

In the
**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PROMETHEUS RADIO PROJECT and)	
MEDIA MOBILIZING PROJECT,)	
)	
Petitioners,)	
)	
v.)	
)	No. 18-_____
FEDERAL COMMUNICATIONS)	
COMMISSION and UNITED)	
STATES OF AMERICA,)	
)	
Respondents.)	

PETITION FOR REVIEW

Pursuant to 47 U.S.C. §402(a), 28 U.S.C. §§2342(1) and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, Prometheus Radio Project (“Prometheus”) and Media Mobilizing Project (“MMP”) (collectively referred to here as “Petitioners”) seek review of the attached order of the Federal Communications Commission (“FCC” or “Commission”) Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, *Report and Order*, FCC 18-114, 2018 WL 3738329, __ FCC Rcd. __ (August 3, 2018) (“*Incubator Order*”). A summary of the *Report and Order* was published in the Federal Register on August 28, 2018. 83 Fed. Reg. 43773. This Petition is being

filed within ten days of the order’s publication in the Federal Register. *See* 28 U.S.C. §2112.

Venue in this Court is proper under 28 U.S.C. §2343 because the principal offices of Prometheus and MMP are in Pennsylvania.

PROCEDURAL HISTORY

The *Incubator Order* for which review is sought is one of a series of Federal Communications Commission decisions implementing its statutorily-mandated quadrennial review of broadcast media ownership rules and its obligation to address ownership diversity—*i.e.*, ownership by women and people of color—in broadcasting. These FCC decisions have been reviewed multiple times by this Court and a panel of this Court (Judges Ambro, Fuentes and Scirica) has retained jurisdiction over them. *Prometheus Radio Project v. Federal Communications Commission*, 824 F.3d 33 (3d Cir. 2016) (“*Prometheus III*”); see also *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus I*”); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (“*Prometheus II*”).

The *Incubator Order* is the product of a Notice of Proposed Rulemaking issued with the Commission’s recent *Reconsideration Order*. *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd. 9802 (2017) (“*Reconsideration Order*”). The *Reconsideration Order* substantially reversed the Commission’s 2016 *Second Report and Order. 2014 Quadrennial Review, Second*

Report and Order, 31 FCC Rcd. 9864 (2016) (“*Second Report and Order*”). Both the *Reconsideration Order* and the *Second Report and Order* are pending before this Court in Docket Numbers 18-1092 and 17-1107, respectively. Further, this Court stayed consideration of them pending the outcome of the Notice of Proposed Rulemaking that has just resulted in the *Incubator Order*. Order, Docket Nos. 18-1167, 17-1107, 18-1902 (Feb. 7, 2018); FCC Status Report, Docket Nos. 18-1167, 17-1108 (Aug. 6, 2018).

In these decisions, this Court has repeatedly reversed and remanded the FCC’s decisions because the FCC had insufficiently justified and analyzed policies purportedly designed to address the Commission’s obligation to promote ownership diversity. The Court further found that the Commission had insufficiently considered how various rule changes would impact ownership diversity and remanded to the Commission consideration of the definition of entities eligible to benefit from diversity-enhancing policies, known as “eligible entities.” *Prometheus I*, 373 F.3d at 420-21, 426-27; *Prometheus II*, 652 F.3d at 471; *Prometheus III*, 824 F.3d at 48-49.

The *Incubator Order* also addresses which classification of eligible entities should qualify for Commission programs to promote diversity and insufficiently analyzes that definition or its impact on ownership diversity. Because the *Second Report and Order*, the *Reconsideration Order*, and the *Incubator Order* are closely

connected, Petitioners are separately moving to consolidate this new proceeding with Docket Nos. 18-1092 and 17-1107 and other cases previously consolidated with it.

REVIEW REQUESTED

Despite statutory obligations and the mandates of this court, the *Incubator Order* fails to compile a record sufficient to consider its impact on ownership diversity and adopts a definition of “eligible entities” that will not increase ownership diversity—despite the Commission’s stated intention to do so. The Commission makes further errors in its compilation and analysis of the record, which does not support its decision. As such, the *Incubator Order* violates this Court’s mandate, the Administrative Procedure Act, and the Communications Act. Therefore, Petitioners ask the Court: to hold unlawful and set aside the Commission’s action pursuant to 5 U.S.C. §706(2), 47 U.S.C. §§151, et seq., and 28 U.S.C. §1651 because it is arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with law and this court’s mandate; to direct specific and date-certain compliance with this Court’s mandates; and to grant such other relief as this Court deems just and proper.

Respectfully submitted,



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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA-HQ-SFUND-2003-0010; FRL-9982-84-Region 7]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the Omaha Lead Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Environmental Protection Agency (EPA) Region 7 announces the deletion of 101 residential parcels of the Omaha Lead Superfund site (Site or OLS) located in Omaha, Nebraska, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Nebraska, through the Nebraska Department of Environmental Quality, determined that all appropriate Response Actions under CERCLA were completed at the identified parcels. However, this deletion does not preclude future actions under CERCLA.

This partial deletion pertains to 101 residential parcels. The remaining parcels will remain on the NPL and are not being considered for deletion as part of this action.

DATES: This action is effective August 28, 2018.

ADDRESSES: EPA has established a docket for this action under Docket ID no. EPA-HQ-SFUND-2003-0010. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the site information repositories. Locations, contacts, and viewing hours of the Site information repositories are:

- EPA Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219, open from 8 a.m. to 4 p.m. Monday–Friday.

- W. Dale Clark Library, located at 215 S 15th Street, Omaha, NE 68102, open 10 a.m. to 8 p.m. Monday–Thursday; 10 a.m. to 6 p.m. Friday and Saturday; and 1 p.m. to 6 p.m. Sunday.

FOR FURTHER INFORMATION CONTACT:

Elizabeth Hagenmaier, Remedial Project Manager, U.S. Environmental Protection Agency, Region 7, SUPR/LMSE, 11201 Renner Boulevard, Lenexa, KS 66219, telephone (913) 551-7939, email: hagenmaier.elizabeth@epa.gov.

SUPPLEMENTARY INFORMATION: The portion of the site to be deleted from the NPL are 101 residential parcels of the Omaha Lead Superfund site, Omaha, Nebraska. A Notice of Intent for Partial Deletion for this Site was published in the **Federal Register** (83 FR 29731) on June 26, 2018.

The closing date for comments on the Notice of Intent for Partial Deletion was July 26, 2018. One public comment was received which was not site-related and EPA has determined it will proceed with the partial deletion.

EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Deletion of a site from the NPL does not preclude further remedial action. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system. Deletion of portions of a site from the NPL does not affect responsible party liability, in the unlikely event that future conditions warrant further actions.

List of Subjects in 40 CFR Part 300

Environmental protection, air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(d); 42 U.S.C. 9601-9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: August 10, 2018.

James B. Gulliford,

Regional Administrator, Region 7.

[FR Doc. 2018-18525 Filed 8-27-18; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 17-289, FCC 18-114]

Rules and Policies To Promote New Entry and Ownership Diversity in the Broadcasting Services

AGENCY: Federal Communications Commission.

ACTION: Final action.

SUMMARY: In this document, the Federal Communications Commission establishes the requirements that will govern the incubator program that the Commission decided to adopt to support the entry of new and diverse voices into the broadcast industry.

DATES: This action contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the approval date for the information collection requirements.

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Room TW-C305, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT:

Radhika Karmarkar, Radhika.Karmarkar@fcc.gov, or 202-418-1523.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, FCC 18-114, in MB Docket No. 17-289, adopted on August 2, 2018, and released on August 3, 2018. The complete text of this document is available electronically via the search function on the FCC's Electronic Document Management System (EDOCS) web page at https://apps.fcc.gov/edocs_public/ (https://apps.fcc.gov/edocs_public/). The complete document is available for inspection and copying in the FCC Reference Information Center, 445 12th Street SW, Room CY-A257, Washington, DC 20554 (for hours of operation, see <https://www.fcc.gov/general/fcc-reference-information-center>). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov (mail to: fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

I. Introduction

1. With this *Report and Order*, we establish the requirements that will govern the incubator program that the Commission previously decided to adopt to support the entry of new and diverse voices into the broadcast industry. Last year, the Commission decided to adopt an incubator program with the goal of creating ownership opportunities for new entrants and small businesses, thereby promoting competition and diversity in the broadcast industry. We recognize the need for more innovative approaches to encourage access to capital, as well as technical, operational, and management training, for those new entrants and small businesses that, without assistance, would not be able to own broadcast stations. Thus, the incubator program is designed with those specific entities in mind—small businesses, struggling station owners, and new entrants that do not have any other means to access the financial assistance and operational support the incubator program seeks to provide. In keeping with that goal, the program requirements we adopt today will enable the pairing of small aspiring, or struggling, broadcast station owners with established broadcasters. These incubation relationships will provide new entrants and struggling small broadcasters access to the financing, mentoring, and industry connections that are necessary for success in the industry but to date have been unavailable to many.

II. Background

2. The Commission has long contemplated the potential for an incubator program to provide new sources of capital and support to entities that may otherwise lack access to financing or operational experience. In concept, an incubator program seeks to provide an established broadcaster with an inducement in the form of an ownership rule waiver or similar benefit to invest the time, money, and resources needed to facilitate broadcast station ownership by new and diverse entrants. An incubator program contemplates that, in exchange for a defined benefit, an established company could assist a new owner by providing “management or technical assistance, loan guarantees, direct financial assistance through loans or equity investments, training, or business planning assistance.”

3. Although the concept of an incubator program has been discussed since at least the early 1990s and has received general support, the

Commission had never undertaken the creation of such a program, and explicitly declined to adopt a program as part of its 2010/2014 Quadrennial Media Ownership Review. In late 2017, however, the Commission reconsidered that determination and at long last decided to adopt an incubator program to help address the lack of access to capital and technical expertise faced by potential new entrants and small businesses. While the Commission committed to initiating an incubator program, it desired further input regarding how best to structure and implement a comprehensive program in light of current market and regulatory conditions. Accordingly, the *NPRM* sought comment on eligibility criteria for the incubated entity; appropriate incubating activities; potential benefits to the incubating entity; how such a program would be reviewed, monitored, and enforced; and the attendant costs and benefits created. See 83 FR 774 (Jan. 8, 2018).

4. The record developed in this proceeding presents a range of thoughtful suggestions and recommendations for the incubator program. We are particularly grateful to the Commission’s Advisory Committee on Diversity and Digital Empowerment (ACDDE) for the group’s extensive consideration of the incubator program and the elements that should define it. The ACDDE working group members devoted many hours to meetings and review of empirical data before making recommendations to the full committee on how to structure the incubator program. The resulting extensive comments provided invaluable research and proposals that the Commission has carefully considered.

5. With this *Report and Order*, we implement a long overdue mechanism to address the primary barriers to station ownership by new and diverse entities: Lack of access to capital and the need for technical and operational experience. In implementing this program, our expectation is that each successful incubation relationship will result in the acquisition of a broadcast radio station by a new entrant or small business, or the preservation of an existing, but struggling, small broadcaster. Accordingly, successful implementation of the incubator program we adopt today will promote ownership diversity by fostering entry into the broadcasting sector by entrepreneurs and small businesses, including those owned by women and minorities.

Services Eligible for Incubator Program

6. The incubator program we outline today will apply to full-service AM and FM radio broadcast stations, as we find that the radio industry provides the best opportunities for successful incubation relationships and the best opportunity for an appropriate reward. In the *NPRM*, the Commission sought comment on whether its incubator program should be focused on radio, as the proposal was initially conceived, or should apply to television as well. The *NPRM* further queried whether the Commission should adopt a phased approach, whereby the incubator program would be implemented on a trial basis in radio and then evaluated for possible expansion to the television market. Based on the record of this proceeding, we find that the radio market has several advantages over the television market as an incubation setting.

7. Perhaps most importantly, the cost of obtaining a radio station is significantly lower than the cost of obtaining a television station. Indeed, the cost of acquiring a television station is generally many times that of a radio station. For example, in 2016 the average sales price of a radio station on the secondary market was approximately \$1 million, and the average price of a television station was \$53 million. Due to their lack of broadcasting experience and financial collateral, new entrants and small broadcasters often face significant difficulties in accessing the capital needed to purchase broadcast stations in the secondary market or to participate in Commission broadcast auctions for new construction permits. Indeed, the record reveals that access to capital is most often the barrier to broadcast station ownership. Furthermore, given the larger numbers of radio stations in the country (11,371 commercial, full-service AM and FM stations) versus television stations (1,377 commercial, full-service stations), we find that radio is a more accessible entry point than television. In addition, the operating costs of running a radio station are significantly lower than those for operating a television broadcast station. As a going concern, radio is less cash flow intensive, requires fewer personnel to operate, and requires programming resources that are less costly than those for television stations. For these reasons, we find that transitioning from a qualifying incubation relationship to independent ownership will be more feasible for incubated entities in the radio service than in television. Consequently, for entities with already limited capital resources and operational experience,

we conclude that radio is a significantly more accessible entry point into the broadcasting industry than television.

7. We expect that implementing an incubator program focused on the radio market will also motivate the participation of incumbent broadcasters, who are key to the success of the program, as they have the power to ensure that the new entrants and small businesses attracted to the radio industry are able to acquire, operate, and grow a broadcast station. As noted above, we anticipate that the inducement of a waiver of the Commission's Local Radio Ownership Rule will provide sufficient incentive for incumbent broadcasters to participate in the program. That is, we expect that radio station group owners will seek to incubate a new entrant or small broadcaster in order to obtain permission to exceed the applicable ownership limit in a market. In reaching this conclusion, we note that the local radio numerical limits and the AM/FM service caps have remained unchanged since they were prescribed by Congress over 20 years ago in the Telecommunications Act of 1996. Thus, the existing Local Radio Ownership Rule has restricted the ability of incumbent broadcasters to grow larger in any given market for over two decades. In addition, Joint Sales Agreements (JSAs) for greater than 15 percent of a station's time remain attributable in radio. Accordingly, given the longstanding strictures remaining on radio ownership, we believe a waiver of the Local Radio Ownership Rule will provide an effective incentive for incumbent broadcasters to incubate either new entities seeking entry into the broadcasting industry or small broadcasters.

8. By contrast, the Commission has recently revised the rules governing local television ownership, including eliminating the attribution of television JSAs; eliminating the eight voices test, which required that at least eight independently owned television stations remain in the market after combining ownership of two stations in a market; and, adopting a hybrid approach to application of the top-four prohibition, permitting case-by-case review of the restriction on ownership of two top-four ranked stations in the same market. In light of these changes and the state of the record in this proceeding as it pertains to television station incubation, we do not believe that it would be appropriate at this time to offer a waiver of the Local Television Ownership Rule as a reward for incubating a television station. However, we do not foreclose the

possibility of reaching a different conclusion following the completion of our next quadrennial review depending on the record that is compiled regarding the local television marketplace in that proceeding. Additionally, were Congress to provide an alternative benefit for incubating broadcasters, we would be strongly inclined to expand the program to include television stations.

9. Based on our consideration of the record and the current broadcast marketplace, including the existing broadcast ownership rules, we conclude that an incubator program has the greatest likelihood of success in the radio industry. Although some commenters, including NAB, advocate for an incubator program for both radio and television broadcast services, for the reasons stated in this section, we determine that the better approach at this time is to focus our program on the radio market. We note, however, that the "leg up" provided to these new and small broadcasters via the incubator program, by allowing them to establish a track record of successful station ownership and providing them increased access to capital, may ultimately position them to add television stations to their radio holdings. For all the reasons provided above, we determine that our initial foray into the use of an incubator program as a mechanism to increase broadcast ownership diversity should be limited to full-service radio. As we gain more experience with the program and assess evolving market and regulatory trends in the television sector, we will be able to analyze whether it is appropriate to expand the program to television.

Defining Entities Eligible for Incubation

10. In this section, we establish the eligibility criteria governing which entities may qualify for incubation under our program. Our criteria consist of both a numeric limit on the number of stations a potential incubated entity may own prior to entering into a qualifying incubation relationship (based on our existing new entrant bidding credit), as well as a revenue cap (based on our existing eligible entity definition). Additionally, as discussed below, we adopt certain safeguards to ensure further that a potential incubated entity genuinely lacks the necessary resources that would have enabled it to enter or succeed in the broadcast industry absent the incubation relationship. Finally, we also address alternative eligibility criteria that were proposed in our record.

11. The *NPRM* sought comment on how to determine eligibility for participation in the incubator program and put forth several options, including the new entrant bidding credit model, a revenue-based eligible entity standard, a socially and economically disadvantaged businesses (SDB) model, and an Overcoming Disadvantages Preference (ODP) standard. The *NPRM* also sought comment on which of these standards best aligns with the Commission's goal of facilitating ownership opportunities for entities that lack access to capital and operational experience and, thereby, best promotes competition and viewpoint diversity in local markets.

12. The ultimate goal of the incubator program is to encourage new entry into the broadcast industry, an industry which—as our record demonstrates—is extremely capital-intensive. The Commission has previously recognized, and the record here confirms, that new entrants and small businesses have had longstanding difficulties accessing the needed capital to participate in broadcast ownership. For example, Diane Sutter, President of ShootingStar Inc., notes that "[t]he size of a deal is extremely important to most banks. Many entrants are limited to purchasing smaller broadcast stations, given their resources; however, banks often consider it not worth the potential risk to finance smaller deals for a new owner." For our incubator program to redress the lack of access to capital, as well as to facilitate operational, managerial, and technical support, it is critical that our eligibility criteria properly identify those entities that are most likely to benefit from program participation and, thereby, increase diversity in the broadcast sector.

13. After careful consideration of the record in this proceeding and the various standards discussed in the *NPRM*, we adopt today a two-pronged eligibility standard that combines a modified version of the existing new entrant bidding credit standard, long used in the context of broadcast auctions, with the revenue-based eligible entity definition contained in our broadcast rules. As detailed below, under the first prong, the potential incubated entity, including its attributable interest holders, may hold attributable interests in no more than three full-service AM or FM radio stations and no TV stations. The ownership limit of three full-service radio stations does not include the radio station to be incubated. Under the second prong of our standard, the entity must also qualify as a small business consistent with the SBA standards for

the radio industry based on annual revenue, currently \$38.5 million or less.

14. *New Entrant Prong.* With respect to the first prong of our standard, we find that modifying the new entrant eligibility standard for this purpose by limiting permissible interests to three full-service AM or FM radio broadcast stations (licenses or unbuilt construction permits) and no TV stations will focus the program on entities that are new or comparatively new to the broadcasting industry (*i.e.*, those with no existing broadcast interests) and small broadcasters (*i.e.*, those with three or fewer full-service radio stations, and no TV stations). The record reflects that individuals seeking to purchase their first or second broadcast station are the ones that often face the most challenging financial hurdles. Thus, the eligibility standard we adopt today is targeted specifically to benefit those small entities seeking to enter the broadcast industry for the first time and to help broadcasters with one, two, or three radio stations to secure the foothold they have obtained in the industry. While we acknowledge that an entity with interests in four or more radio stations or a television station may not necessarily be considered a large or established broadcaster, we expect that a broadcaster with such interests will have more access to traditional financing and capital resources available, such that the resources anticipated to flow through the Commission's incubator program would not be as critical to their entry or survival. Consequently, limiting the eligibility criteria to those who have no more than three radio stations (consistent with the current new entrant bidding credit rule's limitation to "three mass media facilities"), and no TV stations, best promotes the purposes of the program.

15. Moreover, analyses of Commission broadcast auctions data provided in the record show that the new entrant bidding credit—a modified version of which we adopt herein—has increased successful participation of small businesses owned by women and minorities in the auction of construction permits for AM, FM, and TV stations. NAB performed an analysis of the Commission's broadcast auctions data and found that winning bidders relying on the Commission's new entrant bidding credits were more likely to have indicated that they were owned by women and minorities than winning bidders who did not use the credit. NAB's analysis focused on nine FM broadcast auctions that utilized the new entrant bidding credit. Its study concluded that winning bidders relying

on new entrant bidding credits were 93 percent more likely to be women, and 40 percent more likely to be minorities, than winning bidders who did not use the credit. In addition, NAB found that collectively winning bidders using new entrant bidding credits were 64 percent more likely to be minorities or women than other winning bidders.

16. We note that the ACDDE also found that the use of the "new entrant" standard in auctions revealed a statistically significant improvement in female and minority participation after its review of 20 FCC broadcast auctions, more than twice the number evaluated by NAB. The ACDDE determined that these auctions attracted a total of 2,531 applicants, of which 1,681 were determined to be qualified bidders. Of the 1,681 qualified bidders, the ACDDE found that (1) 1,457 were new entrants (*i.e.*, held three or fewer mass media interests); (2) qualified minority new entrants (12.4 percent) were more prevalent than qualified minority-owned applicants who were not new entrants (8.7 percent); and (3) qualified women-owned new entrants (10.8 percent) were more prevalent than qualified women-owned bidders who were not new entrants (7.9 percent). Based on this review, the ACDDE agrees that, while not its preferred approach, the new entrant definition "might have some utility" as a means of determining eligibility for participation in the incubator program.

17. Commission staff also evaluated data from a number of Commission broadcast auctions conducted over the past several years, and that data reveal that the new entrant bidding credit has increased successful participation of small businesses owned by women and minorities in the auction process for AM, FM, and TV construction permits. The Commission collects data on information voluntarily filed by auction participants utilizing FCC Form 175. Staff analysis of auctions data for 20 auctions shows that of the 2,534 total applicants for those auctions, 1,457 of them, or 57.5 percent of the applicants, indicated that they qualified for the new entrant bidding credit. A total of 408 new entrant bidders were successful in their auction. The percentage of winning bidders that used a new entrant bidding credit and identified as women-owned was three times larger (12 percent) than the percentage of bidders that won without a new entrant bidding credit and were women-owned (4 percent). Similarly, the percentage of winning bidders that used a new entrant bidding credit and identified as minority-owned was almost three times larger (14 percent) than the percentage

of bidders that won without the new entrant bidding credit and were minority-owned (5 percent).

18. NAB's and the ACDDE's evaluations of the Commission's broadcast auctions data, like the Commission staff's analysis, suggest that the Commission's use of the new entrant bidding credit standard has been effective in diversifying the pool of successful bidders in the broadcast auctions context. Our assessment encompassed twice as many auctions as those reviewed by NAB, and the overall results of those evaluations were similar—that the percentage of winning bidders who used a new entrant bidding credit and identified as either women-owned or minority-owned consistently exceeded the percentage of winning bidders who did not use a new entrant bidding credit and were women-owned or minority-owned. Thus, we expect that use of a similar new entrant eligibility standard will be an effective means to diversify the applicant pool for the incubator program, by targeting those small broadcasters most in need of the support provided by the incubator program, including minority and female applicants.

19. *Small Business Prong.* The second prong of our eligibility standard requires that incubated entities also qualify as small businesses consistent with the SBA standards for their industry grouping, based on annual revenue, currently \$38.5 million or less for radio. NAB supports use of a revenue-based eligible entity standard in combination with a new entrant standard. The ACDDE objects to a revenue-based standard standing alone, asserting that this type of definition "has little or no value in advancing ownership diversity in the broadcast context." We conclude, however, that the revenue cap, in conjunction with the first eligibility prong as well as other safeguards discussed herein, will assist in identifying entities that are more likely to be in need of incubation by established broadcasters. The combination of the new entrant eligibility criteria and the small business revenue standard will narrow the scope of eligible applicants to those applicants most in need of assistance via our incubator program. In this way, we expect to achieve our overarching goal of increasing ownership diversity by facilitating entry and developing broadcast expertise amongst new and small broadcasters.

20. After close review of the record, we find that the eligibility standard set forth above is the best means for identifying incubated entities whose lack of access to capital and operational

experience has impeded their ability to participate successfully in the broadcast sector. We expect that pairing such entities with established incumbent broadcasters who can provide the necessary capital, knowledge, and operational support will ultimately promote competition and viewpoint diversity in local markets. The combination of a numerical cap on broadcast interests and a revenue limitation will ensure that incubated entities participating in the program are truly new or small broadcasters.

21. Moreover, drawn from existing Commission rules, the standard we adopt today provides a clear, objective metric that is familiar to broadcasters. Use of an objective standard has the advantage of being straightforward and transparent for potential applicants, as well as administrable for the Commission without application of significant additional processing resources. Furthermore, unlike some of the other proposals contained in the record, because the new entrant bidding credit standard is race and gender neutral, it does not raise constitutional concerns.

22. We decline to adopt an Overcoming Disadvantage Preference (ODP) standard. The ACDDE advocates for such a standard, which it describes as a “race-and-gender-neutral preference” focused on the experiences and efforts of an individual person that affords a preference to those who strived, through superior individual efforts, to attempt to overcome major impediments to success. According to the ACDDE, “success or failure in overcoming obstacles is not pertinent;” rather, what would matter is “effort, the steps the person took to persevere.” We note the concerns raised by NAB that a standard such as ODP will require the Commission to make subjective decisions on the qualifications of candidates proposed to be the incubated entity, which could be time-consuming, complex, and subject to disputes.

23. The Commission has previously assessed ODP and articulated its concern that the agency lacks the resources to conduct the individualized reviews recommended as a central component of implementing ODP. In the broadcast licensing context, the Commission indicated that the type of individualized consideration that would be required under an ODP standard could prove to be “administratively inefficient, unduly resource intensive, and inconsistent with First Amendment values.” We do not find the ACDDE’s current filing to have assuaged those concerns. In the Part I Competitive Bidding Rules proceeding, the

Commission stated that “it is not clear what proof should be required from those individuals or entities seeking to receive such a preference or how to apply the ODP on a neutral basis. We are also concerned that our review of such a claim would involve a costly and lengthy process.” While the ACDDE did offer suggestions for the administration of an ODP standard, the standard remains inherently subjective and, we believe, inappropriate for the broadcast licensing context. Consequently, we affirm our earlier decisions regarding the administrative infeasibility of an ODP standard. For all of the reasons stated above, we decline to implement an ODP standard for the incubator program.

24. In addition to advocating for the use of ODP as the eligibility standard, the ACDDE also proposes that “mission-based entities” and Native American Nations be automatically presumed to be eligible for incubation. Although the ACDDE’s incubator proposal and the benefits that it would provide incubators—namely the award of tax certificates for stations donated to a mission-based entity or Native American Nation—are not the same as the incentives that we adopt today, we share the ACDDE’s goal of including diverse participants in our incubator program. We encourage them to apply and establish clearly in their certified supplemental statements how their participation in the incubator program is consistent with the goals of the program. We recognize that, unlike small, aspiring, and struggling broadcasters, many mission-based entities and Native American Nations have broader missions that encompass much more than broadcasting and thus these entities may be less likely to learn of our incubator program absent education and outreach by the Commission. Therefore, the Commission will conduct outreach to help encourage participation in the incubator program by mission-based entities and Native American Nations that meet the program’s eligibility requirements. We decline, however, to adopt the proposed automatic presumption of eligibility.

25. *Safeguards Associated with Eligibility Standard.* We recognize that the ACDDE has raised concerns about the potential for abuse of an eligibility standard based on the Commission’s new entrant bidding credit. In particular, the ACDDE references the Commission’s comparative broadcast hearings, long since discontinued, in which the ACDDE asserts spousal and parent-child relationships were used to “game the system and defeat minority

new entrants.” The ACDDE acknowledges, however, that the new entrant definition might be useful in promoting minority and female broadcast ownership if the Commission were able to address these “legacy applicant” concerns.

26. To address such concerns, we adopt certain safeguards in conjunction with our two-pronged eligibility standard. As part of the application process, which is described in greater detail below, potential incubated entities must demonstrate that they have met both the numeric and revenue limitation for the preceding three years. Thus, an entity must not only comply with the eligibility standard at the time it applies to participate in a qualifying incubation relationship, but also for the three years prior to its application. NAB proposed a one-year certification period, which would require that applicants certify that, for the year prior to applying for participation in the incubator program, they have met the applicable eligibility standards in terms of the number of stations owned. Such a certification would, in NAB’s view, help to discourage any potential manipulation of the program by applicants who dispose of financial interests in additional broadcast properties prior to applying for participation in the incubator program. NAB further proposes that program applicants be required to certify compliance with any revenue eligibility standards that are adopted. We concur with NAB that a certification requirement will safeguard our eligibility concerns; however, we find that a longer 3-year period is more likely to deter any fraud or manipulation than a shorter timeframe.

27. In addition, as part of the incubator program application process, we will require a potential incubated entity to include in its application a certified statement attesting that it would be unable to acquire a station, or continue to operate successfully a station proposed for incubation that it already owns, absent the proposed incubation relationship and the funding, support, or training provided thereby. The Commission, in its discretion, may investigate the accuracy of the certification if it is made aware of information that suggests that the potential incubated entity does not, in fact, need the incubation relationship to purchase and operate a broadcast radio station. All applicants will further be required to detail any attributable interests in broadcast stations held by family members pursuant to FCC Forms 301, 314, and 315, thereby revealing any familial or spousal relations as part of

the application process. If at any point the Commission determines that the certified statement contained misrepresentations, both the incubated and incubating entities may suffer negative consequences. Pursuant to the Commission's *Character Policy Statement*, we would examine the qualifications of both parties to hold or retain broadcast licenses.

28. The incubator program is designed to assist those new or small broadcasters who do not have access to the necessary capital or technical expertise absent a qualifying incubation relationship. Thus, an individual who provides evidence of a meager bank account and attests to limited resources might subsequently be disqualified from the program, while also being subject to any penalties associated with making misrepresentations to a federal agency, if it is later determined that this individual also had access to a large personal trust fund designed to assist him or her in business ventures. Likewise, the incubating entity affiliated with this incubation relationship may find its reward waiver withheld or revoked, depending on whether it knew, or should reasonably have known, about the incubated individual's access to such a trust fund or other assets. We expect that the possibility of negative consequences for both the incubated and incubating entities for any misrepresentations regarding the incubated entity's need for the program should serve as a sufficient deterrent against such behavior.

Qualifying Incubation Relationships

29. In this section, we adopt requirements for qualifying incubation relationships. As discussed below, we will require that qualifying incubation relationships provide the incubated entity with the financial and operational support it lacks (including management training), that such relationships include an option for the incubated entity to purchase the incubating entity's equity interest in the incubated station and/or terminate the incubating entity's creditor-debtor relationship with the incubated entity, and that the standard time period for such relationships be three years, with the option to extend for up to another three years. We also adopt certain safeguards to ensure that the incubated entity retains control of the incubated station.

30. The *NPRM* sought comment on the combination of activities that should be required to qualify as incubation and whether there should be any conditions or limitations on the financial and operational aspects of a qualifying incubation relationship. Noting that

proponents had previously proposed that an incubator program include management or technical assistance, loan guarantees, direct financial assistance through loans or equity investment, training, and business planning assistance, the *NPRM* asked whether the program should also include other activities, such as donating stations to certain organizations or arrangements whereby a new entrant gains operational experience without first acquiring a station (*e.g.*, pursuant to a Local Marketing Agreement (LMA)). In addition, the *NPRM* asked what additional safeguards the Commission should include in order to ensure that the incubated station licensee retains control of its station. We conclude that qualifying incubation relationships are those in which an experienced AM or FM broadcaster provides an eligible new or small broadcaster with support that it cannot obtain on its own and that is essential to its ability to independently own and operate a full-service AM or FM station. We expect qualifying incubation relationships to provide the incubated entity with financial and operational support (including management training) that it needs and that will ultimately enable the incubated entity to own and operate independently either the incubated full-service AM or FM station or another full-service AM or FM station acquired at the completion of the program. We allow parties the flexibility to tailor each proposed incubation relationship to the specific needs of the incubated entity while adopting certain safeguards to ensure that the incubated entity retains full control of the incubated station.

31. *Financial and Operational Support*. Commenters that support an incubator program agree that the incubating entity should provide the financial and operational support that the incubated entity needs and that the parties should have flexibility to determine the specific combination of elements needed to support the incubated station according to its particular circumstances. Requiring the incubating entity to provide the financial and operational support that the incubated entity needs is consistent with the goal of the incubator program, which is to help address the lack of access to capital and operational expertise faced by potential new entrants and small businesses, as discussed above. The record also indicates, however, that there may be some benefit to requiring an incubated entity to make a financial contribution

to the incubation relationship to solidify its own commitment towards the endeavor.

32. Rather than dictate specific minimums for the financial and/or operational support that an incubating entity must provide, we conclude that the better approach is to give parties the flexibility to tailor an incubation plan to the needs of the incubated entity, the realities of the marketplace, and the needs of the community in which the incubated station operates. For example, an incubated entity that already owns and operates an AM or FM station will likely need less financial and operational support than a first-time owner of a broadcast station. Similarly, an incubated entity that has previously programmed a station and sold advertising time will likely need less operational support than a new owner with less experience. Thus, the financial and operational needs of each incubated entity will likely differ depending on how much experience it has in broadcasting and its other assets. It is possible that in some cases, an incubated entity will just need one form of support or the other—*i.e.*, financial or operational. For instance, if a broadcaster donates a station to a mission-based entity, as suggested by the ACDDE, the broadcaster may not necessarily need to provide any additional financing to fund the incubation activities. Nevertheless, a broadcaster that chooses to incubate in this manner would still be required to provide the incubated station with operational support, as discussed herein, to enable the mission-based entity to operate the station independently in the long term.

33. These are just a few examples of how the specific financial and operational needs of an incubated entity may differ depending on the circumstances. We emphasize that qualifying incubation relationships must provide an incubated entity with the level of support needed to enable the incubated entity to own and operate a full-service AM or FM station independently at the conclusion of the qualifying incubation relationship. Depending on the needs of the incubated entity, a qualifying incubation relationship will likely provide or guarantee a substantial share of the financing needed to acquire the incubated full-service AM or FM station and operate it effectively. The incubation relationship must ensure that the incubated entity has sufficient financial resources to hire enough employees to oversee the operation of the station, acquire and produce station programming, acquire and maintain

station equipment and facilities, etc. While the incubating entity may often provide the bulk of the financial resources, we do expect the incubated entity to contribute a substantial amount of funding to support the incubated station. We find that requiring the incubated entity to assume some of the financial risk by making a meaningful financial contribution to the incubation relationship will provide further assurance of the incubated entity's commitment to the success of the relationship. Consequently, as discussed below, we require the incubated entity to hold a minimum equity interest in the incubated station consistent with the control test contained in our existing revenue-based eligible entity definition.

34. For operational support, a qualifying incubation relationship will likely also provide operational assistance and intensive training in the following areas: Engineering/technical operations, office support, sales, programming, and management, including business planning, finances, and administration. These areas of operational support encompass those that commenters have proposed and that proponents have traditionally conceived of as part of a comprehensive incubator program.

35. The specific components of a qualifying incubation relationship may vary based on the amount of industry experience an incubated entity has previously obtained, the incubating entity's existing resources, and the specific needs of the station to be incubated. Parties may be able to demonstrate that an incubated entity already has significant experience in some of the areas listed above and that a qualifying incubation relationship for that entity requires fewer components. Regardless of which of these specific components are included in a particular incubation relationship, the support required by a qualifying incubation relationship must ultimately enable the incubated entity to own and operate independently either the incubated station or another full-service AM or FM station at the conclusion of the incubation relationship. We expect that an incubation relationship where both parties have established a plan for the incubated entity to own and operate independently either the incubated station or a newly acquired full-service AM or FM station at the end of the incubation relationship, with progress indicators identified as part of a contract between the parties, holds the greatest likelihood of success. As discussed below, after the second year of incubation we will not allow any brokering or sharing arrangements

involving the incubated station to ensure that the incubated entity demonstrates its ability to operate the incubated station independently prior to the end of the relationship.

36. *Option to Buy Out Incubating Entity or Obtain Assistance in Acquiring a New Station.* We agree with the ACDDE's proposal that qualifying incubation relationships must include an option that provides the incubated entity with the right, but not the obligation, to purchase the incubating entity's equity interest in the incubated station, if it holds one. The price and terms of this buy-out option must be commercially reasonable and must not strongly favor the incubating entity, and the purchase price must not exceed the station's fair market value. The fair market value must be determined through customary valuation methods that rely on audited financial statements prepared by a certified public accountant, real estate appraisals, and other information such as market size, total radio dollars available market-wide, market growth, market competition, and the potential for signal upgrades, to the extent such information is relevant to determining the fair market value of the station. At the end of the qualifying incubation relationship, the incubated entity may decide not to exercise this option and choose instead to retain its existing controlling interest in the incubated station. Alternatively, the incubated entity may choose to sell its interest in the incubated station and use the proceeds from sale to acquire another full-service AM or FM station. In that case, we expect the incubating entity to help the incubated entity identify a full-service AM or FM station to buy and obtain the financing necessary to purchase the station. Absent a showing at the end of the qualifying incubation relationship that the incubated entity holds a controlling interest in the incubated station or a newly acquired full-service AM or FM station, the incubating entity will not be eligible to receive a waiver of the Local Radio Ownership Rule.

37. By requiring an option as described in the preceding paragraph, we ensure that, before the incubating entity is eligible to receive a waiver, the incubated entity has acquired independent ownership of a full-service AM or FM station, consistent with our program goal of introducing new, independent broadcasters to the industry. Because our approach will provide multiple paths for an incubated entity to achieve the goal of independent station ownership, we conclude that our approach will not

unduly direct or limit the incubated entity's activities following its participation in the program, thereby preserving options as NAB suggests.

38. *Duration of Qualifying Incubation Relationships.* We agree with the ACDDE that in most cases a three-year incubation period will provide enough time for an incubated entity to develop the skills and expertise needed to be able to own and operate a broadcast station independently. NAB offers a similar recommendation, stating that broadcasters' experience in this arena suggests that the term of an incubation relationship should be no less than three years but that an incubated entity may need additional time to obtain the necessary funds or expertise to be self-sufficient, or that an extension may be needed due to marketplace or financing conditions. While we agree that an incubated entity may need more than three years to develop the requisite operational expertise or secure the financing needed to be self-sufficient, we believe we must adopt a maximum time limit of six years for qualifying incubation relationships so that the incubated entity has an incentive to develop the skills and expertise needed to operate a full-service AM or FM station independently.

39. As the ACDDE notes, there may also be instances in which an incubated entity makes exceptional progress towards becoming an independent owner and operator of the incubated station and seeks to acquire full equity ownership and independent control of the incubated station before the incubation term ends. In such circumstances, we will consider granting requests from parties seeking to conclude their incubation relationship before the end of the term.

40. Accordingly, we will require that the incubation agreement provide that the parties must perform the incubation activities for three years, although the parties may jointly seek to conclude their incubation relationship early or request a one-time extension of an additional three years or less, depending on need, upon a showing of good cause. The three-year time period will begin on the effective date of the incubation contract. Extension requests must be submitted before the initial term expires. We direct the Media Bureau (Bureau) to find good cause to grant an extension where (1) the parties need additional time to incubate the full-service AM or FM station as discussed below, or (2) the parties need more time to identify a full-service AM or FM station for the incubated entity to acquire or additional time for the incubated entity to close on the pending

acquisition of a full-service AM or FM station. The parties to the incubation contract must demonstrate that by the end of the extended term they will have resolved the issues that resulted in the need for more time and that the incubated entity will be able to own a full-service AM or FM station and have demonstrated its ability to operate such a station independently. Unless otherwise specified by the parties and approved by the Commission, the terms of the initial incubation contract will govern the incubation relationship during any Commission-approved extension period.

41. *Independence of Incubated Entity.*

The incubator program is designed to provide a “hands on” learning process in which the incubated entity learns by “doing” with the benefit of a mentor. To ensure that the incubated entity derives the maximum benefit from the training and mentoring provided by the incubating entity, we require that the incubated entity be the licensee of the incubated station and maintain ultimate authority over station personnel, programming, and finances. It is by engaging in station management activities independently that the incubated entity will best develop its skills. As NAB notes, “this level of independence is essential to promoting the new entrant’s business growth and experience.” Indeed, the goals of the incubator program, including encouraging new and diverse ownership of broadcast stations, require that we adopt safeguards to ensure that the incubated entity retains control of the incubated station and remains independent of the incubating entity and thus develops the skills necessary to own and operate the station independently. While the incubating entity will devote considerable financial, operational, managerial, and technical resources during the incubation relationship, the incubated entity must retain control of the incubated station and remain independent of the incubating entity to ensure it derives the full measure of intended benefits, in the form of “hands on” learning, during the entire incubation relationship.

42. Below, we adopt certain safeguards to ensure that the incubated entity has the requisite level of autonomy during the incubation relationship. As a threshold matter, we require the incubated entity to satisfy a control test as discussed below, consistent with our revenue-based eligible entity definition. In addition, we place limits on the use of brokering and sharing arrangements. We agree with the ACDDE that JSAs and shared

service agreements (SSAs) may be used only to assist in, and must not be used to substitute for, incubation. Finally, both to promote the incubated entity’s autonomy and to guard from potential conflicts of interest, we place limits on the ability of individuals to take on management or oversight positions in both the incubating entity and incubated entity.

43. First, we require the incubated entity to satisfy the following control test consistent with our existing revenue-based eligible entity definition, upon which we are basing the second prong of the eligibility standard for our incubator program as discussed above. Specifically, we require that the incubated entity hold more than 50 percent of the voting power of the licensee of the incubated station, and if the licensee is not a publicly traded company (which will almost assuredly be the case), a minimum of either 15 percent or 30 percent of the equity interests, depending on whether someone else owns or controls more than 25 percent of the equity interests. Both the ACDDE and NAB agree that the incubated entity must hold more than 50 percent of the voting power to control the incubated station. The ACDDE, however, also calls for the incubated entity to hold a minimum equity interest of 20 percent. Veteran broadcaster Skip Finley proposes that the Commission limit the investment of the incubating entity to 25 percent, which he argues would not permit control or, standing alone, create an attributable ownership interest. We conclude that applying the control test in our existing eligible entity rule will best ensure that the incubated entity retains control of the incubated station while still giving the parties some flexibility to establish incubation relationships that suit their specific needs. Also, as noted above, we find that it is important for the incubated entity to have some minimum “skin in the game” as a sign of its commitment to the success of the incubation relationship. In this regard, we find that the minimum equity holding requirements of the control test contained in the revenue-based eligible entity definition are appropriate. Using these existing requirements should facilitate both participation in and administration of the incubator program, as the requirements are already familiar to licensees. Hence, as discussed more fully below, all incubation applications must demonstrate that control will rest with the incubated entity and that the incubated entity meets the requisite

minimum holding level discussed herein.

44. We remind parties that our rules prohibit unauthorized transfers of control, including de facto transfers of control. Thus, even if the incubated entity has a controlling interest in the incubated station, we will also look to whether the incubated entity maintains control over the station’s core operations, including programming, personnel, and finances, when addressing questions relating to control.

45. To ensure that the incubated entity retains autonomy over the incubated station’s core operating functions so as to gain the necessary level of operational expertise, and in light of concerns raised by the ACDDE and REC Networks, we place certain restrictions on the use of LMAs, JSAs, and SSAs. Our current attribution standards recognize that same-market radio LMAs and JSAs above a certain percentage of the station’s broadcast day may confer on the brokering station the potential to exert a significant degree of influence over core station operating functions (*i.e.*, programming decisions). Specifically, our attribution standards regard as attributable ownership interests same-market radio LMAs and JSAs in which the brokering station brokers more than 15 percent of the broadcast time or sells more than 15 percent of the advertising time per week. Given our rationale for attributing these arrangements and the concerns raised in the record of this proceeding, we adopt the following safeguards.

46. First, to ensure that the incubated entity retains control of the programming aired on the incubated station, we prohibit LMAs involving the incubated station. As defined in our rules, an LMA is any agreement that involves “the sale by a licensee of discrete blocks of time to a ‘broker’ that supplies the programming to fill that time and sells the commercial spot announcements in it,” regardless of how the agreement is titled. Second, to ensure that the incubated entity is able to gain operational expertise by performing the core operations of the incubated station, we limit any JSAs or SSAs involving the incubated station to the first two years of the initial incubation period. Pursuant to the definitions in our rules, we consider a JSA to be any agreement with the licensee of a brokered station that authorizes a broker to sell advertising time for the brokered station, and we consider an SSA to be any agreement or series of agreements in which (i) a station provides any station-related services to a station that is not directly or indirectly under common de jure

control permitted under the Commission's regulations, or (ii) stations that are not directly or indirectly under common de jure control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services. While our attribution standards do not regard SSAs as attributable ownership interests, we are concerned that allowing these arrangements to be used for the full duration of an incubation relationship could deprive the incubated entity of its incentive to gain the operational expertise needed to operate the station independently at the end of the relationship. Permitting limited use of JSAs and SSAs appropriately balances broadcasters' representations that these arrangements can make incubation more successful with the need to ensure that each incubated entity learns how to perform essential station functions independently in order to be viable in the long term as an independent broadcaster. We do not believe that prohibiting LMAs and restricting the use of JSAs and SSAs will reduce the utility of our program for incubated entities, as the record and our experience indicate that new owners of radio stations need assistance primarily with financing and technical issues, rather than programming and advertising sales.

47. Moreover, these safeguards will enable the parties to evaluate whether the incubated entity is prepared to operate independently before the incubation period has ended and while the incubating entity remains contractually obligated to provide support. By requiring that the incubated entity actually obtain or produce programming, sell advertising, and perform other core operating functions for the incubated station for at least one full year prior to the expiration of the incubation relationship, these protections will provide for a more informed assessment of the incubated entity's progress and any areas where it needs additional training and support to be viable as an independent owner and operator of the incubated station or another full-service AM or FM station. The incubated entity's experience performing core operating functions may provide a persuasive justification for extending the incubation relationship if the parties determine that more time is needed to incubate the station; thus, we are likely to rely on the parties' assessment that an extension of the incubation relationship is needed. While we are allowing limited use of

JSAs and SSAs, we emphasize that these agreements, if used, must be accompanied by proper training in the relevant area(s)—e.g., administrative, technical, sales, etc.—covered by any such arrangement(s) involving the incubated station.

48. Finally, we require that none of the officers, directors, managing partners, or managing members of the incubated entity hold an attributable interest in or be an employee of the incubating entity. We are concerned that allowing an employee or an attributable interest holder of the incubating entity to serve as an officer, director, managing partner, or managing member of the incubated entity may jeopardize the independence of the incubated station given the significant conflicts of interests that could arise for these individuals and the significant authority and potential for influence they would wield over the incubated station. While U.S. antitrust laws prohibit, with certain exceptions, one individual from serving as an officer or director of two competing corporations, we believe that an additional safeguard is needed to address circumstances that may be exempt from or not covered by the antitrust laws, such as where the two companies are not competitors, where either company is not a corporation or does not meet certain financial thresholds, or where an officer or director of one company is an employee but not an officer or director of the other company. We note that NAB and MMTC previously stated that the incubating entity and the incubated entity should not share common officers or directors. As discussed above, we believe that an even stronger safeguard is necessary to ensure the independence of the incubated station.

49. *Limitations on Incubation Relationships Per Market.* We will allow each incubating entity to incubate no more than one station per market, as defined for purposes of determining compliance with the Local Radio Ownership Rule. This will help ensure that the benefits that flow from our incubator program reach multiple markets and that our program is not used to restrict the limited number of local broadcast radio channels to one or a few radio station owners. While an established broadcaster that is already in an approved incubation relationship may not concurrently incubate multiple stations in the same market, the incubating broadcaster may apply to incubate a different station in another market. Consistent with the certifications and other requirements discussed herein, the established broadcaster would need to demonstrate

that it will provide the resources necessary to incubate the additional station(s). Moreover, a prospective incubating entity may seek to incubate a station in a market where there is already an ongoing incubation relationship involving a different station if the prospective incubating entity is not a party to or participant in that ongoing relationship.

Benefit To Incubating Entity

50. In this section, we discuss the benefit that an established broadcaster will be eligible to receive for successfully completing a qualifying incubation relationship, namely a waiver of the Local Radio Ownership Rule. We discuss below the terms associated with the waiver and the standard for granting such a waiver.

51. Acknowledging that proponents of a broadcast incubator program have previously suggested that incubating entities receive a waiver of our local broadcast ownership rules in exchange for participating in an incubator program, the *NPRM* sought comment on how to structure the waiver element or other appropriate incentive. In particular, the *NPRM* sought comment on whether the waiver should allow the incubating entity to obtain an otherwise impermissible non-controlling, attributable interest in the incubated station or to acquire a different station in the same market or any similarly sized market. Among other things, the *NPRM* also sought comment on whether a waiver should be tied to the success of the incubation relationship, whether the waiver should continue when the incubator program ends, and whether the waiver should be transferrable if the incubating entity sells a cluster of stations that does not comply with the ownership limits at the time.

52. *Why a Reward Waiver as Opposed to Another Type of Benefit.* We conclude that our incubator program must provide a meaningful economic incentive in order to encourage established broadcasters to commit the substantial financial and other resources needed to incubate a new entrant successfully as discussed below. We recognize that, without active participation by incumbent broadcasters, any incubator program we design will be doomed to fail. Both supporters and opponents of an incubator program agree that a strong incentive is needed to entice prospective incubating entities. Indeed, the ACDDE states that an important goal of the incubator program is to create a sufficient incentive for established broadcasters to incubate new entrants, allowing established broadcasters to

grow their businesses while sharing with others the opportunities they may have enjoyed earlier in their careers.

53. There is, however, a divergence of views over what would be the best incentive. According to the broadcasters, a waiver of the local broadcast ownership rules is the appropriate incentive. The ACDDE, on the other hand, advocates for two forms of tax relief: A tax certificate entitling the incubating entity to defer capital gains taxes on the sale of its interest in the incubated station upon reinvestment in a comparable property, and a tax credit of an amount equal to the appraised fair market value of the station if the incubating entity donates the station to a mission-based entity or a Native American Nation. REC Networks proposes a regulatory fee exemption.

54. We conclude that allowing an incubating entity to seek a waiver of the Local Radio Ownership Rule, including the AM/FM subcap (reward waiver), in exchange for successfully completing a qualifying incubation relationship will provide a meaningful economic incentive to established broadcasters and thereby encourage them to incubate a new entrant. Those broadcasters who have the experience and resources needed to incubate a new or small broadcaster successfully are likely to be longtime station group owners that may be at or near the local ownership limits in one or more markets. Consequently, based on the record in this proceeding, we expect that a waiver of the Local Radio Ownership Rule will be sufficiently attractive to these prospective incubating entities to entice them to participate in the incubator program. While some commenters assert that granting waivers of local ownership rules to incubating entities could harm rather than promote ownership diversity, we find that the record demonstrates a waiver of the Local Radio Ownership Rule is the benefit within our authority that will best provide a sufficient incentive for established broadcasters to participate in our incubator program. In establishing requirements for the use of reward waivers under our incubator program for full-service AM and FM stations, we balance our goal of preserving our local radio ownership limits with the need to provide enough flexibility to foster participation in our program by incubating entities. We conclude that the requirements we adopt herein regarding the use of reward waivers will help ensure that they do not work against our local radio ownership limits and that our incubator program preserves a market structure

that facilitates and encourages new entry into the local media market, as discussed below.

55. We decline to rely on regulatory fee exemptions or tax incentives to encourage participation in our incubator program. With regard to a regulatory fee exemption, we agree with the 22 ACDDE Members who filed reply comments that a six-to-twelve-month exemption of this sort would not provide a sufficient incentive for established broadcasters to incubate new entrants. In addition, we note that the Commission has previously found that it does not have the authority to waive or defer fees categorically.

56. As for tax certificates and tax credits, we agree that they can provide an incentive for established broadcasters to enter qualifying incubation relationships and that some believe tax certificates have been successful in the past in bringing new and diverse entrants to the broadcasting industry, but we are unable to use such measures to encourage participation in our incubator program absent authorization from Congress. Since the prior tax certificate program was eliminated in 1995, supporters have from time to time advocated for the return of the program. Indeed, the Commission itself has previously supported the effort to reinstate tax certificates as a means for increasing ownership diversity. To date, however, those efforts have been unavailing. Thus, rather than indefinitely delaying implementation of an incubator program pending Congressional introduction and passage of the necessary tax legislation, we find that it is in the public interest to proceed with the program we implement today, which will provide a meaningful incentive for established broadcasters to incubate new entrants that genuinely need financial and/or operational support to become independent owners. Of course, following our action today, Congress would be able to adopt legislation either authorizing or mandating the use of tax certificates and tax credits in our incubator program, either in addition to or in lieu of reward waivers, should it so choose.

57. *Timing and Duration of Reward Waiver.* The reward waiver will be available to the incubating entity after the successful completion of a qualifying incubation relationship. The process for determining whether an incubation relationship has been successful is described more fully below. While NAB proposes that the reward waiver be available to the incubating entity prior to the end of the incubation relationship, we believe that

an incubating entity will have a much stronger incentive to cultivate the incubated entity as an independent broadcaster if the reward waiver is available to the incubating entity only after it successfully completes the qualifying incubation relationship. To use its reward waiver, the incubating entity must seek to acquire a full-service AM or FM station and file the waiver request within three years after the successful conclusion of the qualifying incubation relationship. We believe it is necessary to require that each reward waiver be used in proximity to the associated incubation relationship in order to aid our tracking and recordkeeping, and so the Commission is able to consider the availability of such benefits in the context of ownership rules and competition in radio markets close in time to when the incubation relationship occurs. We also believe that the incubating entity will have every incentive to acquire a full-service AM or FM station using the reward waiver as quickly as possible following the successful conclusion of the qualifying incubation relationship. Therefore, we reject NAB's assertion that an unused reward waiver should not expire.

58. We do, however, recognize that retaining the value of a station cluster that includes a reward waiver is an important part of the benefit afforded to an incubating entity. Consequently, as long as the cluster that is initially formed using the reward waiver is transferred intact, we will permit the waiver to be transferred with the station group. Permitting transfer of the initial cluster preserves any increase in value achieved by the incubating entity for its efforts in bringing a new broadcaster into the market. We do not, however, permit the waiver to move separately from the station cluster, as we also seek to ensure that those who have not advanced diversity via participation in the program do not receive a windfall. Consequently, the waiver will continue in effect as long as the cluster remains intact. Further, a single party may not hold the benefit of more than one waiver in a market granted under our incubation program, meaning that a station cluster that exceeds the applicable ownership rule by virtue of an incubation reward waiver may not be transferred to an entity that already holds such a waiver in the market. In addition, we will permit the incubating entity to use its reward waiver to engage in an in-market station swap, which will not impact ownership diversity in the market or allow a broadcaster to obtain a reward waiver without making a

countervailing contribution to ownership diversity.

59. *Markets Where Reward Waiver May Be Used.* We will allow an incubating entity to use a reward waiver to acquire an otherwise impermissible attributable interest to: (i) Purchase a full-service AM or FM station located in the same market as the incubated station, (ii) purchase a full-service AM or FM station located in a market that is comparable to the market in which the incubation occurred, as defined below, or (iii) if the incubated entity chooses not to exercise its option to purchase the incubating entity's non-controlling interest in the incubated station, to retain an otherwise impermissible attributable interest in the incubated station after the incubation relationship ends (including acquiring a controlling interest in the incubated station if the incubated entity acquires a controlling interest in another full-service AM or FM station). An incubating entity that uses a reward waiver in a comparable market may also choose to retain its non-controlling attributable interest in the incubated station if permitted by our ownership rules. Commenters that support the use of waivers in our incubator program agree that we should allow an incubating entity to use a reward waiver in a market other than the incubation market, and we believe this will expand opportunities for incubation by not limiting participants only to markets where the incubating entity is at or near the applicable local radio ownership limits. To preserve competition in even the smallest markets, however, we will not allow an incubating entity to use a reward waiver in a market where the waiver would result in the incubating entity holding attributable interests in more than 50 percent of the full-service, commercial and noncommercial radio stations in a market. Thus, consistent with our existing Local Radio Ownership Rule, an incubating entity will not be able to hold an attributable interest in more than 50 percent of the full-service, commercial and noncommercial radio stations in a market unless the combination of stations comprises not more than one AM and one FM station. Given our decision to allow a reward waiver to be used only if the incubating entity will not hold an attributable interest in more than 50 percent of the full-service, commercial and noncommercial radio stations in a market, we do not think it is necessary to adopt a cap on the in-market revenue share of station combinations resulting from the use of a reward waiver as one commenter

proposes. We believe that a cap on the in-market revenue share of station combinations, which is more likely to change from year to year, would not be as effective as a cap on the share of stations that an incubating entity may own in a reward market.

60. We will consider a market to be "comparable" to the market where the incubation relationship occurred if, at the time the incubating entity seeks to use the reward waiver, the chosen market and the incubated market fall within the same market size tier under our Local Radio Ownership Rule and the number of independent owners of full-service, commercial and noncommercial radio stations in the chosen market is no fewer than the number of such owners that were in the incubation market at the time the parties submitted their incubation proposal to the Commission. Restricting an incubating entity that uses a reward waiver to purchase a station in another market to a comparable market will help ensure that the local impact of the reward waiver on the number of independent owners is similar to that of the incubated station in its market. Thus, it balances our desire to limit the impact of any potential consolidation that could result from the use of a reward waiver with our goal of expanding broadcast station ownership opportunities for small businesses and potential new entrants by allowing an incubating entity to incubate in markets other than those in which it is at or near the applicable local radio ownership caps. To the extent NAB seeks even greater flexibility and proposes that we permit an incubating entity to use a reward waiver in any market it wishes, we reject that element of NAB's proposal. For the reasons discussed above, we believe that the better approach is to require that a reward waiver be used either in the same market where the incubation relationship occurred or in a comparable market.

61. A group of commenters contend that our definition of comparable market could result in applying a reward waiver in a much larger market than that in which incubation occurred and propose limiting the definition of a "comparable market" to those markets ranked "5 Up/5 Down" from the incubation market based on Nielsen's population rankings. We conclude, however that the proposed definition would not necessarily lead to incubation and use of waivers in markets that are truly more "comparable" with respect to the number of stations and independent owners than the definition we adopt

above. As an initial matter, we note that the Nielsen rankings are based on the population of the relevant market, not on the number of stations in a given market or the number of independent owners. Thus, the markets five up or five down from the incubation market might not have the same number of stations or independent owners as the incubation market—the very factors we find most relevant in assessing the diversity of the market. For example, according to Nielsen data from Fall 2017, Baltimore is ranked as market 21 and St. Louis is ranked as market 23, yet Baltimore has only 35 stations, while St. Louis has 68 stations, resulting in the markets being subject to different ownership caps under our rules. In crafting our standard, we focused primarily on preventing the potential for ownership consolidation in a market with fewer stations and independent owners than the market in which the incubation relationship added a new entrant. In addition, we note that ownership interests and circumstances vary widely among incumbent broadcasters, and it is not self-evident that an incubating entity will seek to use a reward waiver in the market with the largest population possible. Rather, we expect the decision will be driven by where the group owner faces ownership restrictions or wishes to grow a successful cluster. Finally, it is possible that the incubating entity does not own any stations in markets that are within five up or five down from the incubation market, in which case it would have no flexibility to use the reward waiver. In this regard, we agree with NAB that the "5 Up/5 Down" proposal is "unduly restrictive" and could have the effect of inhibiting participation by potential incubating broadcasters. For all of the foregoing reasons, therefore, we decline to adopt the "5 Up/5 Down" proposal.

62. While we believe that incubating entities will have no difficulty using reward waivers under our market comparability standard, we may allow an incubating entity to use a reward waiver in a market that does not meet our comparability standard if, due to changed circumstances following the parties' submission of their incubation proposal, there is no longer a comparable market in which the incubating entity is at the local radio ownership cap or AM/FM subcap and the incubating entity demonstrates why doing so is consistent with the public interest. However, we anticipate that incubating entities will consider our market comparability standard when choosing a candidate to incubate given

our decision to allow an incubating entity to use its reward waiver in a market that meets that standard.

63. We will allow an incubating entity that receives multiple reward waivers under our program (as a result of incubating multiple new entrants) to use no more than one reward waiver per market. This, as well as our decision above to grant an incubating entity a reward waiver only after the incubating entity successfully completes a qualifying incubation relationship and only in the same market as the incubated station or a comparable market, will help ensure that reward waivers do not work against our local radio ownership limits. Indeed, our local radio ownership limits promote competition and viewpoint diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market. The safeguards that we adopt today will help ensure that our incubator program preserves such a market structure while further promoting the entry of new and diverse voices in broadcast radio.

64. *Temporary Waiver for Purposes of Qualifying Incubation Relationships.* In some cases, a prospective incubating entity may already hold attributable interests in the maximum number of radio stations permitted by our Local Radio Ownership Rule in the market where it seeks to engage in a qualifying incubation relationship. To ensure that, in such circumstances, a prospective incubating entity may still participate in our program, we will grant such an incubating entity a temporary waiver of the Local Radio Ownership Rule (including the AM/FM subcap) if the incubation relationship would result in the incubating entity holding an otherwise impermissible, non-controlling attributable interest in the incubated station. If such a waiver is necessary, the Bureau will consider and approve such a waiver when reviewing the incubation proposal. This temporary waiver will expire when the incubation relationship ends. At that point, if the incubating entity has met all its obligations under the approved incubation relationship and demonstrates that the relationship was successful as discussed below, the incubating entity will be able to obtain a reward waiver as discussed herein.

65. *Criteria for Granting a Waiver.* We will review requests for both the reward and temporary waiver pursuant to § 1.3 of our rules, which requires a showing of “good cause” and applies to all Commission rules. With regard to the temporary waiver, the incubating entity

and incubated entity must demonstrate, as described in greater detail below, that they are both eligible for, and intend to engage in, a qualifying incubation relationship. To receive a reward waiver, the incubating entity must demonstrate that it has completed a successful qualifying incubation relationship. Specifically, the incubating entity must certify (i) that it complied in good faith with its incubation agreement, as submitted to and approved by the Bureau, and the requirements of our incubator program discussed herein; and (ii) either that the incubated entity holds a controlling interest in the incubated station or a newly acquired full-service AM or FM station, or if the incubated station was a struggling station, that the incubation relationship has resolved the financial and/or operational difficulties that the owner of the previously struggling station faced prior to incubation and sought to remedy through the incubation relationship. If these criteria are met, we will consider the qualifying incubation relationship to be successful even if the incubating entity retains a non-controlling attributable interest in the incubated station when the relationship concludes, provided that the incubating entity’s interest in the station complies with the applicable ownership limits or is permissible pursuant to a waiver of the local radio ownership limit (including the AM/FM subcap). After the incubating entity demonstrates that it has completed a successful qualifying incubation relationship as discussed herein, the incubating entity need not engage in any other actions to receive a reward waiver, beyond seeking to use the waiver in a comparable market and otherwise being in compliance with Commission rules and requirements, and there will be a rebuttable presumption that granting the waiver is in the public interest.

66. We find that “good cause” exists to grant these temporary and reward waivers because doing so yields benefits to competition and ownership diversity in a local market that outweigh the impact on local competition in the market in which a waiver is granted. By tying grant of the reward waiver directly to station ownership by a new or previously struggling entity and restricting the use of reward waivers as discussed herein, any consolidation resulting from the use of a reward waiver will be limited and accompanied by the establishment of a new, or stronger, broadcaster in the same or a comparable market. Indeed, it is our determination herein that the public interest would not be served by strictly

applying the Local Radio Ownership Rule (including the AM/FM subcaps) where an established broadcaster that engages in a qualifying incubation relationship seeks a waiver of the rule as discussed in this Order. While in the context of § 1.3 waiver requests, the Commission has considered showings of undue hardship, the equities of a particular case, or other good cause, in this particular context an applicant is required to make a narrower showing as discussed herein. If the applicant demonstrates that it has engaged in a successful qualifying incubation relationship and that grant of a waiver is consistent with the goals of our incubator program, there will be a rebuttable presumption that granting a waiver in the incubation market or a comparable market is in the public interest.

Procedures for Filing, Reviewing, and Monitoring Compliance of Incubation Relationships

67. Before the parties commence a qualifying incubation relationship, the Bureau must determine that the relationship is designed to help a new entrant, small broadcaster, or struggling broadcaster gain the ability to own and operate a full-service AM or FM station independently and that the relationship otherwise qualifies for the program. This section lays out the process for submission and review of incubation relationship proposals and how compliance will be monitored during the incubation relationship. In addition, this section describes how the Bureau will determine whether a particular incubation relationship has been successful, such that the incubating entity is eligible to seek a reward waiver. We direct the Bureau to implement these procedures.

68. As a threshold matter, we note that all incubation proposals must be based on prospective relationships. Incubating broadcasters will derive a significant benefit by receiving the reward waiver. Consequently, all incubation proposals must demonstrate a strong likelihood of promoting the ultimate program goal of bringing greater ownership diversity to the broadcast sector. This will be done by either enabling the incubated entity to own and operate a newly acquired full-service AM or FM radio station independently, or by improving the incubated entity’s ability to retain and operate independently the struggling station it currently owns. To ensure that a proposed incubation relationship comports with the program’s goal of broadening ownership diversity, we require prior Bureau review of the

proposal with an eye towards its adherence to the program requirements described in the instant order.

Bureau Review of Incubation Proposals

69. *Process for Submitting Incubation Proposals.* There are several ways in which an incubation proposal might come before the Bureau. We expect that most incubation proposals will accompany an assignment, transfer of control, or construction permit application. We direct the Bureau authority to modify the FCC Forms, including instructions and worksheets, as needed to enable applicants to indicate on the relevant FCC Form that the submission involves an incubation proposal. Such applications seeking to transfer, assign, or obtain an authorization are subject to public notice and petitions to deny and informal objections under the Commission's rules, and in addition to reviewing such applications pursuant to its routine review processes, the Bureau will review accompanying incubation proposals and approve or reject such proposals. As part of this review, the Bureau will also assess whether any request for temporary waiver of the ownership rules in the incubated market should be granted to permit the incubation relationship.

70. For any incubation relationship that does not trigger a FCC Form filing requirement, the proposal must be filed as a Petition for Declaratory Ruling in the Incubator docket, MB Docket No. 17–289, in the Commission's Electronic Comment Filing System (ECFS). Just as in the application context, if a temporary waiver of the ownership rules is needed for the incubation relationship, then the waiver request must accompany the Petition for Declaratory Ruling. The Bureau will act on such petitions and temporary waiver requests pursuant to its standard processes. As described above, any temporary waivers needed for the incubator program, irrespective of whether the proposal comes via an application or a Petition for Declaratory Ruling, will be granted (or denied) pursuant to § 1.3 of the Commission's rules.

71. The key factors guiding review of an incubation proposal will be whether: (1) the potential incubated entity has the wherewithal to obtain the necessary financing and support, absent the proposed incubation relationship; (2) the proposal provides for an incubation relationship addressing the needs that the incubated entity has (e.g., financial, technical, managerial, etc.) to be able to own and operate a full-service AM or FM station independently after the

relationship has ended; and (3) the incubated entity retains de jure and de facto control over the station to be incubated. To assess whether the incubation proposal meets these factors, the Bureau will review two forms of documentation: (1) A written incubation contract between the parties; and (2) a certified statement that the incubated and incubating entities must each submit. These submissions will be the Bureau's best indications of whether the proposed incubation relationship is likely to promote the program's goals of increasing diverse station ownership by enabling a qualified incubated entity to own and operate a full-service AM or FM station independently. The Bureau, however, may also require the applicants to submit additional information if needed to determine whether the proposed incubation relationship is likely to promote the goals of our incubator program as discussed herein.

72. *Written Incubation Contract.* The incubation proposal must contain a written contract between the parties memorializing all aspects of the incubation relationship, so as to demonstrate both compliance with program requirements (e.g., that the incubated entity has both de jure and de facto control) and the steps the parties will take to put the incubated entity in a position to own and operate a full-service AM or FM radio station independently.

73. The contract must detail the level of equity interest each party will bring to the relationship. The incubated entity must show that it is providing a minimum equity stake as detailed above. The contract must also detail the parties' plan to unwind the incubation relationship and the steps they will take to enable the incubated entity to own and operate a full-service AM or FM station independently, be it the station that is the subject of incubation or another station to be acquired upon conclusion of the incubation relationship. The contract must provide the incubated entity with the option to buy out the incubating entity's non-controlling interest in the incubated station. As described above, the incubated entity can choose not to pursue this option and maintain the existing relationship along with its controlling interest. Alternatively, the incubated entity may choose to sell its interest in the incubated station and use the proceeds from the sale to acquire another full-service AM or FM station. In that case, we expect the incubating entity to help the incubated entity identify a full-service AM or FM station to buy and obtain the financing

necessary to purchase the station. The contract must also provide for this alternative option. We require the contract to contain both options because we recognize that the incubated entity may not be well-positioned at the outset of the relationship to determine which approach best suits its long-term business interests in the broadcast sector. The incubated entity's anticipated growth trajectory may change as a result of the incubating entity's mentorship and introduction to capital sources that may have been previously unavailable. Indeed, we hope this will be the case. Consequently, while still ensuring that the incubated entity ultimately independently owns and operates a radio station, we do not mandate a pre-determined mechanism for how this goal will be achieved. As described below, however, the parties must notify the Bureau no later than six months before the end of the contract term which option they intend to pursue.

74. *Certified Statements.* Along with a written agreement detailing the terms of the incubation relationship and the rights and obligations of each party, the incubating and incubated entities must each file a certified statement describing, among other things, each party's background, qualifications, and resources, and how these will enable the party, via the incubation relationship, to promote the goals of the incubator program—i.e., enabling a new entrant or small business to own and operate a full-service AM or FM station independently or to place a previously struggling station on a firmer footing. As part of the statement, the incubated entity must certify that its annual revenues for the previous three years did not exceed the SBA revenue standard and that during the preceding three years it held attributable interests in no more than three full-service AM and FM stations (listing the stations, community of license, and facility IDs of each), and that it did not hold an attributable interest in any TV stations, consistent with the eligibility standards adopted above. In addition, if the incubation proposal is being filed as a Petition for Declaratory Ruling, the potential incubated entity must make the same certifications and attribution disclosures that it would have had to submit were it filing the FCC Form 301, 314, or 315. We also require a potential incubated entity to include in its application a certified statement laying out why it is unable to acquire a controlling interest in the incubated station, or successfully operate the station, absent the proposed incubation

relationship and the funding, support, or training provided thereby.

75. Likewise, the incubating entity must certify that it has the resources and experience necessary to help the incubated entity become an independent owner and operator of the incubated station or another full-service AM or FM station and that it will devote those resources and experience to achieve that goal. Dedicating executive and management personnel to provide training, strategic advice, and other support to the incubated entity may help demonstrate that an experienced broadcaster is committed and has the resources necessary to incubate a new entrant successfully. Longtime ownership of radio stations that are in the same service as the incubated station and in multiple markets is another indicator of the owner's potential for success as an incubator. Indeed, due to their resources and experience, station group owners may be in a particularly good position to help persons not only become radio licensees but also succeed in radio station ownership. In addition, the incubated and incubating entities must both certify that the incubated entity will maintain operational and management control of the station, including decisions regarding programming, personnel, and finances. These submissions will enable the Bureau to verify that the incubated entity is a bona fide entity, without links to the incubating entity absent the incubation relationship, and truly needs the resources of the incubator program.

76. The goal of this program is to bring new voices to the local radio market and to stabilize those small broadcasters that might otherwise drop out of the market. While recognizing that the waiver the incubating entity will receive at the end of the incubation relationship is the best way to encourage participation in our program by established broadcasters, we do not grant these waivers lightly. The submissions described above provide an additional opportunity to ensure that both the incubating and incubated entities are legitimate participants in the program. If the Commission determines at a later date that either submission contained a misrepresentation this could lead to a withholding or revocation of a waiver, as well as referral to the Enforcement Bureau for further action.

Compliance During Term of Incubation Relationship

77. Once the incubation contract has gone into effect, on the annual anniversary of the effective date of the

contract, the incubating and incubated entities must jointly file a certified statement describing the incubation activities during the preceding year and how these comport with the commitments laid out in the incubation contract. The statement must describe the progress being made towards the ultimate goal of station ownership, or greater stability regarding current ownership, by the incubated entity. This annual certified statement must be filed both in the Incubator docket via ECFS and the parties' public inspection files, so as to enable public review. These statements will be the primary mechanism by which the Commission and the public can gauge compliance with the terms of the incubation contract and progress towards the goal of independent station ownership. If, upon review of an annual statement, the Bureau has questions or concerns, staff may follow up with the parties.

78. No later than six months before the contract termination date, the parties must make a submission to the Commission stating which option for station ownership the incubated entity plans to pursue at the conclusion of the relationship—*e.g.*, indicating that the incubated entity intends to buy out the incubating entity's non-controlling interest in the incubated station or that the parties will work together to identify and secure another full-service AM or FM station for the incubated entity to acquire. Accordingly, during the remainder of the contract period, both parties can devote some resources towards effectuating the station ownership goal. For example, both parties may need to commit some resources towards finding a new station or obtaining financing for the incubated entity or both.

Final Bureau Review and Grant of Reward Waiver to Incubator

79. At the end of the three-year contract period, the parties must again file a joint certified statement reporting on the previous year's incubation activities. This submission will, however, also state whether the incubated entity has acquired a new station or will continue to retain its controlling interest in the incubated station, either with or without pursuing its option to buy out the incubating entity's non-controlling interest. If the goal of the incubation relationship was to stabilize a previously struggling station, this third annual filing must describe the current status of the incubated station and whether it is now on a firmer footing. In the event of a shorter incubation relationship due to exceptional progress on the part of the

incubated entity in becoming an independent owner and operator of a full-service AM or FM station, the same filing requirement will apply, only the filing may be made before the third year. The Bureau will have 120 days after the filing of this statement to review the submission and ensure that the expectations for the incubation relationship and all program requirements were met. The Bureau may extend the review period if needed. If the incubation relationship required a temporary waiver of the ownership cap and the incubating entity plans to use its reward waiver to retain an otherwise impermissible attributable interest in the incubated station, including buying out the incubated entity's interest in the incubated station, then the incubating entity must file a waiver request along with the final joint statement. The temporary waiver will remain in effect during the Bureau's review period. In the event that the incubation relationship is deemed unsuccessful and the incubating entity cannot receive a reward waiver, the Bureau will extend the temporary waiver for a set time period as necessary to give the parties an opportunity to unwind the relationship.

80. In the absence of any negative determination from the Bureau by the end of the 120-day review period, following submission of a final joint statement, the incubating entity will then have three years in which to submit a request to use the presumptive reward waiver. The request must be submitted with a copy of the Bureau document(s) that approved the qualifying incubation relationship, including any document(s) that approved an extension of the original term as discussed above. If the incubation relationship proposal was submitted and approved as part of a Form 301 construction permit application or a Form 314 or Form 315 assignment or transfer of control application, the waiver request must also include the file number of the approved application. As described above, there is a rebuttable presumption that granting a reward waiver is in the public interest if the incubating entity seeks the waiver for either the incubated market or a comparable market and the incubating entity is otherwise in compliance with the Commission's rules and requirements. If the incubating entity wishes to use its reward waiver to purchase the incubated station, it must file its application seeking an assignment of license or transfer of control application contemporaneously with its final annual

certified statement. It is necessary for the incubating entity to do this to ensure that the ownership limits in the incubated market are not violated when the temporary waiver for the incubation period expires.

81. While incubation contracts are intended to last no longer than three years, parties may extend the incubation relationship for one additional period of up to three years subject to Bureau approval. For example, if the parties believe they need an additional six months beyond the initial three-year period to complete a new station purchase then they must seek an extension for six months. Parties that wish to extend their relationships must file this request no later than 120 days before the end of the initial three-year contract period. The incubating entity, however, may only seek a reward waiver, either for the incubated market or another market, after the successful completion of the incubation relationship, whatever the extended time period is—be it six months or three years. If, as part of the extension, there are any revisions to the initial incubation contract, the proposed revised contract must be filed along with the extension request. The Bureau will have 120 days to review the revised contract and request for extension. Absent Bureau action to the contrary within the 120-day period, the revised contract and request for extension time will be deemed effective, assuming they do not involve an assignment or transfer of control of a station. If there are no changes in the ownership/attribution/control structure of the agreement (e.g., incubator's control over the incubated station has not increased), it is unlikely to raise concerns for the Bureau. As a general matter, the requirements for the standard three-year contract period will apply during this extended period, but there may need to be some modifications depending on the circumstances. For example, an annual filing requirement will not make sense for a three-month extension. The Bureau will notify the parties of any such modifications.

III. Procedural Matters

82. *Paperwork Reduction Act Analysis.* This Order contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in

this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. We have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Act Analysis.

Final Regulatory Flexibility Analysis

83. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in this proceeding. See 83 FR 774 (Jan. 8, 2018). The Commission sought written public comments on proposals in the NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

84. The *Report and Order* adopts requirements that will govern the incubator program that the Commission previously decided to adopt to support the entry of new and diverse voices into the broadcasting industry. The incubator program seeks to provide established broadcasters with an inducement in the form of an ownership rule waiver to invest the time, money, and resources needed to facilitate broadcast station ownership by new and diverse entrants. Through the incubator program, established broadcasters (i.e., incubating entities) will provide new entrants or small broadcasters (i.e., incubated entities) with the training, financing, and access to resources that would be otherwise unavailable to these entities. At the end of the incubation relationship, the incubated entity will either own a broadcast station or will retain ownership of a previously struggling station, now set on firmer footing. In return for its support, the incubating entity will receive a waiver of the Commission's Local Radio Ownership Rule that the incubating entity can use either in the incubated market or in a comparable market as discussed in the *Report and Order*, within three years of the successful conclusion of a qualifying incubation relationship.

85. To qualify for participation in the incubator program, the parties must seek prior approval from the

Commission that their proposed incubation relationship comports with the program requirements. The key factors guiding review of incubation proposals will be whether the potential incubated entity would have been able to obtain the necessary financing and support absent the proposed incubation relationship; whether the proposal provides the incubated entity with adequate financing, training, and support over the course of the incubation relationship to ensure its success; and whether the incubated entity retains de jure and de facto control over the station to be incubated. The standard term required for a qualifying incubation relationship will be three years, but the relationship may be extended up to an additional three years.

86. Qualifying incubation relationships must provide the incubated entity with an option to purchase the incubating entity's equity interest in the incubated station, if it holds one, for a price that is no more than fair market value and/or terminate the incubating entity's creditor-debtor relationship with the incubated entity at the conclusion of the incubation relationship. At the end of the qualifying incubation relationship, the incubated entity may decide not to exercise this option and choose instead to retain its existing controlling interest in the incubated station. Alternatively, the incubated entity may choose to sell its interest in the incubated station and use the proceeds from the sale to acquire another full-service AM or FM station. In that case, the Commission expects the incubating entity to help the incubated entity identify a full-service AM or FM station to buy and obtain the financing necessary to purchase the station. Absent a showing at the end of the qualifying incubation relationship that the incubated entity holds a controlling interest in the incubated station or a newly acquired full-service AM or FM station, the incubating entity will not be eligible to receive a waiver of the Local Radio Ownership Rule. If the goal of the incubation relationship was to stabilize a previously struggling station, then the joint certified filing must describe the status of the incubated station and whether it is now on a firmer footing. If an incumbent broadcaster successfully incubates a new, small entrant, or a small struggling station owner, as part of the incubator program, it will be eligible to receive a waiver of the Local Radio Ownership Rule following the conclusion of the qualifying incubation relationship. Such a waiver can be used for up to three

years after the successful completion of the qualifying incubation relationship and must be used in either the incubated market or a comparable radio market, as discussed in the *Report and Order*. To receive a reward waiver, the incubating entity must demonstrate that it has completed a successful qualifying incubation relationship. Specifically, the incubating entity must certify (i) that it complied in good faith with its incubation agreement, as submitted to and approved by the Bureau, and the requirements of our incubator program discussed herein; and (ii) either that the incubated entity holds a controlling interest in the incubated station or a newly acquired full-service AM or FM station, or if the incubated station was a struggling station, that the incubation relationship has resolved the financial and/or operational difficulties that the owner of the previously struggling station faced prior to incubation and sought to remedy through the incubation relationship.

87. In addition, to the extent the incubating entity needs a waiver of the Local Radio Ownership Rule to engage in a qualifying incubation relationship (for example, if the incubating entity is already at the applicable local radio ownership limit in the market and its investment in the incubated station would exceed that limit), we will grant the incubating entity a temporary waiver of the Local Radio Ownership Rule (including the AM/FM subcap) to allow the incubating entity to acquire an otherwise impermissible noncontrolling, attributable interest in the incubated station for the duration of the qualifying incubation relationship. With regard to the temporary waiver, the incubating entity and incubated entity must demonstrate that they are both eligible for, and intend to engage in, a qualifying incubation relationship, as discussed in the *Report and Order*.

88. The *Report and Order* implements a long overdue mechanism to address the primary barriers to station ownership by new and diverse entities: lack of access to capital and the need for technical and operational experience. In implementing this incubator program, the Commission's expectation is that each successful incubation relationship will result in the acquisition of a broadcast radio station by a new entrant or small business, or the preservation of an existing, but struggling, small broadcaster. Accordingly, successful implementation of this incubator program will promote ownership diversity by fostering new entry in the broadcasting sector by entrepreneurs and small businesses, including those owned by women and minorities.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

89. The Commission received no comments in response to the IRFA.

Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

90. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

Description and Estimates of the Number of Small Entities to Which the Rules Will Apply

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

92. The rules proposed herein will directly affect small radio broadcast stations. Below, we provide a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

93. *Radio Stations.* This Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources." The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts. Economic Census data for 2012 shows that 2,849 radio station firms operated during that year. Of that number, 2,806 firms operated with annual receipts of less than \$25 million per year. Therefore, based on the SBA's size standard the majority of such entities are small entities.

94. According to Commission staff review of the BIA/Kelsey, LLC's Media

Access Pro Radio Database on June 22, 2018, about 11,365 (or about 99.9 percent) of 11,371 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed commercial AM radio stations to be 4,633 stations and the number of licensed commercial FM radio stations to be 6,738, for a total number of 11,371. We note the Commission has also estimated the number of licensed noncommercial (NCE) FM radio stations to be 4,128. Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

95. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included. The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation. We further note that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these bases; thus, our estimate of small businesses may therefore be over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities, and the estimates of small businesses to which they apply may be over-inclusive to this extent.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

96. In this section, we identify the reporting, recordkeeping, and other compliance requirements adopted in the *Report and Order* and consider whether small entities are affected disproportionately by any such requirements. The Commission decided to adopt an incubator program with the goal of creating ownership opportunities for new entrants and small businesses, thereby promoting competition and diversity in the broadcast industry. In keeping with that goal, the program

requirements that the Commission adopted in the *Report and Order* will enable the pairing of small aspiring, or struggling, broadcast station owners with established broadcasters. These incubation relationships will provide new entrants and struggling small broadcasters access to the financing, mentoring, and industry connections that are necessary for success in the industry but to date have been unavailable to many. Participation in the incubator program is optional, not mandatory. The Commission's expectation is that each successful incubation relationship will result in the acquisition of a broadcast radio station by a new entrant or small business, or the preservation of an existing, but struggling, small broadcaster. Therefore, the Commission anticipates that the incubator program will benefit small entities that participate in the program, not burden them.

97. *Reporting Requirements.* The Commission expects that most incubation proposals will accompany an assignment, transfer of control, or construction permit application. The Commission directs its Media Bureau (Bureau) authority to modify the relevant FCC Forms, including instructions and worksheets, as needed to enable applicants to indicate on the form that the submission involves an incubation proposal. Such applications seeking to transfer, assign, or obtain an authorization are subject to public notice and petitions to deny and informal objections under the Commission's rules, and in addition to reviewing such applications pursuant to its routine review processes, the Bureau will review accompanying incubation proposals and approve or reject such proposals. For any incubation relationship that does not trigger an FCC form filing requirement, the proposal must be filed as a Petition for Declaratory Ruling in the Incubator docket, MB Docket No. 17–289, in the Commission's Electronic Comment Filing System (ECFS). Just as in the application context, if a temporary waiver of the ownership cap is needed for the incubation relationship, then the waiver request must accompany the Petition for Declaratory Ruling.

98. The incubation proposal must contain a written contract between the parties memorializing all aspects of the incubation relationship, so as to demonstrate both compliance with program requirements (e.g., that the incubated entity has both de jure and de facto control) and the steps the parties will take to put the incubated entity in a position to own and operate a full-

service AM or FM radio station independently. The contract must detail the level of equity interest each party will bring to the relationship. The incubated entity must show that it is providing a minimum equity stake as detailed above. The contract must also detail the parties' plan to unwind the incubation relationship and the steps they will take to enable the incubated entity to own and operate a full-service AM or FM station independently, be it the station that is the subject of incubation or another station to be acquired upon conclusion of the incubation relationship. The contract must provide the incubated entity with the option to buy out the incubating entity's non-controlling interest in the incubated station. The incubated entity can choose not to pursue this option and instead maintain its existing controlling interest in the incubated station. Alternatively, the incubated entity may choose to sell its interest in the incubated station and use the proceeds from the sale to acquire another full-service AM or FM station. In that case, we expect the incubating entity to help the incubated entity identify a full-service AM or FM station to buy and obtain the financing necessary to purchase the station. The contract must also provide for this alternative option.

99. Along with an agreement detailing the terms of the incubation relationship and the rights and obligations of each party, the incubating and incubated entities must each file a certified statement describing, among other things, each party's background, qualifications, and resources, and how these will enable the party, via the incubation relationship, to promote the goals of the incubator program—i.e., enabling a new entrant or small business to own and operate a full-service AM or FM station independently or to place a previously struggling station on a firmer footing. As part of the statement, the incubated entity must certify that its annual revenues for the previous three years did not exceed the SBA revenue standard and that during the preceding three years it held attributable interests in no more than three full-service AM and FM stations (listing the stations, community of license, and facility IDs of each), and that it did not hold an attributable interest in any TV stations, consistent with the eligibility standards adopted in the *Report and Order*. In addition, if the incubation proposal is being filed as a Petition for Declaratory Ruling, the potential incubated entity must make the same certifications and attribution

disclosures that it would have had to submit were it filing the FCC Form 301, 314, or 315. The *Report and Order* also requires a potential incubated entity to include in its application a certified statement laying out why it is unable to acquire a controlling interest in the incubated station, or successfully operate the station, absent the proposed incubation relationship and the funding, support, or training provided thereby. Likewise, the incubating entity must certify that it has the resources and experience necessary to help the incubated entity become an independent owner and operator of the incubated station or another full-service AM or FM station and that it will devote those resources and experience to achieve that goal.

100. In addition, the incubated and incubating entities must each certify that the incubated entity will maintain operational and management control of the station, including decisions regarding programming, personnel, and finances. These submissions will enable the Bureau to verify that the incubated entity is a bona fide entity, without links to the incubating entity absent the incubation relationship, and truly needs the resources of the incubator program.

Once the incubation contract has gone into effect, on the annual anniversary of the effective date of the contract, the incubating and incubated entities must jointly file a certified statement describing the incubation activities during the preceding year and how these comport with the commitments laid out in the incubation contract. The statement must describe the progress being made towards the ultimate goal of station ownership, or greater stability regarding current ownership, by the incubated entity. This annual certified statement must be filed both in the Incubator docket via ECFS and the parties' public inspection files, so as to enable public review. These statements will be the primary mechanism by which the Commission and the public can gauge compliance with the terms of the incubation contract and progress towards the goal of independent station ownership. If, upon review of an annual statement, the Bureau has questions or concerns, staff may follow up with the parties. No later than six months before the contract termination date, the parties must make a submission to the Commission stating which option for station ownership the incubated entity plans to pursue at the conclusion of the relationship—e.g., indicating that the incubated entity intends to buy out the incubating entity's non-controlling interest in the incubated station or that the parties will work together to identify

and secure another full-service AM or FM station for the incubated entity to acquire.

101. At the end of the three-year contract period, the parties must again file a joint certified statement reporting on the previous year's incubation activities. This submission will, however, also state whether the incubated entity has acquired a new station or will continue to retain its controlling interest in the incubated station, either with or without pursuing its option to buy out the incubating entity's non-controlling interest. If the goal of the incubation relationship was to stabilize a previously struggling station, this third annual filing must describe the current status of the incubated station and whether it is now on a firmer footing. In the event of a shorter incubation relationship due to exceptional progress on the part of the incubated entity in becoming an independent owner and operator of a full-service AM or FM station, the same filing requirement will apply, only the filing may be made before the third year. If the incubation relationship required a temporary waiver of the ownership cap and the incubating entity plans to use its reward waiver to retain an otherwise impermissible attributable interest in the incubated station, including buying out the incubated entity's interest in the incubated station, then the incubating entity must file a waiver request along with the final joint statement.

102. While incubation contracts are intended to last no longer than three years, parties may extend the incubation relationship for one additional period of up to three years subject to Bureau approval. Parties that wish to extend their relationships must file this request no later than 120 days before the end of the initial three-year contract period. The incubating entity, however, may only seek a reward waiver, either for the incubated market or another market, after the successful completion of the qualifying incubation relationship, whatever the extended time period is—be it six months or three years. If, as part of the extension, there are any revisions to the initial incubation contract, the proposed revised contract must be filed along with the extension request.

103. In the absence of any negative determination from the Bureau by the end of the 120-day review period, following submission of a final joint certified statement, the incubating entity will then have three years in which to submit a request to use the presumptive reward waiver. The request must be submitted with a copy of the Bureau document(s) that approved the qualifying incubation relationship,

including any document(s) that approved an extension of the original term as discussed in the *Report and Order*. If the incubation relationship proposal was submitted and approved as part of a Form 301 construction permit application or a Form 314 or Form 315 assignment or transfer of control application, the waiver request must also include the file number of the approved application. If the incubating entity wishes to use its reward waiver to purchase the incubated station, it must file its application seeking an assignment of license or transfer of control contemporaneously with its final annual certified statement. It is necessary for the incubating entity to do this to ensure that the ownership limits in the incubated market are not violated when the temporary waiver for the incubation period expires.

104. *Recordkeeping Requirements.* Under the Commission's existing public file rules, licensees and permittees of commercial and noncommercial AM and FM stations are already required to retain in their public inspection file a copy of any application tendered for filing with the Commission and related materials as discussed in the rules. Thus, in addition to filing with the Bureau, parties to incubation contracts must retain a copy of all application materials, including the proposed incubation contract, in their public inspection files. Similarly, a copy of each annual certified statement discussed above must be filed both in the Incubator docket via ECFS and the parties' public inspection files. Consistent with the Commission's existing public file rules, items in the public file that are required to be filed with the Commission will be automatically imported into the entity's online public file, and entities will only be responsible for uploading to the online file items that are not also filed in the Consolidated Database System (CDBS) or Licensing and Management System (LMS) or otherwise maintained by the Commission on its own website.

105. *Other Compliance Requirements.* In addition to the other compliance requirements discussed above, the *Report and Order* also adopts the following:

To ensure that the incubated entity derives the maximum benefit from the training and mentoring provided by the incubated entity, the *Report and Order* requires that the incubated entity be the licensee of the incubated station and maintain ultimate authority over station personnel, programming, and finances. The *Report and Order* adopts certain safeguards to ensure that the incubated

entity has the requisite level of autonomy during the incubation period.

106. First, the *Report and Order* requires the incubated entity to satisfy the following control test consistent with the Commission's existing revenue-based eligible entity definition, upon which the *Report and Order* bases the second prong of the eligibility standard for the incubator program. Specifically, the *Report and Order* requires that the incubated entity hold more than 50 percent of the voting power of the licensee, and if the licensee is not a publicly traded company (which will almost assuredly be the case), a minimum of either 15 percent or 30 percent of the equity interests, depending on whether someone else owns or controls more than 25 percent of the equity interests. The *Report and Order* concludes that applying the control test from the Commission's existing eligible entity rule will best ensure that the incubated entity retains control of the incubated station while still giving the parties some flexibility to establish incubation relationships that suit their specific needs. Moreover, using the existing standard should facilitate both participation in and administration of the program, as the standard is already familiar to licensees.

107. To ensure that the incubated entity retains autonomy over the incubated station's core operating functions so as to gain the necessary level of operational expertise, and in light of concerns raised by some commenters, the *Report and Order* places certain restrictions on the use of local marketing agreements (LMAs), joint sales agreements (JSAs), and shared service agreements (SSAs). The Commission's current attribution standards recognize that same-market radio LMAs and JSAs above a certain percentage of the station's broadcast day may confer on the brokering station the potential to exert a significant degree of influence over core station operating functions (*i.e.*, programming decisions). Specifically, the Commission's attribution standards regard as attributable ownership interests same-market radio LMAs and JSAs in which the brokering station brokers more than 15 percent of the broadcast time or sells more than 15 percent of the advertising time per week. Given the Commission's rationale for attributing these arrangements and the concerns raised in the record of this proceeding, the *Report and Order* adopts the following safeguards.

108. First, to ensure that the incubated entity retains control of the programming aired on the incubated

station, the *Report and Order* prohibits LMAs involving the incubated station. As defined in the Commission's rules, an LMA is any agreement that involves "the sale by a licensee of discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells the commercial spot announcements in it," regardless of how the agreement is titled. Second, to ensure that the incubated entity is able to gain operational expertise by performing the core operations of the incubated station, the *Report and Order* limits any JSAs or SSAs involving the incubated station to the first two years of the initial incubation period. Pursuant to the definitions in the Commission's rules, a JSA is any agreement with the licensee of a brokered station that authorizes a broker to sell advertising time for the brokered station, and an SSA is any agreement or series of agreements in which (i) a station provides any station-related services to a station that is not directly or indirectly under common de jure control permitted under the Commission's regulations, or (ii) stations that are not directly or indirectly under common de jure control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services. While the Commission's attribution standards do not regard SSAs as attributable ownership interests, the Commission is concerned that allowing these arrangements to be used for the full duration of an incubation relationship could deprive the incubated entity of its incentive to gain the operational expertise needed to operate the station independently at the end of the relationship. Permitting limited use of JSAs and SSAs appropriately balances broadcasters' representations that these arrangements can make incubation more successful with the need to ensure that each incubated entity learns how to perform essential station functions independently in order to be viable in the long term as an independent broadcaster. The Commission does not believe that prohibiting LMAs and restricting the use of JSAs and SSAs will reduce the utility of the incubator program for incubated entities, as the record and the Commission's experience indicate that new owners of radio stations need assistance primarily with financing and technical issues, rather than programming and advertising sales.

109. Moreover, these safeguards will enable the parties to evaluate whether the incubated entity is prepared to operate independently before the incubation period is complete and while

the incubating entity remains contractually obligated to provide support. By requiring that the incubated entity actually obtain or produce programming, sell advertising, and perform other core operating functions for the incubated station for at least one full year prior to the expiration of the incubation relationship, these protections will provide for a more informed assessment of the incubated entity's progress and any areas where it needs additional training and support to be viable as an independent owner and operator of the incubated station or another full-service AM or FM station. The incubated entity's experience performing core operating functions may provide a persuasive justification for extending the incubation relationship if the parties determine that more time is needed to incubate the station. While the *Report and Order* allows limited use of JSAs and SSAs, the *Report and Order* also emphasizes that these agreements, if used, must be accompanied by proper training in the relevant area(s)—e.g., administrative, technical, sales, etc.—covered by any such arrangement(s) involving the incubated station.

110. Finally, the *Report and Order* requires that none of the officers, directors, managing partners, or managing members of the incubated entity hold an attributable interest in or be an employee of the incubating entity. The Commission is concerned that allowing an employee or an attributable interest holder in the incubating entity to serve as an officer, director, managing partner, or managing member of the incubated entity may jeopardize the independence of the incubated station given the significant conflicts of interests that could arise for these individuals and the significant authority and potential for influence they would wield over the incubated station. While U.S. antitrust laws prohibit, with certain exceptions, one individual from serving as an officer or director of two competing corporations, the Commission believes that an additional safeguard is needed to address circumstances that may be exempt from or not covered by the antitrust laws, such as where the two companies are not competitors, where either company is not a corporation or does not meet certain financial thresholds, or where an officer or director of one company is an employee but not an officer or director of the other company.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

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

112. As discussed above, the Commission decided to adopt an incubator program with the goal of creating ownership opportunities for new entrants and small businesses, thereby promoting competition and diversity in the broadcast industry. In adopting the requirements that will govern the incubator program, the Commission considered various options and alternatives that were proposed in the *NPRM* and public comments, and based on the record, the Commission concluded that structuring the incubator program as discussed in the *Report and Order* will provide small new entrants and struggling small broadcasters access to the financing, mentoring, and industry connections that are necessary for success in the broadcasting industry. The Commission's expectation is that each successful incubation relationship will result in the acquisition of a broadcast radio station by a new entrant or small business, or the preservation of an existing, but struggling, small broadcaster. Participation in the incubator program is optional, not mandatory, and the Commission anticipates that the incubator program will benefit small entities that participate in the program, not burden them.

Report to Congress

113. *Congressional Review Act.* The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act, see 5 U.S.C. 801 (a)(1)(A).

IV. Ordering Clauses

114. Accordingly, *it is ordered* that, pursuant to the authority contained in Sections 1, 2(a), 4(i), 257, 303, 307–310,

and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 257, 303, 307–310, and 403, this Report and Order is adopted.

115. *It is further ordered* that this Report and Order shall be effective thirty (30) days after publication of the text or a summary thereof in the **Federal Register**, except for those requirements involving Paperwork Reduction Act burdens, which shall become effective on the date announced in the **Federal Register** document announcing OMB approval.

116. *It is further ordered* that the Media Bureau is hereby directed to make all necessary changes to Form 301, Form 314, Form 315, and the Commission's electronic database system to implement the changes adopted in this Report and Order.

117. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

118. *It is further ordered* that, pursuant to section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), the Commission shall send a copy of the Report and Order to Congress and to the Government Accountability Office.

Federal Communications Commission.

Marlene Dortch,
Secretary.

[FR Doc. 2018–18289 Filed 8–27–18; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

RIN 0648–XG408

Implementation of Import Restrictions; Certification of Admissibility for Certain Fish Products From Mexico

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification.

SUMMARY: The Secretary of Commerce, in cooperation with the Secretaries of Treasury and Homeland Security, is, under the authority of the Marine Mammal Protection Act (MMPA), giving notice of import restrictions on fish and fish products from Mexico caught with

gillnets deployed in the range of the vaquita, an endangered porpoise. Importation into the United States from Mexico of fish and fish products harvested by gillnets in the upper Gulf of California (UGC) within the vaquita's geographic range is now prohibited. These import restrictions are being implemented as required by a court order. These trade restrictions remain in effect until further court action amends the preliminary injunction. Harmonized Tariff Schedule (HTS) codes associated with the prohibited fish and fish products are identified below. NMFS is also requiring that all other fish and fish products not within the scope of the import restrictions but imported under the same published HTS codes be accompanied by a Certification of Admissibility.

DATES: Compliance with the import restrictions and Certification of Admissibility described in this document is required beginning August 24, 2018, and will remain in effect until further notice is published in the **Federal Register** indicating otherwise.

FOR FURTHER INFORMATION CONTACT: Nina Young, NMFS F/IASI at email: Nina.Young@noaa.gov or phone: 301–427–8383.

SUPPLEMENTARY INFORMATION: In August 2016, NMFS published a final rule (81 FR 54390 (August 15, 2016); 50 CFR 216.24) implementing the fish and fish product import provisions (section 101(a)(2)) of the Marine Mammal Protection Act (MMPA). This final rule established conditions for evaluating a harvesting nation's regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in its fisheries producing fish and fish products exported to the United States.

Under the final rule, fish or fish products cannot be imported into the United States from commercial fishing operations that result in the incidental mortality or serious injury of marine mammals in excess of U.S. standards (16 U.S.C. 1371(a)(2)). NMFS published a List of Foreign Fisheries (LOFF) on March 16, 2018 (83 FR 11703) to classify fisheries subject to the import requirements. Effective January 1, 2022, fish and fish products from fisheries identified by the Assistant Administrator for Fisheries in the LOFF can only be imported into the United States if the harvesting nation has applied for and received a comparability finding from NMFS. The rule established the procedures that a harvesting nation must follow and the conditions it must meet to receive a comparability finding for a fishery on

the LOFF. The final rule established a five-year exemption period, ending January 1, 2022, under 50 CFR 216.24(h)(2)(ii) before imports would be subject to any trade restrictions.

Vaquita are a species of porpoise endemic to northern Gulf of California waters in Mexico and are listed as an endangered species under the U.S. Endangered Species Act. In November 2016, the International Committee for the Recovery of the Vaquita (CIRVA)—a group of international scientists supported by Mexico and led by Mexican scientists—reported that less than 30 individuals are likely to remain. Gillnets deployed in an illegal fishery for totoaba (an endangered fish sought for its swim bladder due to black market demand within China) are the primary source of vaquita mortality. NMFS has identified products coming from fisheries interacting with vaquita as a potential focus for import restrictions under the MMPA.

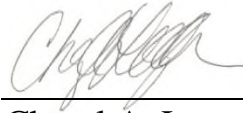
On May 18, 2017, the Natural Resources Defense Council (NRDC), Center for Biological Diversity (CBD), and the Animal Welfare Institute (AWI) petitioned the Secretaries of Homeland Security, the Treasury, and Commerce to “ban the importation of commercial fish or products from fish” sourced using fishing activities that “result in the incidental mortality or incidental serious injury” of vaquita “in excess of United States standards.” The petitioners requested that the Secretaries immediately ban imports of all fish and fish products from Mexico that do not satisfy the MMPA import provision requirements, claiming that emergency action banning such imports is necessary to avoid immediate, ongoing, and “unacceptable risks” to vaquita. NMFS published a notification of the petition's receipt on August 22, 2017 (82 FR 39732), and opened a 60-day comment period. No final decision has been taken on the petition.

On March 21, 2018, the petitioners filed suit before the Court of International Trade seeking an injunction requiring the U.S. Government to ban the import of fish or fish products from any Mexican commercial fishery that uses gillnets within the vaquita's range. On April 16, 2018, petitioners filed a motion for a preliminary injunction with oral arguments held July 10, 2018. The Court of International Trade granted the motion for preliminary injunction and denied the U.S. Government's motion to dismiss the lawsuit. The court has required the U.S. Government to ban the importation of all fish and fish products from Mexican commercial fisheries that

CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the Third Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Prometheus Radio Project and Media Mobilizing Project respectfully state that each of them is a non-profit organization with no parent companies, subsidiaries or affiliates and that none of them have issued shares to the public.

Respectfully submitted,



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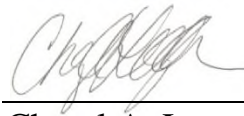
CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2018, I sent copies of the forgoing
Petition for Review via first class mail to the following parties:

Thomas M. Johnson, Jr.
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-A741
Washington, DC 20554

The Honorable Jeff Sessions
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Signed:



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