borger, Texas, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates for Channel 294A at Borger are North Latitude 35–39–24 and West Longitude 101–23–36. With this action, this proceeding is terminated.

DATES: Effective: January 13, 1995. The window period for filing applications will open on January 13, 1995, and close on February 13, 1995.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MM Docket No. 94–56, adopted November 21, 1994, and released November 29, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857–