

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

In the Matter of
Rules and Policies to Promote New Entry and
Ownership Diversity in the Broadcasting Services
MB Docket No. 17-289

REPORT AND ORDER

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By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements;
Commissioner Rosenworcel dissenting and issuing a statement.

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION..... 1
II. BACKGROUND..... 2
III. OVERVIEW OF INCUBATOR PROGRAM..... 6
IV. DISCUSSION - INCUBATOR PROGRAM..... 11
A. Services Eligible for Incubator Program..... 11
B. Defining Entities Eligible for Incubation..... 16
C. Qualifying Incubation Relationships..... 35
D. Benefit to Incubating Entity..... 57
E. Procedures for Filing, Reviewing, and Monitoring Compliance of Incubation
Relationships..... 74

1. Bureau Review of Incubation Proposals..... 76

2. Compliance During Term of Incubation Relationship.....84

3. Final Bureau Review and Grant of Reward Waiver to Incubator.....86

V. PROCEDURAL MATTERS..... 89

VI. ORDERING CLAUSES.....92

APPENDIX – Final Regulatory Flexibility Analysis

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.¹ 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.¹ 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.”²

3. Although the concept of an incubator program has been discussed since at least the early

¹ See *2014 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9859, para. 126 (2017) (*Order on Reconsideration and NPRM*).

¹ *NPRM*, 32 FCC Rcd at 9859, para. 127.

² *Id.*

1990s³ 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.⁴ 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.⁵ 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.⁶ 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.⁷

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.⁸ 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.

³ *Id.* at 9859, para. 128.

⁴ *2014 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Second Report and Order, 31 FCC Rcd 9864, 10001-02, paras. 319-21 (2016) (*Second Report and Order*) (declining to adopt an incubator program for a variety of reasons, including lack of a sufficient record); *see also Order on Reconsideration*, 32 FCC Rcd at 9857, nn.357-58. The Commission had previously adopted a filing preference for an applicant seeking Commission consent to the formation of a television station duopoly if the applicant had funded or incubated an eligible entity (as defined by the FCC's revenue-based standard). *Order on Reconsideration and NPRM*, 32 FCC Rcd at 9857, 9859, nn.357-58, 370. This filing preference was rarely, if ever, used, in part because "the Commission did not provide details regarding the structure and operations of the incubation activities." *Id.* at 9857 n.358.

⁵ *Order on Reconsideration*, 32 FCC Rcd at 9858, para. 124.

⁶ *Id.*

⁷ *NPRM*, 32 FCC Rcd at 9861, para. 130.

⁸ The Broadcast Diversity and Development Working Group of the ACDDE specifically considered the *Incubator NPRM* and drafted the comments for review and adoption by the full advisory committee. *See FCC Announces Agenda for March 27, 2018 Meeting of the Advisory Committee on Diversity and Digital Empowerment*, Public Notice, 33 FCC Rcd 2236 (2018); Comments of Federal Communications Commission's Advisory Committee on Diversity and Digital Empowerment, A Proposal for an Incubator Program, MB Docket No. 17-289 (filed Apr. 2, 2018) (ACDDE Comments).

III. OVERVIEW OF INCUBATOR PROGRAM

6. The Commission expects the incubator program to support the entry of new and diverse voices in the broadcasting industry by facilitating broadcast station ownership for entities with limited financial resources and operational experience. The program seeks to do so by pairing together, in a mentoring and supportive relationship, established broadcasters with either new entrants to the broadcasting industry or small broadcasters, including struggling station owners. Through our program, the established broadcasters (i.e., incubating entities) will provide the new entrants or small broadcasters (i.e., incubated entities) with the training, financing, and access to resources that would be otherwise inaccessible 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 a firmer footing. In return for its support, the incubating entity will receive a waiver of the applicable local radio ownership rule that it can use either in the incubated market or in a comparable market (as defined below) within three years of the successful conclusion of a qualifying incubation relationship.

7. The program we implement today will apply in the radio market, as radio has traditionally been the more accessible entry point for new entrants and small businesses seeking to enter the broadcasting industry, and a waiver of the local radio rules provides an appropriate reward for incubation. Owning and operating a radio station requires a lower capital investment and less technical expertise than owning and operating a television station, and it also requires less overhead to operate. In addition, we believe that the Commission's existing ownership limitations on local radio markets provide a sufficient incentive for incumbent broadcasters to participate in an incubator program with the promise of obtaining a waiver to acquire an additional station in a market. Accordingly, the program we implement today will apply only to incubation relationships in the radio sector.

8. In establishing the structure of the incubator program, a significant challenge has been how to identify those new or small broadcasters that would not otherwise be able to enter, or expand in, the broadcasting sector, and how to encourage established broadcasters to provide incubated entities with the requisite level of support. To identify potential incubated entities, we adopt a two-pronged eligibility standard. In order to be eligible to be considered for the program, the incubated entity must meet both prongs. The first prong is a modified version of the Commission's existing new entrant bidding credit standard, and the second prong derives from the revenue-based eligible entity definition contained in the Commission's broadcast rules.¹ Under the first prong of our new standard, a potential incubated entity, including its attributable interest holders, may hold existing attributable interests in no more than three full-service AM or FM stations and no TV stations. In addition, pursuant to the second prong, the potential incubated entity must also qualify as a small business consistent with the Small Business Administration (SBA) standard for its industry grouping.

9. With respect to soliciting participation by incumbent station owners, we believe that a waiver of our Local Radio Ownership Rule (including the AM/FM subcap) is the best incentive to encourage established station owners with the requisite financial means and expertise to assist incubated entities in overcoming the obstacles to independent ownership and operation of a radio station. Thus, if an incumbent broadcaster successfully incubates a new, small entrant 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.² 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

¹ See 47 CFR § 73.5007(a); *infra* Section IV.B (defining entities eligible for incubation).

comparable radio market, as defined below. While we will apply the “good cause” standard contained in Section 1.3 of our rules in determining whether to grant any waivers contemplated by our program, there will be a rebuttable presumption that such a waiver is in the public interest if the incubation relationship conforms to the elements of the program articulated herein.³ 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 incumbent broadcaster 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 a temporary waiver of the Local Radio Ownership Rule (including the AM/FM subcap) to allow the incubating entity to acquire an otherwise impermissible non-controlling, attributable interest in the incubated station for the duration of the qualifying incubation relationship.

10. 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.⁴ We discuss the specifics of how the program will operate further below.

IV. DISCUSSION - INCUBATOR PROGRAM

A. Services Eligible for Incubator Program

11. The incubator program we outline today will apply to full-service AM and FM radio broadcast stations,¹ 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.² 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.³ Based on the record of this proceeding, we find that the radio market has several advantages over the television market as an incubation setting.

12. Perhaps most importantly, the cost of obtaining a radio station is significantly lower than the cost of obtaining a television station.⁴ 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

² Our decision today does not prejudge whether the current Local Radio Ownership Rule will be maintained or modified as a result of the Commission’s next quadrennial review of the media ownership rules. That decision will be based on the record compiled in that proceeding.

³ See 47 CFR § 1.3.

⁴ See *infra* paras. 45-47.

¹ See 47 CFR § 73.14 *et seq.* (AM broadcast station); *id.* § 73.310 *et seq.* (FM Technical Definitions).

² *NPRM*, 32 FCC Rcd at 9863, para. 139.

³ *Id.*

secondary market was approximately \$1 million, and the average price of a television station was \$53 million.⁵ 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.⁶ Indeed, the record reveals that access to capital is most often the barrier to broadcast station ownership.⁷ 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.⁸ 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

⁴ See ACDDE Comments at 5, 31, 50 (suggesting that full-service TV and major market FM stations are “high value” properties and that acquiring a TV station requires more capital than acquiring a radio station); see also Letter from DuJuan McCoy, President and CEO, Bayou City Broadcasting, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 2, n.2 (filed May 22, 2018) (“BCB *Ex Parte*”) (stating that the average sales price for a full-service TV station is over \$20 million); Letter from W. Lawrence Patrick, Managing Partner, Patrick Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (June 4, 2018) (“Patrick Communications *Ex Parte*”) (stating that new entrants today are often looking at deals ranging from \$1-3 million for purchasing a single station or at best an AM/FM combination).

⁵ SNL Kagan, State Summary of 2016 Full Power Radio Station Sales, S&P Global Market Intelligence, 2018; SNL Kagan, State Summary of 2016 Full Power Television Station Sales, S&P Global Market Intelligence, 2018.

⁶ ACDDE Comments at 2, 19, n.43. The predecessor diversity advisory committee also noted the financial barriers to broadcast ownership: “The current state of financing for media transactions is dire.” Report and Recommendations of the Funding Acquisition Task Force of the FCC Federal Advisory Committee on Diversity in the Digital Age (Dec. 3, 2009), <https://www.fcc.gov/diversity-committee-adopted-recommendations>. The committee also noted that “the inability to access capital is a primary market entry barrier.” *Id.* See also Letter from Diane Sutter, President/CEO, ShootingStar Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (filed May 16, 2018) (ShootingStar *Ex Parte*) (“Banks are also often less inclined to take a chance on a first-time station owner and broadcast properties offer little tangible collateral.”); Patrick Communications *Ex Parte* at 2 (“[Many banks] do not like to loan to parties with an unproven track record of past ownership or senior, multi-station management experience.”); Letter from Hugues Jean to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (filed May 18, 2018) (“[W]ithout some form of collateral, it will be very difficult to secure a loan [to purchase a radio station].”); Letter from Lyle Banks, Vice President and General Manager, WGCL/WPCH, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-189, at 1 (filed June 6, 2018) (Banks *Ex Parte*) (“I found that national banks were only interested in financing deals for entities with significant physical assets to collateralize their loans.”); Letter from Trila Bumstead, Chief Executive Officer and President, Ohana Media Group, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (filed May 14, 2018) (Ohana Media *Ex Parte*) (“Minority and female owners are at a significant disadvantage [when obtaining financing] . . . because they often lack sufficient personal assets to collateralize the loan.”).

⁷ See, e.g., National Association of Broadcasters (NAB) Comments at 5 (NAB Comments) (stating that access to capital is the greatest barrier to entry for prospective owners of broadcast stations); Skip Finley Comments at 3 (stating that access to capital has remained the largest impediment to ownership); ShootingStar *Ex Parte* at 1 (stating that access to capital is one of the primary challenges that new entrants face in the broadcasting industry); Ohana Media *Ex Parte* Letter at 2 (stating that access to capital is a significant barrier for new entrants and small broadcasters seeking to grow); Letter from James Z. Hardman, Chief Executive Officer and President, Hardman Broadcasting, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 1 (filed May 22, 2018) (Hardman Broadcasting *Ex Parte*) (stating that access to capital is the greatest barrier to station ownership); Letter from Francisco R. Montero, Managing Partner, Fletcher, Heald & Hildreth, to Marlene H. Dortch, Secretary, FCC,

resources that are less costly than those for television stations.⁹ 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.

13. 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 1996.¹⁰ 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.¹¹ 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.

14. 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.

MB Docket No. 17-289, at 2 (filed May 15, 2018) (stating that many small businesses, particularly minority- and women-owned businesses, fail to secure financing and never get a foothold in the broadcast marketplace).

⁸ Press Release, FCC, Broadcast Station Totals as of June 30, 2018 (July 3, 2018), <https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf>.

⁹ See *Order on Reconsideration*, 32 FCC Rcd at 9836, para. 77 (stating that "the record suggests that local television news programming is typically one of the largest operational costs for broadcasters").

¹⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(b), 110 Stat. 56, 110 (1996). Subsequently, in the *2002 Biennial Review Order*, the Commission retained the local radio numerical limits and AM/FM subcaps from the 1996 Act but revised the rule to use an Arbitron Metro market definition, attribute certain radio station Joint Sales Agreements (JSAs) toward the brokering licensee's permissible ownership totals, and include noncommercial stations when determining the number of radio stations in a market for purposes of the rule. See *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13712-13, 13724-28, 13742-46, paras. 239, 273-81, 316-25 (2003).

¹¹ See 47 CFR § 73.3555, Note 2(k).

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.

15. 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,¹² 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.

B. Defining Entities Eligible for Incubation

16. 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.

17. The *NPRM* sought comment on how to determine eligibility for participation in the incubator program¹³ and put forth several options, including the new entrant bidding credit model,¹⁴ a revenue-based

¹² NAB Comments at 7-8, 13. NAB asserts that the incubator program should be designed to provide maximum flexibility and incentives for incubating entities to participate. NAB Comments at 13, n.32; *see also* Gray Television, Inc., Reply at 1, 3 (Gray Television Reply) (supporting NAB); Bonneville International Corporation Reply at 1, 3-4 (Bonneville Reply) (supporting NAB).

¹³ *NPRM*, 32 FCC Rcd at 9861, para. 131.

¹⁴ The new entrant definition is used for the bidding credit eligibility definition applicable in the broadcast auctions context. *See* 47 CFR § 73.5007(a). A 35 percent bidding credit is awarded to a qualifying new entrant who has no attributable interest in any other media of mass communication, while a 25 percent bidding credit is awarded to a qualifying new entrant who holds an attributable interest in no more than three mass media facilities. *Id.*

eligible entity standard,¹⁵ a socially and economically disadvantaged businesses (SDB) model,¹⁶ and an Overcoming Disadvantages Preference (ODP) standard.¹⁷ 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.¹⁸

18. 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.¹⁹ 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.²⁰ 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

¹⁵ An eligible entity under this definition is any commercial or non-commercial entity that qualifies as a small business consistent with the SBA revenue grouping according to industry, in this case broadcast radio. The Commission’s rules require that an eligible entity hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the licenses is a publicly traded corporation. *See id.* § 73.3555, Note 2(i)(2) (ii); *see also Second Report and Order*, 31 FCC Rcd at 9983, para. 286 (the Commission re-adopted a revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies).

¹⁶ The SDB standard is based on the definition employed by the SBA. Pursuant to the SBA’s program, persons of certain racial or ethnic backgrounds are presumed to be disadvantaged; all other individuals may qualify for the program if they can show by a preponderance of the evidence that they are disadvantaged. *See* 13 CFR §§ 124.103(b)-(c), 124.104(a). To qualify for this program, a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals. *See id.* § 124.105; *see also* U.S. Small Business Administration, Small Disadvantaged Businesses, <https://www.sba.gov/contracting/government-contracting-programs/small-disadvantaged-businesses> (last visited May 8, 2018). The SDB standard is explicitly race-conscious and, therefore, subject to heightened constitutional review. In the *Second Report and Order*, the Commission determined that evidence in the record was not sufficient to satisfy the constitutional standards to adopt the SDB standard or any other race- or gender-conscious definition of an eligible entity for certain preferential regulatory policies. *Second Report and Order*, 31 FCC Rcd at 9987-88, 9999-10000, paras. 297, 315-16.

¹⁷ The ODP standard would employ various criteria to demonstrate that an individual or entity has overcome significant disadvantage. The *Second Report and Order* declined to adopt an ODP standard, citing concerns with the approach, including administrability and First Amendment concerns. *Second Report and Order*, 31 FCC Rcd at 9993-94, para. 306.

¹⁸ *NPRM*, 32 FCC Rcd at 9862, para. 132.

¹⁹ *See supra* note 19.

²⁰ *See supra*, note 20; *see also 2014 Quadrennial Regulatory Review – Review of Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4470, para. 224 (2014) (*2014 FNPRM and Report and Order*) (stating, “[w]e recognize the presence of many disparate factors, including most significantly, access to capital, as longstanding, persistent impediments to ownership diversity in broadcasting.”).

deals for a new owner.”²¹ 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.

19. 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,²² long used in the context of broadcast auctions, with the revenue-based eligible entity definition contained in our broadcast rules.²³ 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.²⁴ 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.²⁵

20. *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.²⁶ 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 toehold 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,

²¹ See *ShootingStar Ex Parte* at 2.

²² See 47 CFR §§ 73.5007-.5008(b). Note that the new entrant bidding credit applied in the broadcast auction context looks to ownership of “a medium of mass communications,” which includes ownership of a daily newspaper, a cable television system, or a license or construction permit for a television broadcast station, an AM or FM broadcast station, or a direct broadcast satellite transponder.

²³ See *id.* § 73.3555, Note 2(i)(2)(ii).

²⁴ The incubated entity is not restricted from owning low-power FM and/or FM translator stations.

²⁵ Under 13 CFR § 121.201, radio stations (North American Industry Classification System code 515112) that are considered small businesses have an annual revenue of up to \$38.5 million. See 47 CFR § 73.3555, Note 2(i)(2)(ii) (revenue-based eligible entity definition); see also *Second Report and Order*, 31 FCC Rcd at 9983, para. 286 (re-adopting revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies).

²⁶ See, e.g., *Ohana Media Ex Parte* at 2 (“[A]ccess to capital is a significant barrier to entry for those trying to purchase their first broadcast stations and for small broadcasters trying to acquire additional stations. Regulatory reforms that create incentives for established broadcasters to provide needed financial and technical support to new entrants will help foster a more diverse broadcast industry.”).

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.²⁷

21. 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.²⁸ 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.²⁹ 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.³⁰

22. 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

²⁷ We note that the ACDDE's comments seem to suggest that the Commission's new entrant bidding credit rule allows ownership of up to three media of mass communications in each market. ACDDE Comments at 10, n.27. In fact, however, the new entrant bidding credit limits a new entrant to holding interests in three media of mass communications in total anywhere in the country. See 47 CFR § 73.5007(a) ("No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station, or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities." (emphasis added)). We follow this convention here, and under the standard we adopt today applicants will be restricted to holding attributable interests in three or fewer full-service radio stations.

²⁸ Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 2 (filed Mar. 26, 2018) (NAB Mar. 26 *Ex Parte*). Specifically, NAB evaluated the demographic data that are voluntarily provided on the FCC Form 175 by applicants interested in participating in broadcast auctions. *Id.* at 3. FCC Form 175 seeks information regarding the applicant's gender, race, ethnic origin, and new entrant bidding status.

²⁹ NAB Mar. 26 *Ex Parte* at 4.

³⁰ *Id.* Free Press asserts that the use of the new entrant bidding credit to induce successful auction bidding is greatly dependent upon each auction's specific circumstances. See Letter from Jessica J. González, Deputy Director and Senior Counsel, and S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, FCC, at 4 (July 3, 2018) ("Free Press July 3, 2018 *Ex Parte*"). Free Press does not, however, address the evaluation of 20 broadcast auctions performed by the ACDDE. See *infra* para. 22. Free Press and UCC contend that the applicability of NAB's new entrant bidding credit analysis to other situations "is limited," and that the Commission makes an "unsupported analytical leap" to conclude that the success of the new entrant bidding credit in broadcast auctions is directly applicable to the successful completion of an incubator program. *Id.*; see also Letter from Cheryl A. Leanza, Policy Advisor, UCC, et al., to Marlene H. Dortch, Secretary, FCC at 4 (July 26, 2018) ("UCC et al. July 26, 2018 *Ex Parte*"). The significance of the experiences with the "new entrant bidding credit" criterion in the auction context for purposes of the incubator program, however, is merely that the criterion provides a known mechanism for identifying smaller entities and that entities that indicated eligibility for the bidding credit often also indicated that they were minority or female owned businesses. Because use of the criteria in the auction context appears to have led to greater female and minority participation, we anticipate similar results in the instant context.

FCC broadcast auctions, more than twice the number evaluated by NAB.³¹ 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).³² 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.³³

23. 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 175.³⁴ Staff analysis of auctions data for 20 auctions³⁵ 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).³⁶

³¹ ACDDE Comments at 10, n.27.

³² *Id.* at 10-11, n.27.

³³ *Id.* The ACDDE prefers adoption of an ODP standard and expresses concern about the difficulty in preventing abuse of a “new entrant” definition, recommending that the Commission consider omitting legacy applicants (e.g., spouses or the children of broadcasters) if it adopts a “new entrant” definition. *Id.* We address this concern in the section on safeguards applicable to entities eligible for a qualifying incubation relationship.

³⁴ See FCC Form 175, Application to Participate in an FCC Auction, <http://transition.fcc.gov/Forms/Form175/175.pdf>. Although eligibility for the new entrant bidding credit must be specified in an applicant’s Form 175 application, applicants are not required to provide information about their race, ethnicity, or gender. Rather, applicants have the option of indicating that the business is minority-owned or woman-owned, or both. As the provision of this information is voluntary and not detailed further on the auction application, the ability to make definitive statements about the participation of minorities and women in Commission broadcast auctions is limited, as the Commission has noted in the past. See 2014 FNPRM, 29 FCC Rcd at 4507-08, n.917.

³⁵ Staff reviewed data for AM, FM, and TV Broadcast Auctions 25, 27, 28, 32, 37, 62, 64, 68, 70, 79, 80, 81, 82, 84, 88, 90, 91, 93, 94, and 98.

³⁶ We reject UCC et al.’s assertion that the Commission may not rely on its own simple analysis of broadcast auction data because it has not first placed a “study or data” into the record. See UCC et al. July 26, 2018 *Ex Parte* at 3. The Commission did not conduct any complex or technical study, nor did it introduce any new methodology. Instead, it merely tallied the responses of bidders in specified FCC broadcast auctions from information that is publicly available on its website, in a manner similar to that of two commenters in the proceeding. The Commission’s analysis was supplementary information that expanded on and confirmed the findings of the other two analyses of broadcast auction data in the record and provided additional support, and—in any event—UCC has

24. 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.

25. *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.³⁷ NAB supports use of a revenue-based eligible entity standard in combination with a new entrant standard.³⁸ 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.”³⁹ 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.⁴⁰ 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.

26. 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

not demonstrated any prejudice from the Commission's use of that analysis in its decision-making.

³⁷ See 13 CFR §121.201 (North American Industry Classification System code 515112); see also 47 CFR § 73.3555, Note 2(i)(2)(ii) (revenue-based eligible entity definition); see also *Second Report and Order*, 31 FCC Rcd at 9983, para. 286 (re-adopting revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies).

³⁸ NAB Comments at 19.

³⁹ ACDDE Comments at 11, n.28.

⁴⁰ See NAB Comments at 18. In a joint filing, the Office of Communication, Inc., of the United Church of Christ (UCC), Free Press, Communications Workers of America, and Common Cause erroneously claim that the small business prong of our eligibility standard is meaningless given our estimate that 99.9 percent of commercial radio stations had annual revenues of \$38.5 million or less as of June 22, 2018. See UCC et al. July 26, 2018 *Ex Parte* at 2. This assertion disregards the fact that the eligibility standard for our incubator program applies to entities, not individual radio stations, and thus it would exclude entities with attributable interests in multiple radio stations that, in aggregate, have more than \$38.5 million in annual revenues. For instance, staff review of S&P Global Market Intelligence data show that iHeartMedia, Inc., owned over 700 radio stations in 2017 and had \$2.2 billion in radio station ad revenues. See S&P Global Market Intelligence, 2017 Top Radio Station Owners Ranked by Total Radio Station Ad Revenue (2018).

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.⁴¹

27. 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.⁴²

28. *Other Proposals.* We decline to adopt an Overcoming Disadvantage Preference (ODP) standard.⁴³ 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.⁴⁴ 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.”⁴⁵ 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.⁴⁶

29. 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.⁴⁷ 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.”⁴⁸

⁴¹ In the absence of such limits, the incubator program might allow those who do not truly need incubation to benefit from the program, squeezing out potential opportunities for others. See Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket 17-289 et al., at 4, n.4 (filed Apr. 25, 2018) (NAB Apr. 25 *Ex Parte*) (raising the prospect of an “unusual circumstance” where a “broadcaster operates radio or television stations in twenty markets and wishes to enter into an incubation relationship in all of its markets with the *same incubated entity*” (emphasis added)).

⁴² See *supra* note 33. Commenters have not identified changes to proposed race- or gender-based definitions that would address previous concerns expressed by the Commission or provided analysis that persuades us that such a standard could withstand a constitutional challenge. See *NPRM*, 32 FCC Rcd at 9862, para. 132.

⁴³ See ACDDE Comments at 20 (stating “the Commission should not institute a bright-line test defining the extent of the disadvantage that has been overcome. Instead the Commission could compare the net socioeconomic status of the applicant to the net socioeconomic status of other persons who have experienced a similar substantial disadvantage.”).

⁴⁴ *Id.* at 13. At the same time, however, the ACDDE adds that it “may be that members of minority groups and women will be more likely than others to obtain a preference, but that would only be because they tend to face more disadvantages.” *Id.* at 15.

⁴⁵ *Id.* at 18.

⁴⁶ NAB Reply Comments at 10.

⁴⁷ 2014 *FNPRM*, 29 FCC Rcd at 4507, para. 300.

⁴⁸ *Id.*; see also *In the Matter of Updating Part 1 Competitive Bidding Rules*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order,

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."⁴⁹ 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.⁵⁰ Consequently, we affirm our earlier decisions regarding the administrative infeasibility of an ODP standard.⁵¹ For all of the reasons stated above, we decline to implement an ODP standard for the incubator program.

30. In addition to advocating for the use of ODP as the eligibility standard, the ACDDE also proposes that "mission-based entities"⁵² and Native American Nations⁵³ be automatically presumed to be eligible for incubation.⁵⁴ 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.⁵⁵ We decline, however, to

Third Report and Order, 30 FCC Rcd 7493, 7551, para. 138 (2015) (stating concerns about the complexity of implementing such a preference).

⁴⁹ *Id.*

⁵⁰ ACDDE Comments at 23. The ACDDE recommends that the Commission construct a multi-tiered system of review, beginning with a team of three Commission employees to evaluate the applications. At the first stage of the selection process, according to the ACDDE, the candidate's qualifications to control a license would count for 33 percent of the score given by the evaluators; the remaining 67 percent would be awarded based on the severity of the disadvantage. The ACDDE concedes that there is "necessarily some subjectivity concerning determinations of the severity of a disadvantage and a person's degree of success in overcoming it." After scoring, the ACDDE proposes that the applicants would be permitted to make oral presentations of 30-60 minutes to the committee. *Id.* at 22-24.

⁵¹ *Second Report and Order*, 31 FCC Rcd, at 9987, para. 294; *2014 FNPRM*, 29 FCC Rcd at 4507, para. 300.

⁵² The ACDDE describes "Mission-Based Institutions" as Historically Black Colleges and Universities, Hispanic Serving Institutions, Asian American Serving Institutions, and Native American Serving Institutions. ACDDE Comments at 27. The ACDDE states that these institutions are defined by their missions of multicultural education, and not by the race of their students; thus, the ACDDE asserts that they are regarded as race-neutral for equal protection purposes. *Id.*

⁵³ The ACDDE defines a "Native American Nation" as a self-governing Indian territory recognized by the federal government pursuant to a treaty. *Id.* at 28, n.60.

⁵⁴ *Id.* at 27-29.

⁵⁵ See Letter from David Honig to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 1 (filed July 26, 2018) (Honig July 26, 2018 *Ex Parte*) (urging the Commission to conduct outreach to "mission-based entities" and Native American Nations to encourage them to participate in the incubator program).

adopt the proposed automatic presumption of eligibility.⁵⁶

31. *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.⁵⁷ 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."⁵⁸ 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.⁵⁹

32. 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,⁶⁰ 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.⁶¹ 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.⁶² NAB further proposes that program applicants be required to certify compliance with any revenue eligibility standards that are adopted.⁶³ 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.

33. 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

⁵⁶ *See id.*

⁵⁷ *Id.* at 10, n.27. Free Press also raises concerns about the need for transparency in the relationship between the incubated entity and the incubating entity, stating that the incubating entity will have 100 percent control over whom they choose to incubate, and they may have a "strong incentive" to incubate "a cousin of the owner or a banker friend." Free Press July 3, 2018 *Ex Parte* at 5.

⁵⁸ ACDDE Comments at 10, n.27.

⁵⁹ *Id.* Similarly, on reply, 22 members of the ACDDE (22 ACDDE Members) state that if the Commission ultimately prefers a new entrant definition, a modified definition "should be considered." 22 Members of the ACDDE Reply at 3 (22 ACDDE Members Reply).

⁶⁰ *See infra* Section IV.E.1 (Bureau Review of Incubation Proposals).

⁶¹ NAB Comments at 18.

⁶² *Id.*

⁶³ *Id.* at 18-19.

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.⁶⁴ If at any point the Commission determines that the certified statement contained misrepresentations,⁶⁵ 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.⁶⁶

34. 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.

C. Qualifying Incubation Relationships

35. 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.

36. 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.⁶⁷ 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

⁶⁴ FCC Form 301, Application for Construction Permit for a Commercial Broadcast Station, <https://transition.fcc.gov/Forms/Form301/301.pdf>; FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, <https://transition.fcc.gov/Forms/Form314/314.pdf>; FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, <https://transition.fcc.gov/Forms/Form315/315.pdf>.

⁶⁵ See 47 CFR § 1.17 (requiring the submission of factually correct information to the Commission); *id.* § 73.1015 (providing that statements of fact relevant to determining whether a broadcast application should be granted or denied are subject to Section 1.17 of the Commission's rules).

⁶⁶ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C.2d 1179, 1180, para. 2 (1986).

⁶⁷ *NPRM*, 32 FCC Rcd at 9862, paras. 133-34.

organizations or arrangements whereby a new entrant gains operational experience without first acquiring a station (e.g., pursuant to a Local Marketing Agreement (LMA)).⁶⁸ 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.⁶⁹

37. 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.⁷⁰ 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.

38. *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.⁷¹ 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.⁷²

⁶⁸ *Id.*

⁶⁹ *Id.* at 9863, para. 136.

⁷⁰ As discussed below, we use the term “operational support” broadly to refer not only to assistance with the day-to-day operations of a station, such as technical, programming, office, or sales assistance, but also to refer to assistance with developing the skills and expertise necessary to manage broadcast stations successfully in the long term, including training on management, finances, and business planning/strategy. *See infra* para. 41.

⁷¹ *See, e.g.*, NAB Comments at 6-8 (stating that in addition to substantial financial support, “[t]he incubating entity should also make available the technical support, training and other assistance needed by the incubate[d] [entity] to successfully operate the station,” and that the specific details may be best left to the discretion of the parties); ACDDE Comments at 30-33 (stating that, under a “joint venture” model, incubating entity would provide most of the financing and the full range of engineering, technical, sales, management training, and mentoring the incubated entity needs to grow the incubated station).

⁷² *See BCB Ex Parte* at 2 (describing how DuJuan McCoy put the majority of his net worth into his first station acquisition); Bonneville Reply at 3-4 (stating that both the established broadcaster and the incubated entity must demonstrate their respective commitments to the incubation relationship). According to Mr. McCoy, although his cash investment was less than 10 percent of the transaction cost, “the amount of ‘skin in the game’ I invested showed my intense commitment to the transaction and the partnership.” *BCB Ex Parte* at 2. While not arguing for a financial commitment per se on the part of the incubated entity, Bonneville does state that “the incubated entity must demonstrate a commitment to learning the broadcast industry and to active participation in the day-to-day operations of the station, with a goal of becoming an independent operator of the station.” Bonneville Reply at 3-4.

39. 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.⁷³ 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.

40. 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.⁷⁴ 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.⁷⁵

41. 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

⁷³ We agree with the ACDDE that, if the mission-based entity does not have the financial resources needed to operate the donated station successfully, it would be appropriate for the donor-incubating entity to provide the financial support required for the mission-based entity to operate the donated station successfully, and we will require the donor-incubating entity to do so. See ACDDE Comments at 41-42 (stating that in such instances it may be appropriate for the donor-incubating entity to provide working capital and perhaps a loaned executive to ensure the financial solvency and economic success of the incubated station).

⁷⁴ See, e.g., *id.* at 31-32, 40-42; NAB Comments at 6-7; NAB Apr. 25 *Ex Parte* at 1-2.

⁷⁵ See *infra* para. 50 (requiring incubated entity to satisfy control test consistent with our existing revenue-based eligible entity definition).

that proponents have traditionally conceived of as part of a comprehensive incubator program.⁷⁶

42. 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.⁷⁷

43. *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.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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.⁸¹ 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

⁷⁶ ACDDE Comments at 2, 33; NAB Comments at 5-8, 10, 12; REC Networks Comments at 3; Bonneville Reply at 3.

⁷⁷ See *infra* para. 53.

⁷⁸ See ACDDE Comments at 33.

⁷⁹ *Id.*

⁸⁰ To receive a reward waiver, the incubating entity must demonstrate that it has successfully completed a qualifying incubation relationship as discussed below. See *infra* paras. 72-73.

⁸¹ As discussed below, the parties may seek an extension of their incubation relationship if they need more time to identify a station for the incubated entity to acquire or if the incubated entity needs additional time to close on the pending acquisition of a station. See *infra* paras. 45-47.

incubating entity will not be eligible to receive a waiver of the Local Radio Ownership Rule.⁸²

44. 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.⁸³

45. *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.⁸⁴ 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.⁸⁵ 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.⁸⁶

46. 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.⁸⁷ In such circumstances, we will consider granting requests from parties seeking to conclude their incubation relationship before the end of the term.

47. 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.⁸⁸ 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,⁸⁹ or 2) the parties need more time to identify a full-service AM or FM station for the incubated entity to acquire or

⁸² See *infra* paras. 72-73.

⁸³ See NAB Reply at 7-8, n.20; NAB Apr. 25 *Ex Parte* at 2 & n.2.

⁸⁴ ACDDE Comments at 32, n.70.

⁸⁵ NAB Comments at 4, 10; see also Gray Television Reply at 1 (urging the Commission to adopt NAB's recommendations); 22 ACDDE Members Reply at 6, n.25 (concurring with NAB's recommendation on the duration of incubation relationships).

⁸⁶ See NAB Comments at 10 ("NAB recognizes the value of a deadline in helping ensure that an incubated entity will become independent at some point.").

⁸⁷ ACDDE Comments at 33, n.71.

⁸⁸ See 47 CFR § 1.3.

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.⁹⁰

48. *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.”⁹¹ 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.⁹²

49. 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.⁹³ 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.

50. First, we require the incubated entity to satisfy the following control test consistent with our existing revenue-based eligible entity definition,⁹⁴ upon which we are basing the second prong of the

⁸⁹ See *infra* para. 53 (discussing how our safeguards for the program will facilitate a more informed assessment of the incubated entity’s progress and any areas where it may need additional training and support).

⁹⁰ As discussed below, revisions to the initial incubation contract must be submitted to and approved by the Commission. See *infra* Section IV.E.3.

⁹¹ NAB Comments at 7.

⁹² *Id.*

⁹³ ACDDE Comments at 39.

⁹⁴ See 47 CFR § 73.3555, Note 2(i)(2)(ii) (revenue-based eligible entity definition); *Second Report and Order*, 32 FCC Rcd at 9983, para. 286 (re-adopting revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies).

eligibility standard for our incubator program as discussed above.⁹⁵ Specifically, we require that the incubated entity hold more than 50 percent of the voting power of the licensee of the incubated station,⁹⁶ 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.⁹⁷ 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.⁹⁸ The ACDDE, however, also calls for the incubated entity to hold a minimum equity interest of 20 percent.⁹⁹ 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.¹⁰⁰ 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.

51. We remind parties that our rules prohibit unauthorized transfers of control, including de facto transfers of control.¹⁰¹ 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.¹⁰²

52. To ensure that the incubated entity retains autonomy over the incubated station’s core

⁹⁵ See *supra* para. 25.

⁹⁶ As discussed below, we also adopt safeguards relating to control of the board of directors or management committee of the incubated station licensee. See *infra* para. 55.

⁹⁷ See 47 CFR § 73.3555, Note 2(i)(2)(ii) (requiring same minimum voting and equity interests for “eligible entities” under revenue-based eligible entity definition re-adopted in *Second Report and Order*); see also *Second Report and Order*, 32 FCC Rcd at 9983, para. 286 (re-adopting revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies). While the control test in our revenue-based eligible entity rule refers to ownership of “stock/partnership shares,” see 47 CFR § 73.3666, Note 2(i)(2)(ii), we find that referring instead to ownership of “equity interests” in the control test for our incubator program will help clarify that the test applies not only to corporations and partnerships but also to other types of entities, such as limited liability companies (LLCs).

⁹⁸ ACDDE Comments at 31. NAB concurs with the ACDDE’s position that control should be reflected in the incubated entity’s ownership of a 51 percent or greater voting interest. NAB Reply at 7, n.20.

⁹⁹ ACDDE Comments at 31.

¹⁰⁰ Skip Finley Comments at 4. The 25 percent limit on investment, Finley states, would be analogous to the Commission’s foreign ownership limits. Finley further suggests that the incubating entity participate in a non-attributable fashion, without board participation and holding only non-voting stock in a C corporation or only insulated interests in a limited partnership or LLC. *Id.*

¹⁰¹ 47 U.S.C. § 310(d); 47 CFR § 73.3540.

operating functions so as to gain the necessary level of operational expertise, and in light of concerns raised by the ACDDE and REC Networks,¹⁰³ 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.¹⁰⁴ Given our rationale for attributing these arrangements and the concerns raised in the record of this proceeding, we adopt the following safeguards.

53. 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,"¹⁰⁵ 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,¹⁰⁶ 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.¹⁰⁷ 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

¹⁰² See *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142 (1995); *Choctaw Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39 (1997); *Southwest Texas Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981); *WHDH, Inc.*, Memorandum Opinion and Order, 17 F.C.C.2d 856, 863 (1969). As discussed above, the incubation relationship must ensure that the incubated entity has sufficient financial resources to hire enough employees to oversee the operation of the station. See *supra* para. 40.

¹⁰³ See ACDDE Comments at 38-39; REC Networks Comments at 3.

¹⁰⁴ 47 CFR § 73.3555, Note 2(j)-(k). In addition, under our equity debt plus (EDP) attribution standard, an inter-market LMA also is attributable if it involves more than 15 percent of a station's programming and is accompanied by a financial investment that is above the relevant threshold specified in the rule. See *id.*, Note 2(i).

¹⁰⁵ *Id.*, Note 2(j).

¹⁰⁶ *Id.*, Note 2(k).

¹⁰⁷ *Id.* § 73.3526(e)(18). Station-related services include but are not limited to administrative, technical, sales, and/or programming support. *Id.* As discussed above, we prohibit outright any arrangement in which the licensee of the incubated station sells 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 arrangement is characterized.

independently in order to be viable in the long term as an independent broadcaster.¹⁰⁸ 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.¹⁰⁹

54. 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.

55. 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.¹¹⁰ We are concerned that allowing an employee or an attributable interest holder of the incubating

¹⁰⁸ Compare NAB Reply at 8, n.20 (“[R]estricting the ability of the parties to use sharing agreements . . . may unduly hinder incubation activities that could make incubated stations more successful.”), and Banks *Ex Parte* at 2 (“[S]tations involved in an incubation arrangement should be permitted to enter into sharing arrangements (e.g., joint sales or shared services agreements).”), with ACDDE Comments at 39 (“[JSAs and SSAs] should not be long-lasting elements of incubation. If they are used at all, they should be used upon proof of need, and they should *never* last for more than one year.” (emphasis in original)).

¹⁰⁹ See ACDDE Comments at 2 (stating that incubator program would incentivize companies to provide entrepreneurs with access to capital, assistance with engineering/technical issues, and mentorship, enabling experienced station managers to transition to ownership); *id.* at 39 (stating that minority broadcasters previously learned how to sell ads on their own and that qualified candidates for incubation should be able to develop the necessary skills within a year); NAB Comments at 5 (stating that access to capital is the greatest barrier to entry for prospective owners of broadcast stations); Skip Finley Comments at 3 (stating that access to capital has remained the largest impediment to ownership); ShootingStar Inc. *Ex Parte* at 1 (stating that access to capital is one of the primary challenges that new entrants face in the broadcasting industry); Ohana Media *Ex Parte* at 2 (stating that access to capital is a significant barrier for new entrants and small broadcasters seeking to grow); Hardman Broadcasting *Ex Parte* at 1 (stating that access to capital is the greatest barrier to station ownership).

¹¹⁰ As discussed below, *see infra* Section IV.E.1, all incubation proposals submitted to the Commission must include the certifications and disclosures required by FCC Form 301, 314, or 315, including those concerning the media interests (if any) of the immediate family members of the incubated station licensee's principals. See FCC Form 301, Application for Construction Permit for a Commercial Broadcast Station, Worksheet # 2 at p. 9, <https://transition.fcc.gov/Forms/Form301/301.pdf>; FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Worksheet # 3 at p. 9, <https://transition.fcc.gov/Forms/Form314/314.pdf>; FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, Worksheet # 3 at p. 9, <https://transition.fcc.gov/Forms/Form315/315.pdf>.

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.¹¹¹ We note that NAB and MMTC previously stated that the incubating entity and the incubated entity should not share common officers or directors.¹¹² As discussed above, we believe that an even stronger safeguard is necessary to ensure the independence of the incubated station.

56. *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.¹¹³ 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.¹¹⁴ 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,¹¹⁵ 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.¹¹⁶

D. Benefit to Incubating Entity

57. 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.

¹¹¹ See 15 U.S.C. § 19.

¹¹² See Letter from David Honig, President, MMTC, and Jane E. Mago, Executive Vice President and General Counsel, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, FCC, Secretary, MB Docket No. 09-182, attach. at 2 (filed Jan. 30, 2013) (MMTC-NAB Jan. 30, 2013 Joint *Ex Parte*); NAB Comments at 2 (noting that NAB joined with MMTC to propose some of the key elements of an incubator program and citing the MMTC-NAB Jan. 30, 2013 Joint *Ex Parte*).

¹¹³ See 47 CFR § 73.3555(a); see also *Order on Reconsideration*, 32 FCC Rcd at 9841-46, paras. 87-95 (discussing methodology used to determine radio markets for purposes of the Local Radio Ownership Rule).

¹¹⁴ See *infra* paras. 67-70; *Second Report and Order*, 31 FCC Rcd at 9897, para. 82.

¹¹⁵ See *infra* Section IV.E.

¹¹⁶ As discussed below, we believe that the requirements we adopt herein regarding the use of waivers under our incubator program will help ensure that the program does not work against our local radio ownership limits and that it preserves a market structure that facilitates and encourages new entry into the local media market. See *infra* Section IV.D.

58. 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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

59. *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.¹²⁰ 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.¹²¹ 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.¹²²

60. 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.¹²³ 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

¹¹⁷ *NPRM*, 32 FCC Rcd at 9863, para. 137.

¹¹⁸ *Id.* at 9863, paras. 137-38.

¹¹⁹ *Id.* at 9863, para. 137.

¹²⁰ *See infra* para. 72-73 (discussing criteria for determining whether an incubation relationship was successful).

¹²¹ ACDDE Comments at 2-4; NAB Comments at 11-12; Bonneville Reply at 3; Skip Finley Reply at 2; Gray Television Reply at 1, 3; Meredith Corporation Reply at 2 (Meredith Reply); *see also* 22 ACDDE Members Reply at 2, n.4 (“[T]he amount of money involved [in a regulatory fee exemption] is probably too small to provide a sufficient incentive for incubation.”); Office of Communication, Inc., of the United Church of Christ (UCC) et al. Comments at 8 (UCC et al. Comments) (“[E]ven the best designed incubator program will not be effective without any incentive for in-market licensees to participate.”).

¹²² ACDDE Comments at 2-3.

¹²³ NAB Comments at 11-15; *see also* Skip Finley Comments at 3-5; Bonneville Reply at 3; Gray Television Reply at 1; Meredith Reply at 2; NAB Reply at 4-9.

if the incubating entity donates the station to a mission-based entity or a Native American Nation.¹²⁴ REC Networks proposes a regulatory fee exemption.¹²⁵

61. 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.¹²⁶ 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.¹²⁷ While some commenters assert that granting waivers of local ownership rules to incubating entities could harm rather than promote ownership diversity,¹²⁸ 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

¹²⁴ ACDDE Comments at 5-6, 30-31, 34-38 & n.74, 40 & n.83; 22 ACDDE Members Reply at 5-6. The ACDDE states that under current law an incubating entity could be eligible for a tax deduction upon donating a station in accordance with the ACDDE's proposal but that "[o]ften—especially if the station has little revenue—a tax deduction is not a sufficient incentive to donate a station." ACDDE Comments at 40 & n.83.

¹²⁵ REC Networks Comments at 3-4.

¹²⁶ 47 CFR § 73.3555(a). The Local Radio Ownership Rule permits an entity to own (i) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM); (ii) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which can be in the same service (AM or FM); (iii) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which can be in the same service (AM or FM); and (iv) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination. *Id.*

¹²⁷ We also recognize that in some instances a prospective incubating entity's ownership interests in the market designated for incubation may require a waiver to enable a qualifying incubation relationship. We will treat these as "temporary waivers" solely for the purposes of the qualifying incubation relationship, and we describe in more detail below how they may be obtained. Such waivers should not be confused with the reward waivers described here. *See infra* paras. 71-72.

¹²⁸ Free Press Comments at 2-3; UCC et al. Comments at 6-8; *see also* REC Networks Comments at 3-4 ("[T]here may be very few options [for encouraging established broadcasters to participate in an incubator program] other than waivers of ownership rules, which would in turn increase the concentration of existing owners . . ."); ACDDE Comments at 37 (stating that awarding tax certificates in lieu of waivers, if Congress passes legislation authorizing the Commission to do so, would not create an exception to the multiple ownership rules and would "bend toward de-consolidation").

below.¹²⁹

62. 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.¹³⁰ In addition, we note that the Commission has previously found that it does not have the authority to waive or defer fees categorically.¹³¹

63. 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,¹³² 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 1995,¹³³ 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.¹³⁴ 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

¹²⁹ See *infra* paras. 66-70.

¹³⁰ 22 ACDDE Members Reply at 2, n.4 (discussing regulatory fee exemptions and stating that “the amount of money involved is probably too small to provide a sufficient incentive for incubation”).

¹³¹ See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, Report and Order, 2 FCC Rcd 947, 961, para. 88 (1987) (“[T]hose requesting a [case-specific] waiver or deferral [of an application fee] will have the burden of demonstrating that, for each request, a waiver would override the public interest, as determined by Congress, that the government should be reimbursed for that specific regulatory action of the FCC.”); *Implementation of Section 9 of the Communications Act*, Report and Order, 9 FCC Rcd 5333, 5344-46, paras. 29-35 (1994) (similarly restricting waivers of regulatory fees only to those requests that unambiguously articulate “extraordinary and compelling circumstances” outweighing the public interest in recouping the cost of the Commission’s regulatory services from a particular regulatee). The RAY BAUM’s Act of 2018 amended Sections 8 and 9 of the Communications Act and provided an effective date of October 1, 2018 for such changes. Consolidated Appropriations Act, 2018, Division P – Ray Baum’s Act of 2018, Title I, FCC Reauthorization, Public Law No. 115-141, § 102, 132 Stat. 348, 1082-86 (2018) (to be codified at 47 U.S.C. §§ 158-59, 159a). Congress envisioned a transition between fees adopted before and after the effective date of the amendments to Sections 8 and 9. In particular, Congress provided that application fees in effect on the day before the effective date of the RAY BAUM’s Act shall remain in effect until such time as the Commission adjusts or amends such fee. *Id.* Our holding here does not address how we might view incubators under future fee schedules adopted pursuant to Section 8 and 9 as amended by the RAY BAUM’s Act.

¹³² See ACDDE Comments at 59-60 (noting the scale of participation in the 1978-1995 Tax Certificate Program).

¹³³ See *Second Report and Order*, 31 FCC Rcd at 9962, para. 238 (stating that the Commission discontinued its tax certificate policy following the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and that Congress subsequently repealed the tax certificate policy as part of its budget approval process).

¹³⁴ *Section 257 Triennial Report to Congress*, Report, 31 FCC Rcd 12037, 12078, para. 139 (2016) (*Fifth Section 257 Report*); see also *Second Report and Order*, 31 FCC Rcd at 9966, para. 244 (stating that the Commission’s most recent *Section 257 Report* included a recommendation that Congress pass tax deferral legislation).

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.

64. *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.¹³⁵ While NAB proposes that the reward waiver be available to the incubating entity prior to the end of the incubation relationship,¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹

65. 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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² Further, a single party may not hold the benefit of more than one waiver in a market granted under our incubation

¹³⁵ Specifically, successful incubation requires the incubating entity to certify: (i) that it complied in good faith with its incubation agreement, as submitted to and approved by the Media Bureau (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 station, or if the incubated station was a struggling station, that the incubation relationship has resolved any financial and/or technical difficulties that the owner of the previously struggling station faced prior to incubation. *See infra* para. 72.

¹³⁶ *See* NAB Comments at 13-15; *see also* Bonneville Reply at 3 (supporting NAB proposals); Gray Television Reply at 1 (supporting NAB proposals); Meredith Reply at 2 (supporting NAB proposals).

¹³⁷ *See infra* Section IV.E.

¹³⁸ *See infra* Section IV.E.3 (discussing Bureau review and grant of reward waiver requests).

¹³⁹ *See* NAB Comments at 14.

¹⁴⁰ *See* Letter from Patrick McFadden, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 5 (filed July 26, 2018).

¹⁴¹ *See* NAB Comments at 13, n.32.

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.

66. 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,¹⁴³ 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,¹⁴⁴ 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.¹⁴⁵ 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,¹⁴⁶ 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.¹⁴⁷ 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

¹⁴² This is consistent with the one-waiver-per-market limitation we discuss below, which permits 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. *See infra* para. 70. In addition, as a result of our one-waiver-per-market limitation, the purchaser of a cluster of stations acquired by an incubating entity through use of its reward waiver will not be able to incubate a station in any market in which the purchaser owns such a cluster of stations.

¹⁴³ *See* Skip Finley Comments at 3-5 (proposing that incubating entity be allowed to use reward waiver in comparable markets as long as the proposed combination would not exceed a 40 percent revenue share); *see also* NAB Reply at 5 (stating that incubating entity should be allowed to use its waiver in a different market than where the incubated station is located).

¹⁴⁴ *See infra* paras. 43-44.

¹⁴⁵ NAB Comments at 13-15; NAB Reply at 5, n.14; Bonneville Reply at 3; *see* Gray Television Reply at 1; Meredith Reply at 1-3.

¹⁴⁶ *See supra* note 143 (summarizing Local Radio Ownership Rule).

¹⁴⁷ *See* 47 CFR § 73.3555(a).

proposes.¹⁴⁸ 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.

67. 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.¹⁴⁹ 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.¹⁵⁰ 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,¹⁵¹ 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.¹⁵²

68. 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

¹⁴⁸ See Skip Finley Comments at 3-4.

¹⁴⁹ In the *Order on Reconsideration*, the Commission revised the Local Television Ownership Rule to eliminate the Eight-Voices Test. *Order on Reconsideration*, 32 FCC Rcd at 9834-36, paras. 73-77. Because our market comparability standard does not require a specific number of independent voices in a market, it is consistent with the decision in the *Order on Reconsideration* to eliminate the Eight-Voices Test. We note that Skip Finley, an experienced minority broadcaster, proposes that the Commission allow an incubating entity to use its reward waiver in a market that is comparable to the incubation market, and we agree that doing so will help promote the broad distribution of the benefits of our incubator program. Skip Finley Comments at 4-5.

¹⁵⁰ For instance, if an established broadcaster incubates a station in a market that already has five independent owners at the time the parties submit the incubation proposal for the station, the incubating broadcaster will be able to use its waiver only in a market with at least five independent owners. As a result, the number of independent owners in the market where incubation occurred would either remain at five or increase by 20 percent, depending on whether the incubated entity already owned a station in the market prior to the incubation relationship, and similarly the number of independent owners in the reward market would either remain at a minimum of five or decrease by no more than 20 percent, depending on whether the reward waiver is used to acquire a station from an owner of an individual station or an owner of group of in-market radio stations.

¹⁵¹ See, e.g., NAB Reply at 5, n.14.

¹⁵² Thus, a broadcaster that incubates a new independently owned and operated FM station in a market with six independent radio station owners will not be able to use its reward waiver in a market with only three such owners. Conversely, a broadcaster that incubates an AM station in a market that falls within the smallest market-size tier under our Local Radio Ownership Rule will not be able to use a reward waiver on an FM station in a market that falls within the largest tier. See Skip Finley Comments at 4 (stating that the Commission could require that the value of the reward station be proportional to the value of the incubated station).

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.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ For all of the foregoing reasons, therefore, we decline to adopt the “5 Up/5 Down” proposal.

69. 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.

70. 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.¹⁵⁶ The safeguards that we adopt today will help ensure that our incubator program preserves such a market structure while further promoting the

¹⁵³ Honig July 26, 2018 *Ex Parte* at 2.

¹⁵⁴ Nielsen, Radio Market Survey Population, Rankings & Information (2017).

¹⁵⁵ NAB July 25, 2018 *Ex Parte* at 4.

¹⁵⁶ See *Second Report and Order*, 31 FCC Rcd at 9897, para. 82.

entry of new and diverse voices in broadcast radio.

71. *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.¹⁵⁷ This temporary waiver will expire when the incubation relationship ends.¹⁵⁸ 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.

72. *Criteria for Granting a Waiver.* We will review requests for both the reward and temporary waiver pursuant to Section 1.3 our rules, which requires a showing of “good cause” and applies to all Commission rules.¹⁵⁹ 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.

73. 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

¹⁵⁷ See *infra* Section IV.E.1 (discussing procedures for filing incubation proposals).

¹⁵⁸ As discussed below, if the incubating entity seeks to use its reward waiver to retain an otherwise impermissible attributable interest in the incubated station, the incubating entity’s temporary waiver (if it has one) will remain in effect during the Bureau’s review of the incubating entity’s timely filed waiver request. See *infra* Section IV.E.3.

¹⁵⁹ 47 CFR § 1.3.

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 Section 1.3 waiver requests, the Commission has considered showings of undue hardship, the equities of a particular case, or other good cause,¹⁶⁰ 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.

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

74. 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.

75. 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.

1. Bureau Review of Incubation Proposals

76. *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.¹⁶¹ We direct the Bureau authority to

¹⁶⁰ See *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁶¹ FCC Form 301, Application for Construction Permit for a Commercial Broadcast Station, <https://transition.fcc.gov/Forms/Form301/301.pdf>; FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, <https://transition.fcc.gov/Forms/Form314/314.pdf>; FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, <https://transition.fcc.gov/Forms/Form315/315.pdf>. We note that, in addition to filing with the Bureau, parties must retain a copy of all application materials, including the proposed incubation agreement, in their public inspection files.

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,¹⁶² and in addition to reviewing such applications pursuant to its routine review processes,¹⁶³ the Bureau will review accompanying incubation proposals and approve or reject such proposals.¹⁶⁴ 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.

77. 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).¹⁶⁵ 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 section 1.3 of the Commission's rules.¹⁶⁶

78. 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;¹⁶⁷ 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.

¹⁶² See 47 CFR § 73.3584 (procedure for filing petitions to deny for broadcast applications); *id.* § 73.3587 (procedures for filing informal objections to broadcast applications).

¹⁶³ We remind incubator program applicants that they are also subject to our qualifications standards and other requirements for broadcast applicants, as discussed in our rules and the relevant application forms. See, e.g., 47 CFR Pts. 1, 73; Form 301; Form 314; Form 315.

¹⁶⁴ We anticipate that applicants will be cognizant that the Bureau may need additional time to process a Form 301, Form 314, or Form 315 application where the application includes an incubation proposal.

¹⁶⁵ See 47 CFR § 1.2 (discussing petitions for declaratory ruling).

¹⁶⁶ See *id.* § 1.3.

¹⁶⁷ See *supra* paras. 38-42 (discussing the types of support that an incubating entity must provide during a qualifying incubation relationship).

79. *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.¹⁶⁸

80. 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.¹⁶⁹ 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.¹⁷⁰ 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,¹⁷¹ 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.¹⁷² 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.

81. *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

¹⁶⁸ See *supra* Section IV.C. (discussing qualifying incubation relationships).

¹⁶⁹ See *supra* para. 50 (requiring incubated entity to satisfy control test consistent with our existing revenue-based eligible entity definition).

¹⁷⁰ NAB Comments at 10 (stating that “the agreement also should specify how and when the incubation relationship will conclude”).

¹⁷¹ See *supra* Section IV.C.

¹⁷² See, e.g., Patrick Communications *Ex Parte* at 4 (describing how the initial entry of several now successful broadcast station owners was facilitated by sponsors who helped them with their initial purchases); Skip Finley Comments at 3 (stating that access to capital has remained the largest impediment to ownership); ShootingStar *Ex Parte* at 1 (stating that access to capital is one of the primary challenges that new entrants face in the broadcasting industry); Ohana Media *Ex Parte* at 2 (stating that access to capital is a significant barrier for new entrants and small broadcasters seeking to grow); Hardman Broadcasting *Ex Parte* at 1 (stating that access to capital is the greatest barrier to station ownership).

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 315.¹⁷³ 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.¹⁷⁴

82. 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.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ 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.

83. 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.

¹⁷³ As discussed above, we require these certifications and disclosures to address the ACDDE's concerns about familial and spousal relations. *See supra* para. 33.

¹⁷⁴ *See supra* paras. 28-33 (describing concerns about legacies and others who may not need the assistance of an incubator program).

¹⁷⁵ *See supra* paras. 37-42 (describing the types of support that an incubating entity must provide during a qualifying incubation relationship).

¹⁷⁶ *See supra* para. 41 (providing examples of the type of operational support the incubating entity might provide during an incubation relationship).

¹⁷⁷ *See supra* paras. 48-55 (requiring that the incubated entity maintain control of the incubated station).

2. Compliance During Term of Incubation Relationship

84. 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.¹⁷⁸ 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.¹⁷⁹

85. 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.

3. Final Bureau Review and Grant of Reward Waiver to Incubator

86. 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.¹⁸⁰ 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

¹⁷⁸ See REC Comments at 4 (describing how periodically filed reports should indicate the types of training, mentoring or other activity that the incubating entity is conducting as well as a statement about how far the incubated station's learning path has progressed and where additional education may be necessary).

¹⁷⁹ See Comments of REC at 4 (stating "[c]ompliance can't be outsourced to be self-policed by the industry, it must be enforced at the Commission").

¹⁸⁰ The 120-day timelines discussed herein do not apply to the Bureau's processing and review of assignment or transfer of control applications.

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.

87. 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.¹⁸¹ 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.

88. 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.

V. PROCEDURAL MATTERS

89. *Final Regulatory Flexibility Analysis.*—As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA)

¹⁸¹ See *supra* para. 45 (discussing duration of qualifying incubation relationships).

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

relating to this Order. The FRFA is set forth in the Appendix.

90. *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 FRFA in the Appendix, *infra*.

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

VI. ORDERING CLAUSES

92. 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**.

93. **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 effective date announced in the *Federal Register* notice announcing OMB approval.

94. **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.

95. **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.

96. **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 H. Dortch

Secretary

APPENDIX**Final Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) in this proceeding.² The Federal Communications Commission (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.³

A. Need for, and Objectives of, the Rule Changes

2. 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.⁴ 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.⁵ 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.⁶ 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.⁷ 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.⁸

3. The incubator program will apply to full-service AM and FM radio broadcast stations.⁹ To identify potential incubated entities, the *Report and Order* adopts a two-pronged eligibility standard. The

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

² *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9883-87, Appx. C (2017) (*NPRM*).

³ See 5 U.S.C. § 604.

⁴ *Report and Order*, para. 1.

⁵ See *id.*, para. 2.

⁶ *Id.*, para. 6.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*, Section IV.A.

first prong is a modified version of the Commission's existing new entrant bidding credit standard, and the second prong derives from the revenue-based eligible entity definition contained in the Commission's broadcast rules.¹⁰ Under the first prong of the eligibility standard, a potential incubated entity, including its attributable interest holders, may hold existing attributable interests in no more than three full-service AM or FM stations and no TV stations.¹¹ In addition, pursuant to the second prong, the potential incubated entity must also qualify as a small business consistent with the Small Business Administration (SBA) standard for its industry grouping.¹²

4. 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.¹³ 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.¹⁴ 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.¹⁵

5. 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.¹⁶ 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.¹⁷ 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.¹⁸ 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. The Commission expects qualifying incubation relationships to provide the incubated entity with

¹⁰ *Id.*, Section IV.B.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*, Section IV.E.

¹⁴ *Id.*

¹⁵ *Id.*, Section IV.C.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

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.¹⁹ 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.²⁰ 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*.²¹ To receive a reward waiver, the incubating entity must demonstrate that it has completed a successful qualifying incubation relationship.²² 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.²³

6. 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.²⁴ 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*.²⁵

7. 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.²⁶ 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.²⁷ Accordingly, successful implementation of this incubator program will promote ownership diversity by

¹⁹ *Id.*

²⁰ *Id.*, Section IV.D.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*, para. 5.

²⁷ *Id.*

fostering new entry in the broadcasting sector by entrepreneurs and small businesses, including those owned by women and minorities.²⁸

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

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

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

9. 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.²⁹ The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

10. 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.³⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³² 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.³³

11. 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.

12. *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.”³⁴ The SBA has established a small business

²⁸ *Id.*

²⁹ 5 U.S.C. § 604(a)(3).

³⁰ *Id.* § 603(b)(3).

³¹ *Id.* § 601(6).

³² *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.* § 601(3).

³³ *Id.* § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

size standard for this category as firms having \$38.5 million or less in annual receipts.³⁵ Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.³⁶ Of that number, 2,806 firms operated with annual receipts of less than \$25 million per year.³⁷ Therefore, based on the SBA's size standard the majority of such entities are small entities.

13. 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.³⁸ 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 11,371.³⁹ We note the Commission has also estimated the number of licensed noncommercial (NCE) FM radio stations to be 4,128.⁴⁰ 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.

14. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.⁴¹ 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.⁴² 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.

³⁴ U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

³⁵ 13 CFR § 121.201; NAICS code 515112.

³⁶ U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112), https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

³⁷ *Id.*

³⁸ Press Release, FCC, Broadcast Station Totals As of June 30, 2018 (July 3, 2018), <https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both." 13 CFR § 121.103(a)(1).

⁴² *Id.* § 121.102(b).

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

15. 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.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ Therefore, the Commission anticipates that the incubator program will benefit small entities that participate in the program, not burden them.

16. *Reporting Requirements.*⁴⁷ 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.

17. 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

⁴³ *Report and Order*, para. 1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*, para. 5.

⁴⁷ *See id.*, Section IV.E.

above.⁴⁸ 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.

18. 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.

19. 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.

20. 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

⁴⁸ See *supra* para. 50 (requiring incubated entity to satisfy control test consistent with our existing revenue-based eligible entity definition).

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.

21. 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.

22. 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.

23. 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.

24. *Recordkeeping Requirements.*⁴⁹ 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.⁵⁰

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

26. 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.⁵¹ The *Report and Order* adopts certain safeguards to ensure that the incubated entity has the requisite level of autonomy during the incubation period.⁵²

27. 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.⁵³ 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.⁵⁴ 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.⁵⁵ Moreover, using the existing standard

⁴⁹ See *id.*, Section IV.E.

⁵⁰ See 47 CFR §§ 73.3526(b)(4), 73.3527(b)(3); *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report and Order, 31 FCC Rcd 526, 534, 555, paras. 17, 77 (2016).

⁵¹ *Report and Order*, Section IV.C.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

should facilitate both participation in and administration of the program, as the standard is already familiar to licensees.⁵⁶

28. 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).⁵⁷ 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).⁵⁸ 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.⁵⁹ 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.⁶⁰

29. 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.⁶¹ 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,"⁶² 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.⁶³ 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,⁶⁴ 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.⁶⁵ While the Commission's attribution standards do not regard SSAs as attributable ownership interests, the Commission is concerned that allowing these arrangements to be

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* In addition, under the Commission's equity debt plus (EDP) attribution standard, an inter-market LMA also is attributable if it involves more than 15 percent of a station's programming and is accompanied by a financial investment that is above the relevant threshold specified in the rule. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 47 CFR § 73.3555, Note 2.j.

⁶³ *Report and Order*, Section IV.C.

⁶⁴ 47 CFR § 73.3555, Note 2.k.

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.⁶⁶ 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.⁶⁷

30. 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹

31. 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.⁷² 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.⁷³ While U.S. antitrust laws prohibit, with certain exceptions, one individual from serving as an officer or director of two competing corporations, the

⁶⁵ *Id.* § 73.3526(e)(18). Station-related services include but are not limited to administrative, technical, sales, and/or programming support. *Id.*

⁶⁶ *Report and Order*, Section IV.C.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

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.⁷⁴

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

32. 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.⁷⁵

33. 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.⁷⁶ 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.

G. Report to Congress

34. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁰ In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.⁰

⁷⁴ *Id.*

⁷⁵ 5 U.S.C. § 603(c)(1)-(c)(4).

⁷⁶ *Report and Order*, para. 5.

⁰ *See* 5 U.S.C. § 801(a)(1)(A).

⁰ *See id.* § 604(b).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*,
MB Docket No. 17-289

Everyone needs help from time to time, even the greatest among us. Hercules learned from Chiron, Luke learned from Yoda, Daniel learned from Mr. Miyagi, and Harry Potter needed to learn from Dumbledore before taking on Voldemort. Sometimes we need someone to show us the ropes before we venture out on our own.

That's the basic idea of an incubator program: Established broadcasters will pair with, and provide support to, small new entrants, including women and minorities, to help promote diversity of ownership in the broadcast sector. Relationships like these will help address the significant barriers that currently make it hard for many to enter the broadcast industry, including lack of access to capital.

The idea of an incubator program has been discussed for decades. The National Association of Black Owned Broadcasters first advanced the idea to the FCC way back in 1990, and the FCC first sought comment on it in 1992. And in the last 26 years, the proposal has been discussed in no fewer than seven different dockets. That's a lot of talk. But talk doesn't get the job done. So, this Commission has adopted a different attitude, one borrowed from Elvis Presley: "A little less conversation, a little more action."

Action came at long last this past November, when the FCC agreed to adopt an incubator program. And today, we establish rules for this program to enable it to get off the ground.

Under the procedures we are adopting, incubating stations will be able to pair up with small new entrants or existing struggling stations for a three-year incubation period. Among other things, the incubating station will provide invaluable support to the incubated entity in the form of mentoring, financial, engineering, and/or technical assistance, and operational support. The program will initially apply to the radio industry, as radio has traditionally been the most accessible entry point for new entrants and small businesses seeking to enter the broadcasting sector, and there is an appropriate incentive that is within our authority to grant to incubating stations.

For an incubation relationship to be deemed successful at the end of the three-year period, the incubated entity must either own a new full-service radio station or its previously struggling station must be on a firmer footing. In exchange, if the incubation relationship is successful, the incubating entity can receive a waiver of the FCC's local radio ownership rule that it can use in the incubated market or a comparable market.

Getting to this point took a lot of time, energy, and patience. In particular, I'd like to thank the Advisory Committee on Diversity and Digital Empowerment for its hard work on this issue. I'd also like to thank the FCC staff who worked so diligently on this *Order*. From the Media Bureau: Francesca Campione, Michelle Carey, Christopher Clark, Brendan Holland, Thomas Horan, Jamila Bess Johnson, Radhika Karmarkar, Holly Saurer, Al Shuldiner, and Sarah Whitesell. And from the Office of General Counsel: Bill Dever, Bill Scher, and Royce Sherlock.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*,
MB Docket No. 17-289

I commend the Chairman for bringing to order the incubator program he officially proposed in November after years of previous advocacy. The number of women-owned and -controlled broadcast stations and the number of African-American-owned and -controlled stations in the United States is abysmally low. In fact, according to the Commission's most recent report on the ownership of commercial broadcast stations, women collectively or individually held a majority of the voting interests in only 760 radio stations, or 8.4 percent. African Americans fared even worse, holding collectively or individually a majority of the voting interest in just 159 radio stations, or 1.8 percent. These are anemic statistics resulting from the FCC's longstanding, archaic media ownership rules, which we took important steps to modernize in November.

I truly believe that updating our rules to reflect the actual marketplace will allow broadcasters to compete and thrive. As I stated at a Congressional hearing last October, the situation we have today is a result of our media ownership rules, and those rules have not worked. We must try something new. Today, the Commission does just that, as we set up the parameters for a radio incubator program. First, I want to thank the Chairman for recognizing in the item that although our incubator program will offer reward waivers from certain aspects of our Local Radio Ownership Rule, including the AM/FM subcap, nothing in this item precludes the Commission from reconsidering these rules in future items. Specifically, sometime this year the Commission will launch our 2018 Quadrennial Review. In that review, I will pursue an elimination or at least to drastically lift, our AM/FM subcap restrictions. This item specifically confirms that our decision today does not prejudge or speak to whether the current Local Radio Ownership Rule will be maintained or modified as a result of this review. We successfully eliminated the Newspaper/Broadcast Cross-Ownership rule in November, perhaps a decade too late. We cannot rest on our laurels by maintaining the same regulatory climate for radio that helped seal the fate of many newspapers.

Next, I want to thank the Chairman for reversing the draft's policy position on transferability. I believe that preventing the reward waiver from being freely transferable would harm participation rates and undermines sound policy. Once the incubator earns the benefit from a successful incubation, the reward waiver should apply, period. It should not matter which station owner ultimately receives the benefit, as it should not artificially expire if the station is sold to another individual. This was an important edit, and again demonstrates that, despite making our drafts publicly available in advance of

our meetings, significant edits can still occur prior to our final approval of the items.

Finally, I thank my colleagues for accepting other minor edits I proposed, including jettisoning the use of delegated authority and clarifying the Commission's views on the previous success rate of tax certificates. I am aware that some have suggested that we include a recommendation in our item that Congress adopt tax relief for incubation as an alternative to ownership waivers. Such an edit would do nothing but cause extensive delay and a further continuation of the tragically low diversity ownership rate in the broadcast space. I also was unable to support altering the comparable markets algorithm to disallow comparability more than five market rank sizes removed in either direction from the incubated station's market. This is an overly complex alternative that I fear will restrict participation in our program. Finally, I could not support any report to Congress that revisits the Overcoming Disadvantages Preference (ODP) concept as it is constitutionally flawed and more than problematic to implement.

I truly hope that the incubation program we launch today is a success. I must admit that some questions do remain. For example, I wonder what will happen to incubators who take on an incubatee that is less than stellar. Will they be forced into pouring resources into a company that simply cannot get off the ground? There is no easy answer for this, other than the need for incubators to choose their incubatees wisely. Time will tell how much of a factor this becomes. I approve.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*,
MB Docket No. 17-289

Anyone who has spent any time at a tech or telecom conference—from New York to Silicon Valley—knows that there’s more progress to be made on diversity.

For decades, the Commission talked about ways to help close the gap, including by establishing an incubator program to promote diverse voices in the broadcast industry. After years of inaction, today, we take a small but important step in the right direction by doing just that.

By providing the right incentives for established broadcasters to incubate new entrants, we aim to address two longtime impediments to minority ownership: access to capital and operational experience. The average sales price for a radio station in 2016 was about \$1 million, and new entrants and small broadcasters often lack the deep pockets necessary to get off the ground.

To incentivize incubators, this Order will waive the Local Radio Ownership Rule for broadcasters who provide the necessary funding and training for a new entrant to stand on their own. And the program will include safeguards to prevent fraud and abuse.

Maintaining the status quo isn’t going to bring more diversity and new entry into the market, and the Local Radio Ownership Rule has remained largely unchanged since 1996. So I am glad we’re modernizing our rules to provide the right incentives to increase diversity in broadcast ownership. I look forward to seeing how this program develops, and whether the lessons we learn from this approach can be applied more broadly. I thank the Media Bureau for its work on this item. It has my support.

**DISSENTING STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*,
MB Docket No. 17-289

For decades, at the direction of Congress, the Federal Communications Commission maintained limits on the number of broadcast stations that a single company can own. These rules prevented a single entity from owning the top television stations in the same market. They also placed limits on the number of television stations and radio stations a single entity could control in any community. These policies were designed to sustain media diversity, localism, and competition. Those values may not be especially trendy, but I think they are solid. I think they support journalism and jobs. I think they play a critical role in advancing the mix of facts we all need to make decisions about our lives, our communities, and our country.

In a decision late last year, the FCC dismantled those values. Instead of engaging in thoughtful reform that modernizes our rules—which we should do—it set our most basic values on fire. They are gone. As a result, wherever you live the FCC has given the green light for a single company to own the newspaper and multiple television and radio stations in your community. I am hard pressed to see any commitment to diversity, localism, or competition in that result.

We should be troubled. Because we are not going to remedy what ails our media today with a rush of new consolidation. We are not going to fix our ability to ferret out fact from fiction by doubling down on just a handful of companies controlling our public airwaves. We are not going to be able to remedy the way the highest level in government is now comfortable stirring up angry sentiment, denouncing news as false facts, and bestowing favors on outlets with narratives that flatter those in power rather than offer the hard-hitting assessments we need as citizens. Despite all this, our policy changes have greased the way for mergers of ever greater magnitude—which let's be honest, will not do a thing to make it more likely that women and minorities become owners of broadcast stations.

To apologize for this set back, today the FCC offers the most modest of proposals. It will provide existing radio station owners with the right to exceed radio ownership limits if they offer a bit of aid to a qualifying new entrant in the market. There is nothing bold here. I fail to see how it will make a material difference in the diversity of media ownership. Its scope is too narrow, its consequences too small, and its impact on markets too muddled. Moreover, I fail to see how this will satisfy the Court of Appeals for the Third Circuit which on—count them—three occasions has directed the FCC to take meaningful actions to

address the shameful lack of racial and gender diversity in broadcast station ownership.

Media ownership matters because what we see and hear over the air says so much about who we are as individuals, as communities, and as a nation. Study a bit of history and you can only come to one conclusion: consolidation will make our stations look less and less like the communities they serve. Women and minorities have struggled for too long to take the reins at media outlets. Because today's action will do too little to change that reality for too many who have waited too long, I dissent.