

effectuates our goal of promoting competition in local DVP markets.

148. *Waiver Standard.* In the Commission's Local TV Ownership Report and Order, it established a waiver standard for purposes of our local TV ownership rule. The standard permits a waiver of the current rule where a proposed combination involves at least one station that is failed, failing, or unbuilt. The Commission defines a "failed station" as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. The Commission's "failing" station standard provides that it will presume a waiver is in the public interest if the applicant satisfies each of the following criteria: (1) One of the merging stations has had low all-day audience share (*i.e.*, 4% or lower); (2) the financial condition of one of the merging stations is poor; and (3) the merger will produce public interest benefits. The Commission's unbuilt station waiver standard presumes a waiver is in the public interest if an applicant meets each of the following criteria: (1) The combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so. For each type of waiver, the Commission also requires that the waiver applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station. Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets our local TV ownership rules or one of our three waiver standards at the time of transfer.

149. The Commission's rationale for adopting these waiver criteria was that failed, failing and unbuilt stations could not contribute to competition or diversity in local markets, and that the public interest benefits of activating a dark or unbuilt station, or preventing a failing station from going dark, outweighed any potential harm to competition or diversity. Most commenters addressing the waiver standard urge us to relax or eliminate the standard.

150. The Commission concludes that tightening our waiver standard would not promote our public interest goals. Moreover, the Commission agrees with the NAB and other commenters who urge us to expand our waiver standard

to include consideration of combinations that will yield other public interest benefits. The Commission's treatment of waivers will follow the competition principles established in the DOJ/FTC Merger Guidelines, with a specific focus on the industry at hand. In particular, as in the DOJ/FTC Merger Guidelines, the Commission will consider combinations that involve firms that are not failing but that could better serve the public interest through a merger not otherwise permitted by our rules. The Commission also will consider a waiver of our local TV ownership rule where a proposed combination involves stations that do not engage in head-to-head competition because they do not have overlapping Grade B contours and are not carried by MVPDs in the same geographic areas.

151. First, for failed, failing, and unbuilt stations, the Commission retains the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. The Commission believes that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.

152. Otherwise, however, a failed, failing, or unbuilt station clearly cannot contribute to localism, competition or diversity in local markets. Nothing in the record in the instant proceeding leads us to find otherwise. The Commission concludes that the public interest benefits of activating a dark or unbuilt station outweigh the potential harm to competition or diversity. Therefore, if it can be shown that, absent the transfer, the licensee's assets will exit the market, then the transfer is not likely to either enhance market power or facilitate its exercise. In such cases, the granting of a waiver would not be inconsistent with our competition goal.

153. The record also suggests that local television stations outside the largest markets may, in some cases, better serve the public interest through station combinations not permitted by our local television ownership rules. The Commission's new rules allow one company to own two stations in a market provided both are not ranked in the top four in ratings. This top four-ranked prohibition promotes competition by preventing the strongest competitors in each market from

combining. The top four restriction is premised on evidence that the four leading stations in each market are already the strongest competitors and that combinations among them would harm the public interest by diminishing competition in the DVP market. However, NAB data shows that, as a class, smaller market stations (including both top four and other stations) are less effective competitors in the DVP market relative to stations in large markets. Therefore, the Commission allowed station combinations that would not be permitted in larger markets. However, our concern for the economics of broadcast television in small markets does not lead us to relax the top four prohibition generally because the Commission concluded that this restriction remains necessary to promote competition in the DVP market. Nonetheless, the Commission does recognize that there may be instances where application of this top four restriction will disserve the public interest by preventing marginal—but not yet "failing"—stations from effectively serving the needs of their communities. Such stations may not be financially capable of producing the amount of news and local affairs programming that they would like to provide their communities, which in turn may make them less competitive in the local marketplace. Accordingly, in order to effectuate our goals of diversity, localism, and competition, the Commission will consider waivers of the top four-ranked restriction in markets with 11 or fewer television stations. Those are the markets in which the Commission has already recognized that the economics of broadcast television justify relatively greater levels of station consolidation and better serve the public interest.

154. In considering waivers of our top four-ranked restriction, the Commission will consider a number of factors. For instance, mergers between stations that reduce a significant competitive disparity between the merging stations and the dominant station in the marketplace are particularly likely to be pro-competitive. Accordingly, waiver applicants should supply television ratings information for the four most recent ratings periods for all local stations so that the Commission may assess the competitive effect of the merger.

155. Second, the Commission also will evaluate the effect of the proposed merger on the stations' ability to complete the transition to digital television. Waiver applicants claiming that the merger is needed to facilitate