



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 19-310 and 17-105; FCC 19-122]

Amendment of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations, Modernization of Media Initiative

AGENCY: Federal Communications Commission.

ACTION: Proposed rule

SUMMARY: This document seeks comment on whether the Commission should modify or eliminate its rule (the radio duplication rule) that bars same-service (AM or FM) commercial radio stations from duplicating more than 25% of their total hours of programming in an average broadcast week if the stations have 50% or more contour overlap and are commonly owned or subject to a time brokerage agreement.

DATES: Comments Due: **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Replies Due: **[INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Interested parties may submit comments and replies, identified by MB Docket Nos. 19-310 and 17-105, by any of the following methods:

- *Federal Communications Commission Website:* <http://apps.fcc.gov/ecfs/>. Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: FCC504@fcc.gov or phone: 202-418-0530 or TTY:202-418-0432.

For more detailed filing instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Julie Saulnier, Industry Analysis Division, Media Bureau, Julie.Saulnier@fcc.gov, (202) 418-1598.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s *Notice of Proposed Rulemaking* (NPRM) in MB Docket Nos. 19-310 and 17-105, FCC 19-122, that was adopted November 22, 2019 and released November 25, 2019. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, 445 12th Street, SW., Room CY-A257, Washington, DC 20554, or online at <https://docs.fcc.gov/public/attachments/FCC-18-179A1.pdf>.

Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format, etc.) and reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) may be requested by sending an email to fcc504@fcc.gov or calling the FCC’s Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

SYNOPSIS:

1. *Background.* In 1964, the Commission first limited radio programming duplication by commonly owned stations in the same local area by prohibiting FM stations in cities with populations over 100,000 from duplicating the programming of a co-owned AM station in the same local area for more than 50% of the FM station’s broadcast day. Even though the Commission did not consider programming duplication an efficient use of FM spectrum, it was willing to allow limited duplication “as a temporary expedient to help establish the [then-new] FM service.” To minimize the rule’s economic impact on radio broadcasters, the Commission allowed for waivers upon a substantial showing that

programming duplication would be in the public interest, and provided that compliance would be monitored through the license renewal process. In 1976, the Commission concluded that “the virtually complete absence of available channels as well as the strengthened economic position of FM” warranted tightening the restriction to limit FM stations to duplicating only 25% of the average program week of a co-owned AM station in the same local area if either the AM or FM station operated in a community of over 25,000 population. The Commission found that fewer available channels in communities of substantial size could inhibit programming diversity and that programming duplication was a wastefully inefficient use of spectrum. In 1986 the Commission eliminated the cross-service radio duplication rule entirely, finding that FM service had developed, and FM stations were fully competitive. The Commission further found that the rule was no longer necessary to promote spectrum efficiency because market forces would lead stations to provide separate programming where economically feasible, and, where separate programming was not economically feasible, duplication was preferable to a station curtailing programming or going off air entirely to comply with the rule.

2. In 1992, as part of a broad review of radio ownership rules, the Commission adopted a new programming duplication rule barring same-service (AM or FM) commercial radio stations from duplicating more than 25% of the total hours of an average broadcast week of programming if the stations have 50% or more contour overlap and are commonly owned or subject to a time brokerage agreement. Principal community contours are defined as “predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations.” 47 CFR 73.3556. A time brokerage agreement generally involves the sale by one radio licensee of blocks of time to a broker who then supplies programming to fill that time and sells advertising to support it.

3. The Commission saw no public benefit in allowing substantial programming duplication, observing that, “when a channel is licensed to a particular community, others are prevented from using that channel and six adjacent channels at varying distances of up to hundreds of kilometers. The limited amount of available spectrum could be used more efficiently by other parties to serve competition and

diversity goals.” The Commission concluded, however, that limited programming duplication had benefits, stating “we are persuaded that limited simulcasting, particularly where expensive, locally produced programming such as on-the-spot news coverage is involved, could economically benefit stations”

4. *Discussion.* Overall, the Commission seeks comment on whether it should modify or eliminate the radio duplication rule and asks if the rule has outlived its utility or whether it remains necessary to further the public interest goals of competition, programming diversity and spectrum efficiency for which it was intended. The broadcast industry has changed significantly since the Commission adopted the current rule in 1992. One change promoting competition and programming diversity is the greatly increased number of radio stations licensed and operating across the country: roughly 11,700 commercial AM and FM and FM translator stations in 1992, but close to 19,500 such stations today. There also are many more non-commercial/educational radio stations (1,588 in 1992 versus 4,122 today) as well as more than two thousand low power FM stations, all adding to diverse programming. Further, radio broadcasters now expand their content offerings by using station websites and mobile applications, allowing users to listen to a variety of programming on multiple devices either for free or with a paid subscription. This significant growth in the number of radio broadcasting outlets, combined with the new and varied formats in which broadcasters disseminate their programming, has led to greater radio broadcasting competition and programming diversity.

5. Broadcast radio technology also has improved with the introduction of digital radio, which enables FM stations to provide clear sound comparable in quality to CDs and enables AM stations to provide sound quality equivalent to standard analog FM sound quality. Stations broadcasting in digital also are able to provide multiple streams of programming as well as other data such as information about music airing on the station, weather updates, traffic reports and other news.

6. Further, the Commission’s AM revitalization proceeding has brought AM programming to the FM band and enabled greater competition. The Commission began allowing AM stations (both

commercial and noncommercial) to use currently authorized FM translator stations to retransmit their AM service within their AM stations' coverage areas in 2009. In 2016, the Commission opened two exclusive windows for AM stations to apply to relocate FM translator stations, giving them the ability to expand service by broadcasting at night when their signals may be substantially reduced. In response, the Commission granted more than 1,000 such applications. The Commission opened two additional spectrum windows in 2018 and 2019 and awarded licenses for more than 1,700 new FM translator stations to AM stations not participating in the earlier windows. These efforts have helped AM stations to increase their audiences, and potentially their advertising revenues, in an effort to better compete against stronger rivals.

7. Collectively, how do these changes affect the need for the radio duplication rule? Is the rule still needed to promote radio broadcast competition or programming diversity? Is the Commission's assessment of the increased competition and programming diversity within the radio broadcast industry correct? Are there advantages to competition and programming diversity from giving radio broadcasters additional programming freedom? Or, alternatively, is the radio duplication rule needed to ensure continued competition and diversity, and if so, could elimination or modification of this rule potentially harm programming diversity? Do other sources of audio programming, such as satellite radio or digital streaming audio services, impact the analysis of the need for the radio duplication rule, and if so, how? Has there been consolidation in any aspect of the media marketplace, and if so, how does it impact the Commission's analysis? Should the Commission also consider the impact of non-audio sources of information and entertainment, such as video providers, newspapers, and social media outlets, and if so, how? We seek comment on whether elimination of the radio duplication rule would affect any other public interest goals articulated by the Commission; for example, the public interest goals of broadcast localism, competition and diversity. We also seek comment on whether elimination or modification of this rule would impact local news gathering and journalism, and how elimination or modification could impact consumers who rely on local news for information about their community. Would the elimination

or modification of this rule have any special impact on current or prospective station owners who are women or people of color and their ability to compete? Commenters should support any assertions on these points with relevant data and analyses.

8. The Commission also seeks comment on whether the radio duplication rule remains necessary to promote spectrum efficiency. Due in part to the increased number of stations, radio broadcast spectrum is now fully utilized. Demand for spectrum for wireless data applications has mushroomed, leading to the first-ever incentive auction to repurpose television broadcast spectrum for wireless broadband and continuous Commission efforts to free more spectrum for wireless applications. Spectrum remains a scarce and valuable resource, and increased demand for spectrum now pushes radio broadcasters, and indeed all spectrum users, to maximize efficiency. Should the Commission be concerned that absent the radio duplication rule, radio broadcasters will use spectrum less efficiently? Or are the increased number of stations and demand for spectrum today sufficient to ensure that radio broadcasters use spectrum efficiently and supply varied programming to the local market so that the current same-service duplication rule can be eliminated or modified? Is there any evidence to show that radio broadcasters currently use their spectrum inefficiently? Would the limited amount of spectrum available be used more efficiently by current licensees broadcasting duplicative content or other parties to serve competition and diversity goals?

9. In 1986, the Commission eliminated the previous cross-service programming duplication rule, which had restricted certain FM stations from rebroadcasting the programming of commonly owned AM stations in the same local market. Initially adopted to encourage the growth of the FM band and foster competition among local stations, the Commission eliminated the rule once it determined that the FM service was sufficiently established and FM stations were fully competitive. The Commission found that the rule was no longer necessary to promote spectrum efficiency because market forces would lead stations to provide separate programming where economically feasible, and where it was not economically feasible, duplication was preferable to a station curtailing programming or going off the air

entirely due to failure to comply with the rule. Do the reasons that caused the Commission to eliminate the cross-service programming duplication rule apply equally to our consideration of the current, same-service duplication rule (§73.3556)? Is competition among local broadcast radio stations sufficiently robust to ensure that overlapping, commonly owned same-service stations will provide separate programming where economically feasible? And where not economically feasible, is duplication of programming preferable to a station ceasing operation or curtailing programming?

10. In adopting section 73.3556 in 1992, the Commission noted certain benefits to permitting some level of programming duplication. Specifically, the Commission found that some duplication could save local broadcaster resources invested in producing expensive programming. In setting the limit on programming duplication at 25% of the total hours of a station's average weekly programming, the Commission sought to strike an appropriate balance between affording stations the ability to repurpose costly programming and continuing to foster competition and programming diversity in the local market. Do the benefits previously identified by the Commission related to the duplication of programming still exist in today's market? Given the changes that have occurred over the past twenty-seven years, as discussed above, does permitting duplication of 25% of the total hours of a station's average weekly programming continue to strike the appropriate balance? If we were to retain and modify the rule, should the amount of programming that can be duplicated on commonly owned stations be increased or decreased, and if so, what would that appropriate percentage be? Commenters should substantiate any proposed change in the amount of permitted programming duplication and explain the benefits that they believe would redound to radio stations and their listeners. Further, if the Commission were to modify and retain the radio duplication rule, would the restriction on broadcasters' programming choices raise any First Amendment concerns?

11. Additionally, in the event the rule is retained, does the trigger for the rule, namely, that the overlap between the stations constitutes more than 50% of the principal community contour service area of either station, continue to be the appropriate standard? Does an overlap of principal community

contours appropriately identify stations that should be subject to a programming duplication rule? Should the overlap percentage be revised so that the rule applies if there is some greater, or lesser, amount of overlap between the commonly owned stations? And if so, what should that overlap be? Commenters should substantiate any proposed change in the amount of overlap before the program duplication rule would be triggered and explain any potential benefits or harms. For example, would any potential modification of the rule's trigger have differential effects on small entities? What impact could increasing or decreasing the contour overlap trigger have on duplicative programming? For example, could modifying the contour overlap trigger result in some communities receiving more duplicative programming, thereby harming localism and availability of diverse programming? Could modifying the rule so that it is triggered by a larger contour overlap percentage make valued programming available to more listeners?

12. Given the economic and technical challenges facing AM broadcasters, should the programming duplication rule treat the AM service differently than the FM service? For example, should the Commission keep the rule for the FM service but eliminate it for the AM service? Given reception challenges in the AM band, particularly in urban environments, would eliminating or loosening the AM portion of the rule allow more listeners to hear popular programming?

13. Finally, the Commission seeks comment generally on the benefits and costs associated with possible modification or elimination of the radio duplication rule. Commenters supporting retention, modification, or elimination of the rule should explain the anticipated economic impact of any proposed action, including the impact on small entities, and, where possible, quantify benefits and costs of proposed actions and alternatives. Does the current radio duplication rule create benefits or costs for any segment of consumers, advertisers, or broadcasters? If so, how would elimination or modification of the rule alter the benefits and costs? If the rule were eliminated or modified, how could that impact small entities' ability to compete for advertising dollars? What are the comparative benefits and costs of modifying the rule rather than eliminating it entirely?

PROCEDURAL MATTERS

14. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this NPRM.

15. *Initial Paperwork Reduction Act Analysis.* This document may result in new or revised information collection requirements subject to the Paperwork Reduction Act of 1995. If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the *Federal Register* inviting the public to comment on the requirement, as required by the Paperwork Reduction Act. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

16. *Ex Parte Rules – Permit-But-Disclose.* The proceeding this NPRM initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Commission’s pre-meeting Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b) of the Commission’s rules.

In proceedings governed by § 1.49(f) of the Commission's rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

17. *Filing Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be

disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

18. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

19. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

20. *Additional Information.* For additional information on this proceeding, contact Julie Saulnier, julie.saulnier@fcc.gov, of the Industry Analysis Division, Media Bureau, (202) 418-1598.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

21. *Need for, and Objective of, the Proposed Rules.* This NPRM seeks comment on whether the Commission should eliminate or modify the radio duplication rule, which limits same-service programming duplication to 25% of total hours in an average broadcast week for commercial AM and FM radio stations with 50% or more contour overlap that are commonly owned or subject to a time brokerage agreement. The radio broadcast industry has seen significant changes since the Commission adopted the rule in 1992, including a greatly increased number of licensed radio stations, the introduction of AM broadcasting to the FM band through FM translator stations, improved digital radio broadcast technology, and new, digital methods for distributing audio content to multiple devices. Based on these changes, the

NPRM seeks comment on whether the radio duplication rule has outlived its utility or whether it remains necessary to further the public interest goals of competition, programming diversity and spectrum efficiency for which it was intended.

22. *Legal Basis.* The proposed action is authorized under sections 14(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and 303.

23. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA). 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. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

24. The radio broadcasting U.S. Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.” Programming may originate in the establishment’s own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts. Economic Census data for 2012 show that 2,849 firms in this category operated in that year. Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more. Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

25. The Commission has estimated the number of licensed commercial FM radio stations to be 6,728, the number of commercial FM translator stations to be 8,177 and the number of commercial AM stations to be 4601, for a total of 19,505 commercial radio stations. Of this total, 19,496 stations (or 99.9%) had revenues of \$38.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Radio Database (BIA) on October 7, 2019, and therefore these stations qualify as small entities under the SBA definition.

26. In assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules may apply does not exclude any radio station from the definition of small business on this basis and is therefore possibly over-inclusive.

27. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.* The NPRM seeks comment on whether to modify or eliminate the radio duplication rule. If the Commission were to eliminate the rule, it would be expected to reduce compliance requirements for radio broadcasters, including small entities. If the rule were retained but modified to increase the contour overlap necessary to trigger the rule or increase the amount of programming permitted to be duplicated on the commonly owned stations, the compliance requirements would be reduced for radio broadcasters, as the current restriction would be made more permissive. Conversely, were the rule to be modified so as to decrease the contour overlap necessary to trigger the rule or to decrease the amount of programming permitted to be duplicated, it could increase the number of radio broadcasters subject to the rule and/or

potentially increase the compliance requirements for those broadcasters in situations that are not subject to the existing rule.

28. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The NPRM seeks comment on eliminating the radio duplication rule, which would relieve radio broadcasters, including small entities, from costs of compliance with the rule. The NPRM also seeks comment on modifying the rule instead of repealing it, alternatives that will minimize any burden on small entities, and on retention of the existing rule.

29. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule.* None.

30. *Ordering Clauses.* Accordingly, it is ordered that, pursuant to the authority found in sections 1, 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and 303(r), this *Notice of Proposed Rulemaking* is adopted.

31. It is further ordered that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket Nos. 19-310 and 17-105 on or before thirty (30) days after publication in the *Federal Register* and reply comments on or before forty five (45) days after publication in the *Federal Register*.

32. It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Notice of Proposed Rulemaking*, including the

Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 73:

Television; Radio

FEDERAL COMMUNICATIONS COMMISSION.

Cecilia Sigmund,
Federal Register Liaison Officer.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73 – RADIO BROADCAST SERVICES

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

AUTHORITY: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

§ 73.3556 [Removed and Reserved]

2. Remove and reserve § 73.3556.