

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 03–130; FCC 03–127]

Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area

AGENCY: Federal Communications Commission

ACTION: Notice of proposed rulemaking.

SUMMARY: This document is designed to solicit comment on proposals to define radio markets outside of the Arbitron defined areas. The Commission replaced the current contour-overlap methodology for defining radio markets with a geography-based market definition. For areas of the country covered by Arbitron Metro markets, we adopted the Metro market as the relevant radio market for purposes of determining compliance with the local radio ownership rule. Metro markets, however, do not cover a significant portion of the country. We initiate this rulemaking proceeding to define radio markets for those areas.

DATES: Comments are due on or before September 4, 2003 and reply comments are due September 19, 2003.

ADDRESSES: Office of the Secretary, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. See **SUPPLEMENTARY INFORMATION** for filing instructions.

FOR FURTHER INFORMATION CONTACT: Amy Brett, Media Bureau at (202) 418–2703.

SUPPLEMENTARY INFORMATION: 1. This is a summary of the Commission's *Notice of Proposed Rulemaking* (NPRM) MB Docket No. 03–130, FCC 03–127, adopted June 2, 2003, and released July 2, 2003. The complete text of the NPRM and the Initial Regulatory Flexibility Analysis is available on the Commission's Internet site, at <http://www.fcc.gov>, and is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW., Washington, DC. The text may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B4202, Washington, DC 20554 (telephone 202–863–2893).

2. In the Local Radio Section of the final rule in this proceeding (published in the final rule section of this **Federal Register**), we replaced our current contour-overlap methodology for defining radio markets with a geography-based market definition. 47

CFR 73.3555(a)(2). For areas of the country covered by Arbitron Metro markets, we adopted the Metro market as the relevant radio market for purposes of determining compliance with the local radio ownership rule. A significant portion of the country, however, is not covered by Metro markets. We initiate this rulemaking proceeding to define radio markets for those areas.

3. We seek comment on how to draw specific market boundaries in areas of the country not located in Arbitron Metros. What factors should we consider in grouping radio stations into markets? We propose that radio markets be county-based, as Arbitron Metros are. We seek comment on that proposal. In the western United States, counties are significantly larger. We seek comment on whether we should, like Arbitron, divide counties into separate radio markets in certain circumstances. We also propose that radio stations be assigned to radio markets based on the location of their communities of license. We seek comment on this proposal.

4. We seek comment on whether we should rely on any pre-existing market definitions in delineating radio markets for non-Metro areas. As indicated in the Local Radio Section, Arbitron traditionally has based its Metro definitions on the Metropolitan Area (MA) definitions developed by OMB. Should we also do the same for non-Metro areas? OMB recently released new MA definitions based on the results of the 2000 Census.¹ The 935 new MAs, moreover, cover a greater portion of the country. Previously, MAs were defined only for urban areas with a population of 50,000.² The new MA definitions cover areas with a population of 10,000 to 50,000 (known as Micropolitan Statistical Areas), which should greatly increase the number of radio stations located in MAs.³ If we rely on MAs, how should we address future changes to MA definitions, and the creation of a new, or the deletion of an existing, MA⁴ In addition, even with the expanded

¹ See OMB Bulletin No. 03–04, <http://www.whitehouse.gov/omb/bulletins/b03–04.html>. In 2000, OMB revised its procedures for defining MAs. In addition, it adopted the more generic term Core Based Statistical Area (CBSA) to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas. See generally Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 FR 82228 (2000). Although less accurate, we will use former term—i.e., MAs—to avoid confusion.

² See U.S. Census Bureau, Cartographic Boundary Files, http://www.census.gov/geo/www/cob/ma_metadata.html (visited May 30, 2003).

³ See 65 FR 82236–37 for a detailed description of the standards OMB uses to define MAs.

⁴ See *id.* at 82237 for the rules governing future updates to MAs.

reach of the new MAs, there will be areas that they do not cover. How should the radio market be defined in those areas if MAs are used? One possible method is to establish geographic markets based on the location, distribution, and density of populated areas.⁵ Because population clusters are likely to indicate areas of economic and social interaction, the location and distribution of the centers of population should give us a reasonable indicator of the boundaries of the relevant geographic market in which radio stations compete. Because the geographic areas involved generally will be low-density and rural areas of the country, moreover, we believe that population data could provide a fairly reliable and easily determinable market definition. We seek comment on this and any other methods.

5. Another possibility is to treat Cellular Market Areas (CMAs) as the relevant geographic market for radio. CMAs were developed in the mid-1980s to be the geographic basis for licensing cellular spectrum. CMAs consist of MAs (as they were defined after the 1980 census) and Rural Service Areas (RSAs),⁶ which the Commission delineated for areas of the country not located in MAs.⁷ Although CMAs were not developed in the context of radio broadcasting, they were designed to follow “natural social and economic communities” through “multi-county groupings drawn along county boundaries.”⁸ Are CMAs a reasonable proxy for radio markets in non-Metro areas of the country? We seek comment on this issue.

6. For any market definition we establish, how should we address situations in which that market overlaps an Arbitron Metro. If we use MAs or CMAs, there will be existing areas of overlap. Even if we define radio markets around existing Arbitron Metros, Metro boundaries may change, or Arbitron may create or delete a Metro. We seek comment on how to address the possibility of a market overlap (or in the case of a deleted Metro, the possibility of an undefined market).

7. The goal of this rulemaking proceeding is to generate a map or a list of markets for radio stations across the entire country, using Arbitron Metros where available and a Commission-

⁵ Population data is available over the Internet from the Census Bureau.

⁶ See *Amendment of the Commission's Rules for Rural Cellular Service*, 1985 WL 260366, FCC 85–646, ¶1 (rel. Dec. 17, 1985).

⁷ *Amendment of the Commission's Rules for Rural Cellular Service*, 60 Radio Reg. (P&F) 1029, ¶1 (1986).

⁸ *Id.* at ¶11.

endorsed market definition everywhere else. We therefore encourage parties to use this opportunity to submit specific information that would assist in properly delineating the boundaries of the local radio markets in which they are interested.

8. *Comments and Reply Comments.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,⁹ interested parties may file comments on the *Notice of Proposed Rulemaking* on September 4, 2003 and reply comments are due September 19, 2003. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

9. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket, which in this instance is MB Docket No. 03-130. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes 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 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's

Secretary, Office of the Secretary, Federal Communications Commission.

10. Parties must also serve either one copy of each filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com. In addition, parties should serve one copy of each filing via e-mail or one paper copy to Amy Brett, Media Bureau, 445 12th Street, SW., 2-C134, Washington, DC 20554. Parties should serve one copy of each filing via e-mail or five paper copies to Linda Senecal, 445 12th Street, SW., 2-C438, Washington, DC 20554.

11. *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. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267, (202) 418-7365 TTY, or bcline@fcc.gov. These documents also will be available electronically at the Commission's Disabilities Issues Task Force Web site: <http://www.fcc.gov/df>, and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Qualex International, Portals II, 445 12th Street, SW., Room, CY-B402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail at qualexint@aol.com. 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 and Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

12. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.¹⁰ Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of

the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹¹ Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules. Parties submitting written ex parte presentations or summaries of oral ex parte presentations are urged to use the ECFS in accordance with the Commission rules discussed above. Parties filing paper ex parte submissions must file an original and one copy of each submission with the Commission's Secretary, Marlene H. Dortch, at the appropriate address as shown above for filings sent by either U.S. mail, overnight delivery, or hand or messenger delivery. Parties must also serve either one copy of each ex parte filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com. In addition, parties should serve one copy of each ex parte filing via email or one paper copy to Amy Brett, Media Bureau, 445 12th Street, SW., 2-C134, Washington, DC 20554. Parties should serve one copy of each ex parte filing via email or five paper copies to Linda Senecal, 445 12th Street, SW., 2-C438, Washington, DC 20554.

13. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (RFA),¹² the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking ("NPRM"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM.

14. The Commission will send a copy of the NPRM, including this IRFA to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

A. Need for, and Objectives of, the Proposed Rules

15. Section 202(h) of the Telecommunications Act of 1996 (1996 Act) requires the Commission to review all of its broadcast ownership rules

¹¹ See *id.* § 1.1206(b)(2).

¹² See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁹ 47 CFR 1.415 and 1.419.

¹⁰ 47 CFR 1.1206(b).

every two years commencing in 1998 ("Biennial Review"), and to determine whether any of these rules are necessary in the public interest as the result of competition. The 1996 Act also requires the Commission to repeal or modify any regulation it determines to be no longer in the public interest. In the 2002 Biennial Report and Order, the Commission concluded that the numerical limits in the local radio ownership rule are necessary in the public interest to protect competition in local radio markets. We also concluded that the rule in its current form did not promote the public interest as it relates to competition, in part, because the current methodology for defining radio markets is conceptually flawed as a means to protect competition in local radio markets. Thus, the Commission revised the present method of determining the dimensions of radio markets and/or of counting the stations available in those markets. The new geographic based approach better serves the public interest, reflects true markets in which radio stations compete, and better effectuates Congressional intent when it adopted the radio ownership limits in 1996. In the 2002 Biennial Report and Order, the Commission adopted a geography-based approach using Arbitron-defined markets. However, the Commission found that the current record provides insufficient information about appropriate boundaries for areas located outside of Arbitron defined areas. This NPRM is designed to solicit comment on proposals to define radio markets outside of Arbitron defined areas.

B. Legal Basis

16. This NPRM is adopted pursuant to sections 1, 2(a), 4(i), 303, 307, 309, 310, of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, and section 202(h) of the Telecommunications Act of 1996.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

17. 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.¹³ The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity under Section 3 of the Small Business Act."¹⁴

In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁵ 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.¹⁶

18. In this context, the application of the statutory definition to radio stations is of concern. 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 estimates that follow of small businesses to which rules may apply do not exclude any radio station from the definition of a small business on this basis and are therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

19. The SBA defines a radio broadcast entity that has \$6 million or less in annual receipts as a small business.¹⁷ Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."¹⁸ According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of \$6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control)

definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the *Federal Register*."

¹³ *Id.*

¹⁴ 15 U.S.C. 632.

¹⁵ See OMB, North American Industry Classification System: United States, 1997, at 509 (1997) (Radio Stations) (NAICS code 513111, which was changed to code 515112 in October 2002).

¹⁶ *Id.*

affiliations¹⁹ are included.²⁰ Our estimate, therefore likely overstates the number of small businesses that might be affected by any changes to the ownership rules.

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

20. The NPRM proposes to modify the definition of radio markets outside of Arbitron defined areas. The action, depending on the definition ultimately adopted, would modify the instructions and the multiple ownership showing currently required for the following forms: (1) FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 301, Application for Construction Permit For Commercial Broadcast Stations. The impact of these changes will be the same on all entities. Whether compliance will take more, less, or the same amount of time and money, will depend on the definition adopted.

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

21. 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.²¹

22. We are directed under law to consider alternative means to achieve our stated objectives.²² In the *2002 Biennial Report and Order*, the Commission considered and rejected alternatives to defining radio markets through the rulemaking process. Specifically, the Commission found that

¹⁹ "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 the power to control both." 13 CFR 121.103(a)(1).

²⁰ "SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size." 13 CFR 121(a)(4).

²¹ 5 U.S.C. 603(c).

²² 5 U.S.C. 603(b).

¹³ 5 U.S.C. 603(b)(3).

¹⁴ *Id.* section 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to the RFA, the statutory

determining radio markets on a case-by-case basis would create significant regulatory uncertainty and impose substantial burdens on small-market radio broadcasters, many of which are small businesses. The Commission concluded that the better course is to develop radio market definitions for non-Metro areas through the rulemaking process. The Commission found that this would be the most expeditious way to define local radio market boundaries for the entire country. Defining radio markets also would give all interested parties, including small businesses, clear guidance about how the Commission will analyze a proposed radio station combination in non-Arbitron areas.

23. The NPRM invites comment on how to modify the current methodology for determining radio markets for areas of the country outside of Arbitron defined areas. The Commission has a number of alternatives on which it invites comment. We particularly invite comment on how the various alternatives might impact on small businesses and on alternatives outside the NPRM which might minimize any burden on small businesses.

24. The Commission seeks comments on how to draw specific market boundaries in areas of the country not located in the Arbitron Metros and on what factors should we consider in grouping radio stations into markets. The Commission proposes that radio markets be county-based. One alternative, if that proposal is adopted, would be to use a different standard in the western United States where

counties are significantly larger. The Commission could also divide counties into separate radio markets in certain circumstances. Small businesses should benefit from a county-based system because county boundaries are clear, stable, and well-known, and are commonly used for market definition purposes (see next paragraph).

25. The Commission also seeks comment on whether to rely on any pre-existing market definitions in delineating radio markets for non-Metro areas. For example, the Commission could base its Metro definitions on the Metropolitan Area (MA) definitions developed by OMB. The Commission asks how the radio market should be defined in areas that MAs do not cover, and notes one possible alternative would be to establish geographic markets based on the location, distribution, and density of populated areas. The Commission could also treat Cellular Market Areas as the relevant geographic market for radio. Both of these potential market definitions are county-based. We do not believe that the selection of one pre-defined market definition over another generally will have an impact on small business. We invite comment on this question.

26. The market definition we establish would result in small business owners being subject to a market definition that is different than the one to which they currently are subject. As a result, the number of radio stations that they may own, and the number of radio stations that their competitors may own, under the local radio ownership rule may change. We encourage parties to use this

opportunity submit specific information that would the Commission in properly delineating the boundaries of the local radio markets in which they are interested.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

27. None.

28. *Authority.* This *Notice of Proposed Rulemaking* is issued pursuant to authority contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 307, and Section 202(h) of the Telecommunications Act of 1996.

29. Pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this Notice of Proposed Rulemaking in MB Docket 03-130 is adopted.

30. 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 Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

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