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

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

REPORT AND ORDER

Adopted: August 5, 1999 **Released: August 6, 1999**

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate statements; Commissioner Furchtgott-Roth dissenting in part, concurring in part and issuing a statement; Commissioner Tristani dissenting in part and issuing a statement.

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I. **Introduction**

1. The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.[1] In this *Report and Order*, we amend our broadcast and our cable/Multipoint Distribution Service ("MDS") attribution rules to improve the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees and markets, and facilitate application processing -- our goals in initiating this proceeding. In taking these steps, we have sought to avoid undue impact on our goal of promoting the rapid conversion of broadcast television licensees to a digital mode.[2] We initiated this long-pending proceeding in 1995, sought further comment after the passage of the Telecommunications Act of 1996, and have had the benefit of numerous comments on the variety of issues resolved herein. The new attribution rules we adopt today are integrally related to the rules adopted in our companion local television ownership and national television ownership

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[1] *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984) ("*Attribution Order*"), *on recon.*, 58 RR 2d 604 (1985) ("*Attribution Reconsideration*"), *on further recon.*, 1 FCC Rcd 802 (1986) ("*Attribution Further Reconsideration*"); *Notice of Proposed Rule Making* in MM Docket Nos. 94-150 *et al*., 10 FCC Rcd 3606, 3614 (1995) ("*Attribution Notice*"). We also issued in this proceeding a *Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150 *et al*., 11 FCC Rcd 19895 (1996) ("*Attribution Further Notice*").

[2] *See Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997) ("*DTV Fifth Report and Order*"), *on recon.*, 13 FCC Rcd 7417 (1998); *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588 (1997) ("*DTV Sixth Report and Order*"), *on recon.*, 13 FCC Rcd 6860 (1998); *Second Memorandum Opinion and Order* on Reconsideration of the Fifth and Sixth Report and Orders, 14 FCC Rcd 1348 (1998).

proceedings.[3] A reasonable and precise definition of what interests should be counted in applying the multiple ownership rules is a critical element in assuring that those rules operate to promote the goals they were designed to achieve.

II. **Background**

2. The attribution rules that are the subject of this proceeding define what constitutes a "cognizable interest" in applying the broadcast multiple ownership rules,[4] the broadcast/cable cross-ownership rule,[5] and the cable/MDS cross-ownership rule.[6] We issued the *Attribution Notice* to review the attribution rules based on several considerations, including: (1) changes in the broadcasting industry and in the multiple ownership rules since our last revision of the attribution rules over ten years ago and our consequent desire to ensure that the attribution rules remain effective in identifying interests that should be counted for purposes of applying the multiple ownership rules; (2) concerns raised that certain nonattributable investments, while permissible under current rules, might permit a degree of influence that warrants their attribution; (3) concerns that individually permissible cooperative arrangements between broadcasters are being used in combination so as to result in significant influence in multiple stations that is intended to be prohibited by the multiple ownership rules; and (4) the need to address attribution treatment of Limited Liability Companies ("LLCs").

3. We solicited comment in the *Attribution Notice* on several issues, including: (1) whether to increase the voting stock benchmark from 5 percent to 10 percent and the passive investor benchmark from 10 percent

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[3] We also adopt today companion Reports and Orders in our television local ownership proceeding, *Report and Order* in MM Docket Nos. 91-221 & 87-8, FCC 99-209, adopted August 5, 1999 ("*TV Local Ownership Order*") and in our television national ownership proceeding, *Report and Order* in MM Docket Nos. 96-222, 91-221, & 87-8, FCC 99-208, adopted August 5, 1999 ("*TV National Ownership Order*"). We incorporate into the record of this proceeding the Comments and Reply Comments filed in the TV Local Ownership and the TV National Ownership proceedings to the extent that they deal with issues incorporated into this proceeding. When we refer to Comments and Reply Comments filed in other proceedings, we will identify the proceedings in which they were filed. For this purpose, we will refer to the *Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-222 & 87-8, 11 FCC Rcd 21655 (1996), as "*TV Local Ownership Second FNPRM*" and the *Further Notice of Proposed Rule Making* in MM Docket Nos. 91-222 & 87-8, 10 FCC Rcd 3524 (1995) as "*Local Ownership Further Notice*." In addition, we will refer to the *Notice of Proposed Rule Making* in MM Docket Nos. 96-222, 91-221, & 87-8, 11 FCC Rcd 19949 (1996) as "*TV National Ownership NPRM*."

[4] *See* Notes to 47 C.F.R. § 73.3555. The following corporate interests are generally attributable under the existing attribution rules for purposes of applying the broadcast multiple ownership rules: voting stock interests amounting to five percent or more of the outstanding voting stock, except for passive investors (*i.e*., bank trust departments, insurance companies, and mutual funds) for which there is a ten percent benchmark; and positions as officers and directors. The following corporate interests are not currently attributable: minority stockholdings in corporations with a single majority shareholder; nonvoting stock; other nonvoting instruments such as options or warrants; and debt. All partnership interests are currently attributable, except sufficiently insulated limited partnership interests upon a certification that the limited partner is not materially involved, directly or indirectly, in the management or operation of the partnership's media-related activities. For a brief history of the attribution rules, see *Attribution Notice*, 10 FCC Rcd at 3610-12.

[5] *See* Notes to 47 C.F.R. § 76.501(a).

[6] 47 C.F.R. § 21.912 Note 1(A).

to 20 percent; (2) whether to expand the category of passive investors; (3) whether and, if so, under what circumstances to attribute nonvoting shares; (4) whether to retain our single majority shareholder exemption from attribution; (5) whether to revise our insulation criteria for limited partners, and whether to adopt an equity benchmark for noninsulated limited partners; (6) how to treat interests in LLCs and other new business forms under our attribution rules; (7) whether to eliminate the remaining aspects of our cross-interest policy; and (8) how to treat financial relationships and multiple business interrelationships which, although not individually attributable, should perhaps be treated as attributable interests when held in combination.

4. Congress subsequently enacted the Telecommunications Act of 1996 ("1996 Act"),[7] which substantially relaxed several of our ownership rules. We issued the *Attribution Further Notice* to seek comment as to how these ownership rule revisions should affect our review of the attribution rules. We also sought comment on new proposals, including a proposal to attribute the otherwise nonattributable interests of holders of equity and/or debt in a licensee where the interest holder is a program supplier to a licensee or a same-market media entity and where the equity and/or debt holding exceeds a specified threshold. Additionally, we sought comment on: (1) proposals to attribute television Local Marketing Agreements ("LMAs") and to modify the scope of the radio LMA attribution rules;[8] (2) whether we should revise our approach to joint sales agreements ("JSAs") in specified circumstances; (3) a study conducted by Commission staff, appended to the *Further Notice*, on attributable interests in television broadcast licensees and on the implications of this study for our attribution rules, particularly on the voting stock benchmarks; (4) whether we should amend the cable/MDS cross-ownership attribution rule;[9] and (5) transition issues.[10]

5. In the *Attribution Notice*, we stated our goals in initiating this proceeding as follows:

While our focus is on the issues of influence or control, at the same time, we must tailor the

[7] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[8] In this *Report and Order*, we refer to LMAs or time brokerage agreements. For purposes of applying the radio LMA rules, the Commission's current rules define time brokerage as "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." 47 C.F.R. § 73.3555(a)(4)(iii).

[9] 47 C.F.R. § 21.912 (Note 1(A)). For purposes of this rule, the attribution standard is defined by reference to the definitions contained in the Notes to § 76.501, but provides that: (i) The single majority shareholder provisions of Note 2(b) to § 76.501 and the limited partner insulation provision of Note 2(g) to § 76.501 shall not apply; and (ii) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more. *See also Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6828, 6843 (1993) ("*Implementation Order*"), *reconsidered on other grounds*, 10 FCC Rcd 4654 (1995). We note here that the statutory and regulatory prohibitions on cable/MDS cross-ownership do not apply if the cable operator is subject to "effective competition" in its franchise area. *See* 47 U.S.C. § 533(a)(3); 47 C.F.R. § 21.912(e)(3).

[10] We note that we received late-filed Comments in response to the *Attribution Notice* and to the *Attribution Further Notice*. In the interests of obtaining as broad a record as we can, we have accepted all of these late-filed Comments. A list of Comments filed in response to the *Attribution Further Notice* is attached hereto as Appendix C. A list of Comments filed in response to the *Attribution Notice* was attached as Appendix C to the *Attribution Further Notice*.

> attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry. We intend to ensure that any revisions we make to the attribution rules meet these stated goals. We also seek to ensure that any new rules adopted are clear to our broadcast regulatees, provide reasonable certainty and predictability to allow transactions to be planned, ensure ease of processing, and provide for the reporting of all the information we need in order to make our public interest finding with respect to broadcast applications.[11]

6. We believe the rule revisions we adopt today promote these goals.[12] In this *Report and Order*, we: (1) adopt an equity/debt plus attribution rule that would narrow, but not eliminate, the current exemptions from attribution for nonvoting stock and debt, as well as the single majority shareholder exemption; (2) attribute certain television LMAs and modify the radio LMA rules; (3) retain the 5 percent voting stock attribution benchmark, but raise the passive investor voting stock benchmark to 20 percent; (4) retain the current definition of passive investor; (5) eliminate the cross-interest policy; (6) decline to adopt attribution rules for JSAs; (7) adopt as an attribution rule our interim processing policy under which we apply limited partnership insulation criteria to LLCs; (8) retain the current insulation criteria for attribution of limited partnerships; (9) revise the cable/MDS cross-ownership attribution rule to conform it to the broadcast attribution rules, as revised in this *Report and Order*; and (10) establish transition measures with respect to interests made attributable as a result of rules adopted in this *Report and Order* that would result in violations of the multiple ownership rules. So that our broadcast attribution rules remain consistent, we also modify the attribution rules that apply to the broadcast/cable cross-ownership rule, Section 76.501(a) to incorporate the attribution rule changes adopted today.[13]

III. **Issue Analysis**

A. **Stockholding Benchmarks**

7. Background. The *Attribution Notice* sought comment on whether we should increase the voting stock benchmarks from five to ten percent for non-passive investors and from ten to twenty percent for passive investors.[14] This issue was originally raised in the *Notice of Proposed Rule Making and Notice of Inquiry* in

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[11] *Attribution Notice*, 10 FCC Rcd at 3610 (footnotes omitted).

[12] We note that CanWest Global Communications Corp., in its Comments, asked that we liberalize rules governing foreign investment in U.S. broadcast properties. That request is outside the scope of this proceeding.

[13] We recognize that the attribution standards used in a number of other cable rules are implicitly or explicitly based on Section 76.501. For example, the attribution standards in the cable television horizontal ownership, channel occupancy and program access rules are derived from these attribution Notes. We have initiated a separate proceeding to address whether to modify the attribution criteria for these rules. *Notice of Proposed Rule Making* in CS Docket No. 98-82, 13 FCC Rcd 12990 (1998). In the instant proceeding, we are addressing only the attribution criteria that would apply to Section 76.501(a), the cable-broadcast cross-ownership rule.

[14] The category of "passive investors" consists of bank trust departments, mutual funds and insurance companies.

MM Docket No. 92-51, ("*Capital Formation Notice*")[15] which cited concerns about the availability of capital to broadcasters. Insufficient evidence was submitted in comments to the *Capital Formation Notice* to warrant raising the benchmarks, and, therefore, the *Attribution Notice* again raised the issue of whether to increase the voting stock benchmarks.[16] In the *Attribution Further Notice*, the Commission noted that commenters responding to the *Attribution Notice* had again not submitted specific empirical data sufficient to conclude that the benchmarks should be raised. The *Attribution Further Notice* thus asked for additional information to justify raising the benchmarks, including information on changes in the economic climate and competitive marketplace, and the link between additional capital investment and raising the voting stock benchmarks.[17]

1. *Non-passive investor benchmarks*

8. Comments. Few commenters responded to our requests in the *Attribution Further Notice* for additional comments supporting the increase in the active investor benchmark to 10 percent.[18] The National Association of Broadcasters ("NAB") argued that a 10 percent benchmark would not adversely affect the Commission's regulatory interests since, according to the NAB, it is difficult to envision how an investor holding 10 percent or less of the voting stock of a company could exercise effective control if the investor or his representatives are neither officers nor directors of the company.[19] Tele-Communications, Inc. ("TCI") argued that voting stock holdings at 10 percent or below are not controlling interests and that raising the benchmark to 10 percent will make more capital available to media entities.[20] Paxson Communications Corporation ("Paxson") generally supported an increase in the voting stock benchmark to 25 percent, noting that, as a practical matter, stockholders holding less than this level of interest are not in a position to exercise

[15] 7 FCC Rcd 2654 (1992).

[16] *Attribution Notice*, 10 FCC Rcd at 3616.

[17] *Attribution Further Notice*, 11 FCC Rcd at 19912-13.

[18] As noted in *Attribution Further Notice*, 11 FCC Rcd at 19912-13 & n. 60, a majority of commenters in response to the *Attribution Notice* supported an increase to 10 percent but did not provide empirical evidence to support that increase. Also, in response to the *Attribution Notice*, some commenters had urged a higher benchmark than 10 percent. For example, Freedom of Expression Foundation, Inc. ("FOE") urged that the benchmark be raised to at least 10 percent, and to 25 percent in closely-held corporations, The Blackstone Group, M/C Partners and Vestar Capital Partners ("M/C") supported increasing the voting stock benchmarks to 50 percent, and Fox Television Stations, Inc. and Fox Broadcasting Company ("Fox") argued that attribution should be limited to those holding the controlling interests in the licensee. Comments in response to Attribution Notice of FOE at 5; Comments in response to Attribution Notice of M/C at 16; Comments in response to Attribution Notice of Fox at 6.

[19] *See* Comments in response to Attribution Further Notice of the National Association of Broadcasters ("NAB") at 2-3. NAB encloses a statement of an investment analyst that increasing the benchmarks would ease restrictions on broadcast investment. Knight-Ridder, Inc. ("Knight-Ridder") also argues in favor of a 10 percent benchmark, noting that a 10 percent benchmark would adequately protect the integrity of the Commission's multiple ownership rules while providing healthy opportunities for significant broadcast investment. Comments in response to Attribution Further Notice of Knight-Ridder, Inc. at 9.

[20] Comments in response to Attribution Further Notice of TCI at 5-6.

effective day-to-day control over station operations.[21] CBS, Inc. ("CBS") noted its support for raising the voting stock benchmark but only if the increase is not accompanied by the introduction of a multi-factor analysis making attribution less predictable. CBS added that raising the benchmark would enhance capital flow to the industry, without permitting exercise of undue influence or control.[22] None of these commenters provided the empirical studies requested by the Commission to justify an increase in the benchmark.

9. Some commenters opposed any relaxation of the attribution rules, which include the attribution benchmarks. In its Comments in response to the *Attribution Notice*, the National Association of Black Owned Broadcasters ("NABOB") generally opposed relaxing the attribution rules, arguing that such relaxation would permit increased concentration of broadcast industry control, which works against viewpoint diversity and minority ownership.[23] Press Broadcasting Company, Inc. ("Press") noted that unprecedented consolidation of broadcast ownership has resulted from Congressional relaxation of ownership limitations and argued that the Commission should not encourage further broadcast industry consolidation at this time through modification of the attribution rules. Press urged that consolidation reduces diversity of broadcast voices and that the Commission should therefore not relax the attribution rules, until the effect of the Congressional action is known.[24] BET Holdings ("BET") argued that the Commission should not increase the voting stock benchmark for existing television licensees, allowing incumbent group owners to extend their influence and control, but should increase the voting stock benchmark for new TV and DTV entrants to promote diversity in new entry.[25] Additionally, the National Telecommunications and Information Administration ("NTIA") urged the Commission not to raise the benchmark to 10 percent unless it can determine with confidence that stock ownership of less than 10 percent in a licensee with no majority shareholder does not convey an ability to influence or control the licensee's operations.[26]

10. Decision. We have decided to retain the current active voting stock benchmark at 5 percent.[27]

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[21] Comments in response to Attribution Further Notice of Paxson at 40.

[22] Comments in response to Attribution Further Notice of CBS at 3-4, 8-9.

[23] NABOB did not mention the benchmark specifically. Comments in response to Attribution Notice of NABOB at 13. Without discussing the attribution benchmarks specifically, The Mid West Family also urged the Commission to retain the current attribution rules. Comments in response to Attribution Notice of Mid West Family at 7.

[24] Comments in response to Attribution Further Notice of Press at 3-4. Indeed, Press urged that any changes in the attribution rules be designed to tighten, not loosen, ownership restrictions while the initial effects of Congressionally-mandated changes in ownership limits are being experienced. *Id*. at 4.

[25] Comments in response to Attribution Further Notice of BET at 3-4.

[26] Letter from Larry Irving, NTIA, to Chairman Reed E. Hundt, dated May 22, 1997 at n. 38 ("NTIA Letter").

[27] We decline to adopt the suggestion of some commenters, such as M/C or Goldman Sachs Group, L.P. ("Goldman"), that voting shareholders that agree to be bound by insulation criteria such as apply to limited partnerships or that certify their non-involvement should be able to qualify for nonattribution. Reply Comments in response to Attribution Notice of Goldman at n. 9; Comments in response to Attribution Notice of M/C at 19. That

First and most importantly, in reviewing the evidence related to the issue of non-passive voting equity benchmarks, we remain convinced that shareholders with ownership interests of 5 percent or greater may well be able to exert significant influence on the management and operations of the firms in which they invest. In this regard, we have not been presented with empirical evidence to rebut our conclusion in the *Attribution Order* that a "5% benchmark is likely to identify nearly all shareholders possessed of a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution."[28]

11. In this regard, a growing body of academic evidence indicates that an interest holder with 5 percent or greater ownership of voting equity can exert considerable influence on a company's management and operational decisions. This is particularly true with widely-held corporations where a 5 percent stockholder is likely to be among the largest shareholders in the firm. One recent study demonstrated that block trades involving 5 to 10 percent of the firm's voting stock resulted in a 27 percent turnover rate of the CEO of the traded firm, that a 20 to 35 percent block trade resulted in a 40 percent turnover rate of the CEO of the traded firm, and that block trades over 35 percent of the voting equity resulted in a 56 percent turnover rate.[29] The turnover of the CEO was tracked over a one year period following the date of the trade. These results, spanning an increasing level of ownership starting at 5 percent, demonstrate a consistent relationship between ownership trades and the rate of replacement of top management. The results imply that investors who acquire and hold such large blocks of voting stock can influence the choice of management of the firms in which they invest.

12. Another study presents evidence that 5 percent or greater stockholders vote more actively than less-than-five percent shareholders, and they tend to vote more often against the recommendations of management in votes over corporate anti-takeover amendments.[30] This study suggests that larger owners, starting at a 5 percent level of ownership, tend to be more active in influencing management than smaller owners. The two studies considered together provide evidence that ownership percentages starting at 5 percent can influence management policies and have an impact on firm value.

13. In addition, notwithstanding our requests for empirical evidence, in the *Attribution Notice* and again in the *Attribution Further Notice*, commenters have not provided the kind of specific data to justify raising the non-passive investor benchmark even though they generally supported raising the benchmark. And, while commenters have not provided sufficient empirical evidence to justify raising the active voting stock benchmark, the *Attribution Further Notice* did incorporate and invite comment on a Commission staff study that categorized and quantified attributable interests in commercial broadcast television licensees, as reported

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suggestion is outside the scope of this proceeding and would, moreover, undermine our goal of providing, to the extent possible, bright line attribution standards that promote regulatory certainty.

[28] *Attribution Order*, 97 FCC 2d at 1006. In the *Attribution Order*, we noted that, based on our ownership survey, in a widely-held corporation, a 5 percent stockholder is likely to be one of the largest 2 or 3 shareholders, in a preeminent position to command the attention of management, and that a 5 percent benchmark was also appropriate for a closely-held corporation based on several possible ownership scenarios. *Id.* at 1005-08.

[29] L.E. Ribstein, *Business Associations* 987 (1990).

[30] J.A. Brickley, R.C. Lease and C.W. Smith, *Ownership Structure and Voting on Antitakeover Amendments*, 20 Journal of Financial Economics 267-291 (1988).

in the Ownership Reports that licensees are required to file.[31] Several facts emerge from that study that are relevant to our decision concerning the voting stock benchmarks. First, the study found and reported that increasing the attribution benchmark for non-passive investors from 5 percent to 10 percent would decrease by approximately one third the number of currently-attributable owners. This increase in the non-passive investor benchmark would also increase from 81 to 134 the number of stations (out of 389 commercial for-profit television stations studied that are incorporated and are not single majority shareholder stations), for which no stockholders and only officers and directors would be held attributable. These large potential changes in the number of attributable owners heighten our concern about the impact of raising the 5 percent benchmark. In light of the lack of sufficient evidence that such an increase is necessary or appropriate, we are reluctant to institute a change that would have such a major impact.

14. Further, we note that our concerns over capital availability that originally prompted the proposal to increase the active voting stock benchmark have eased somewhat, particularly in light of the increasing strength shown by the communications sector and financial markets in general over the past several years. For example, communications transactions increased by 38 percent during 1996, with the total value of mergers, acquisitions, share offerings and other deals totalling $113 billion.[32] Within the communications sector, TV transfers of ownership in 1996 increased by 121.26 percent in dollar terms over 1995 figures, and FM and AM transfers increased by 283.27 percent and 99.34 percent, respectively. In total, dollars spent on radio and television transactions increased from $8.32 billion in 1995 to $25.362 billion in 1996, with the number of transactions increasing from 849 to 1115 over the same period. Station trading remained strong in 1997, with a total of 1067 radio and television transactions worth $23.44 billion. In 1998, the total number of radio and television transactions fell slightly, as a result of the slower pace of radio consolidation, to 950 transactions, with the value of these transactions remaining fairly stable at $22.8 billion.[33] This overall increase in capital spending from 1995 to 1998 occurred while our current attribution rules were in effect, and therefore provides us with strong evidence that those rules do not impede the availability of capital in the communications industry. And, to the extent that there are still concerns about not impeding capital flow to broadcasting, we believe that they will be adequately addressed by our increase in the passive investor benchmark. In sum, in reviewing the overall body of evidence on this issue, we believe that our original decision to set a 5 percent benchmark to capture influential interests remains valid and will not unduly restrict capital availability.

15. Finally, retention of the 5 percent benchmark remains consistent with the SEC's analogous 5 percent benchmark. Pursuant to Section 13(d)(1) of the Exchange Act, 15 U.S.C. § 78m(d)(1), any person who becomes a direct or indirect owner of more than 5 percent of any class of stock of a company through a stock acquisition must file a statement with the Securities and Exchange Commission (SEC). The purpose of this reporting requirement is generally to ensure that investors are alerted to potential changes in control.[34] The broadcast attribution rules have a similar objective as they are intended to identify ownership interests that

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[31] *Attribution Further Notice*, 11 FCC Rcd at Appendix B.

[32] Financial Times, April 10, 1997, at 37.

[33] *Broadcasting & Cable*, February 3, 1997, at 19; *Broadcasting & Cable*, February 2, 1998, at 34; *Broadcasting & Cable*, February 15, 1999, at 33.

[34] *See Securities and Exchange Commission v. Savoy Industries, Inc.*, 587 F.2d 1149 (1978), *cert. denied* 99 S.Ct. 1227 (1979).

confer on their holders the potential to influence or control a licensee's day-to-day operations.[35]

2. *Passive Investor Benchmarks*

16. Comments. Most commenters that responded to this issue favored raising the passive investor benchmark. ALTV urged the Commission to increase the benchmark to 20 percent.[36] CG asserted that the growth in stock mutual funds has exceeded the growth of capital markets in general, and that the current 10 percent benchmark has been a barrier to further investment by this rapidly growing sector. CG additionally noted that the vast majority of mutual funds have adopted restrictions against investing for purposes of management or control.[37] Investment Company Institute ("ICI") similarly pointed to the rapid growth in mutual fund assets over the past several years, and argued that mutual fund policy and conduct have given little cause for concern over their exerting influence or control.[38] NAB argued that an increase in the passive investor benchmark carries no risk that institutions will control broadcast stations without the Commission's knowledge because licensees with large institutional investors will continue to be required to certify that they have not sought to exercise control in order for the higher attribution benchmark to apply.[39] Paxson urged the Commission to increase the passive investor benchmark to 25 percent, urging that stockholders holding less

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[35] In the *Attribution Notice*, we invited comment on the significance of other agency benchmarks. We now believe that these other benchmarks are inapposite. We disagree with those commenters who argue that the attribution rules are more appropriately analogized with those other federal rules that use benchmarks higher than 5 percent. Comments of The Association of Independent Television Stations, Inc., now the Association of Local Television Stations ("ALTV") at 4; Reply Comments of ALTV at 3-4; Comments of Capital Group Companies ("CG") at 3-4; Comments of Tribune Broadcasting Company ("Tribune") at 22-24. While our rules are intended to identify all interests that confer the potential to influence day-to-day operations, the regulations they cite have different goals. For example, some reporting requirements have the more limited purpose of identifying only those interests conveying a *substantial* ability to influence or control an entity, as opposed to our criteria, which are not necessarily limited to influence or control that is substantial in nature. *E.g.*, 14 C.F.R. §§ 204.2(l)(3), 204.5 (Department of Transportation), 49 C.F.R. § 1201.5-2(b)(1) (Surface Transportation Board). Others are intended to prevent intrinsically illegal or undesirable activities. *E.g.*, 15 U.S.C. § 78p(b) (SEC's insider trading prohibitions); 15 U.S.C. § 18a (Federal Trade Commission and Department of Justice antitrust prohibitions). We continue to believe that the SEC's 10 percent benchmark is inapposite. As we have stated with respect to the SEC's 10 percent "insider trading" benchmark, among other agency benchmarks, the:

> unifying characteristic of these rules is that they are intended to prevent intrinsically illegal or undesirable activities. The levels of stock ownership which these rules variously identify as carrying an appreciable risk of permitting such activities seem inappropriate models where, as here, the activity at issue -- influencing a licensee's programming decisions -- is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation.

Attribution Order, 97 FCC 2d at 1010.

[36] Comments in response to Attribution Notice of ALTV at 6-7.

[37] Comments in response to Attribution Notice of CG at 3.

[38] Comments in response to Attribution Notice of ICI at 2.

[39] Comments in response to Attribution Further Notice of NAB at 3.

cannot exercise day-to-day control over station operations.[40] For similar reasons, TCI urged an increase in the passive investor benchmark to 49 percent.[41] In contrast, as discussed above, Press generally opposed relaxation of the attribution rules at this time.[42]

17. Decision. We will increase the voting stock benchmark from 10 percent to 20 percent for passive investors. We believe that increasing the passive investor benchmark to 20 percent will give broadcasters increased access to investment capital,[43] while preserving the Commission's ability to enforce its ownership rules effectively. This decision takes into account the special nature of the passive investor category, in terms of the legal and fiduciary requirements that constrain passive investors' involvement in the management and operational affairs of the firms in which they invest.

18. We believe that we can increase the passive investor benchmark without incurring substantial risk that investors who should be counted for purposes of applying the multiple ownership rules will avoid attribution. As we have stated:

> passive institutional investors generally invest funds on behalf of others, play passive investment roles, and are generally prohibited either by law or by fiduciary duties from becoming involved in the operation or control of the companies in which they invest. To ensure that these institutional investors maintain a truly passive role in the affairs of the licensee, we require them to refrain from contact or communication with the licensee on any matters pertaining to the operation of its stations, and we prohibit such investors or their representatives from acting either as officers or directors of the licensee corporation. (footnotes omitted)[44]

19. Despite recognizing these principles, we have not previously had sufficient evidence to justify raising the passive investor benchmark and have sought additional assurance and evidence of the passivity of such investors and of the positive impact on investment of an increase in the benchmark.[45] We have, however, become convinced that an increase in the passive investor benchmark is warranted at this time. Clearly, passive investors continue to face multiple constraints on their ability to become directly involved with the management

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[40] Comments in response to Attribution Further Notice of Paxson at 40.

[41] Comments in response to Attribution Further Notice of TCI at 6-8.

[42] Comments in response to Attribution Further Notice of Press at 3-4.

[43] While we note that our concerns as to capital availability have eased somewhat, we also recognize that funding the transition to DTV will increase the level of future capital needs required by broadcasters, which may then require access to new or increased sources of investment capital. We believe that raising the passive investor benchmark is a safer way to accommodate such needs than raising the active investor benchmark.

[44] *Attribution Notice*, 10 FCC Rcd at 3628, *citing Attribution Order*, 97 FCC 2d 1012-14. We also noted that, as an additional safeguard, our Ownership Report, Form 323, Instruction 6, requires the licensee to certify that such (purportedly passive) entities exercise no influence over the corporation, directly or indirectly, and have no representatives among the officers and directors of the corporation. *Attribution Notice*, at n. 92.

[45] *Attribution Notice*, 10 FCC Rcd at 3629-30; *Attribution Further Notice*, 11 FCC Rcd at 19912-13.

and operations of the firms in which they invest, including statutory and regulatory restrictions as well as fiduciary obligations.[46]

20. In setting the limit at 10 percent, we noted that an increase above 10 percent was not advisable at that time based on our concern about the impact on corporate management that could result, even unintentionally, from the trading and voting of large blocks of stock by purportedly passive investors.[47] We have not been presented with any evidence to indicate that our ten percent benchmark has resulted in any such block trading problems. Further, as TCI noted in its Comments, if passive investors vote or trade or threaten to vote or trade their shares in an attempt to control a media entity, that action would violate the Commission's rules concerning their passivity. Moreover, any inadvertent effect of a passive investor's decision to sell its stock, for example, because it is dissatisfied with the return on its investment, simply reflects the marketplace at work, and a responsive action by management to make the entity more profitable in response to a sale is simply an appropriate reaction to market demands.[48]

21. While we note that our concerns about capital availability have eased somewhat, to the extent that these concerns remain, particularly based on funding needs related to the conversion to digital television, we believe that increasing the passive investor benchmark is a relatively safe way to facilitate such further investment in broadcasting, without compromising the ability of our attribution rules to capture influential interests.[49] Raising that benchmark will reduce barriers to investment in broadcasting and result in greater efficiencies in the use of capital. Both CG and ICI, for example, commented on the rapid growth of passively-

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[46] In particular, life insurance companies face multiple constraints under state law that insure the passivity of their investments. For example, New York state insurance law applies to any life insurance company that operates in New York state, and limits its investment in non-New York subsidiaries to 5 percent of its total assets. Under this law, a subsidiary is broadly defined as "any firm for which the insurer has 'possession, direct or indirect, of the power to direct or cause the direction of the management and policies of [that firm], whether through the ownership of voting securities, by contract or otherwise.'" M.J. Roe, *Strong Managers, Weak Owners*, Princeton University Press 88 (1994). Therefore, the state law imposes reasonably stringent limits on the ability of life insurance companies to exert influence or control over those companies they invest in, without having those investments fall within the 5 percent of total assets limits. Mutual funds also face multiple constraints in the form of Subchapter M Internal Revenue Code restrictions (with key tax provisions at I.R.C. §§ 243, 1201, and 7704(c)) that require mutual funds to be broadly diversified to avoid corporate taxation, and fiduciary constraints imposed under the Investment Company Act of 1940 and its amendments.

[47] *Attribution Notice*, 10 FCC Rcd at 3628-29; *Attribution Order*, 97 FCC 2d at 1013.

[48] Comments in response to Attribution Further Notice of TCI at 7-8.

[49] The staff study attached to the *Attribution Further Notice* had the following findings with respect to passive investors. First, the study indicates that 28 passive investors have interests in the 5 percent to 10 percent ownership range, which is just below the current benchmark cutoff. NAB noted that this may indicate that relaxing the benchmark for passive investors would encourage greater passive investment in broadcasting. Comments in response to Attribution Further Notice of NAB at 3-5. Furthermore, the study indicates that the proposed relaxation of the passive-investor benchmark from 10 percent to 20 percent would affect 5 of the 13 currently attributable interests in this category. While this is a relatively high percentage, the actual number of interests affected would be small, far smaller than the number of investors that might be affected by a change in the active investor benchmark.

managed funds over the last decade.[50] ICI also noted that since the broadcast attribution rules aggregate the holdings of funds under common management, the 10 percent benchmark can readily become a barrier for further mutual fund investment in broadcasting.[51] Both CG and ICI cited restrictions that limit the involvement of mutual funds in the operations of their investments and argued that increasing the benchmark would lead to a growth in passive investments in broadcasting.[52]

22. As discussed above, we have been requested by some parties to raise the benchmark even higher than 20 percent. We decline to do so. Although passive investors are subject to constraints that limit their ability and incentive to become actively involved in the management and operations of the firms in which they invest, we believe that we should nonetheless act cautiously in raising the benchmark to ensure that our relaxation does not serve to undermine the purposes of the attribution rules. In this regard, as noted by FOE, the voting stock held by passive investors could become decisive in proxy disputes, and passive investors cannot therefore be considered as equivalent to limited partners or non-voting shareholders.[53] Should our experience with a 20 percent benchmark suggest that even further relaxation might be advisable, we can address that issue at an appropriate time.

3. *Definition of Passive Investors*

23. Background. In response to the *Capital Formation Notice*, several commenters raised the issue as to whether the Commission should expand its definition of "passive investors" to include such institutional investors as pension funds, commercial and investment banks, and certain investment advisors. These commenters argued that these largely institutional investors invest primarily for reasons of financial returns, rather than to exert significant influence or control, and therefore their interests should be treated as passive investments. In the *Attribution Notice*, the Commission stated that it did not intend to revisit its 1984 decision, which defined the passive-investor category to include only bank trust departments, insurance companies and mutual funds, and we tentatively concluded that we would not expand the passive investor category to include Small Business Investment Companies ("SBICs") and Special Small Business Investment Companies ("SSBICs"),[54] as we had not been able to conclude that these entities met our definition of "passive." Nonetheless, we invited further comment on these tentative conclusions.[55]

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[50] Comments in response to Attribution Notice of ICI at n. 3; Comments in response to Attribution Notice of CG at 2.

[51] Comments in response to Attribution Notice of ICI at 1-2.

[52] Comments in response to Attribution Notice of CG at 2-3; Comments in response to Attribution Notice of ICI at 2.

[53] Comments in response to Attribution Notice of Freedom of Expression Foundation ("FOE") at 6.

[54] As we noted in the Capital Formation Notice, the Small Business Administration licenses Small Business Investment Companies and Special Small Business Investment Companies (formerly known as Minority Enterprise Small Business Investment Companies) to act as vehicles through which it provides advisory services and venture capital in the form of equity financing and long-term loan funds to small business and minority-owned concerns. *Capital Formation Notice*, 7 FCC Rcd at 2656.

[55] *Attribution Notice*, 10 FCC Rcd at 3630-3631.

24. Comments. Several commenters, including California Public Employees' Retirement System ("CalPERS"), Communications Corporation of America ("CCA"), CG, ICI, ALTV and M/C, urged the Commission to expand its passive investor category. CG, ICI and M/C argued that investment advisors should be included in the expanded definition.[56] ALTV, however, disagreed, stating that an investment advisor could work on behalf of an entity or individual that has a strong interest in the day-to-day operations of a broadcast station. ALTV supported broadening the definition to include commercial banks, arguing that the Commission has failed to justify their exclusion.[57] Capital Cities/ABC, Inc. ("Capital Cities/ABC"),[58] proposed that other investment entities, including SBICs and SSBICs, pension funds, and investment and commercial banks should be incorporated in the passive investor category so long as they met the passivity standard currently applied to the approved types of passive investors.[59] Finally, CalPERS urged the Commission to include pension funds in the passive investor category, or in lieu of their inclusion, argued that pension funds should be allowed higher levels of non-attributable investments if they certify their non-involvement in the media operations of firms in which they invest.[60]

25. Decision. We reaffirm our earlier decision to retain the current definition of "passive investors," which is limited to bank trust departments, insurance companies and mutual funds. We noted that we earlier stated that we "do not intend to revisit our decision of 1984 in order to broaden the category of passive investors...."[61] We are not convinced that other types of investors lack the interest and/or the ability to actively participate in the affairs of the firms in which they invest. This is particularly true of public pension funds, many of which have apparently become increasingly active in proxy fights and other devices to put pressure on management perceived to be underperforming.[62] Furthermore, commercial and investment bank activities do not fall under the same fiduciary restrictions, discussed above, that apply to bank trust departments. And, we have not been presented with sufficient evidence thus far to revise our earlier tentative conclusion not to include SBICs and SSBICs in the definition of passive investors.[63] As we have noted, under certain

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[56] Comments in response to Attribution Notice of Capital Cities/ABC at 7; Comments in response to Attribution Notice of CalPERS at 18-22; Comments in response to Attribution Notice of CCA at 3-6; Comments in response to Attribution Notice of CG at 1; Comments in response to Attribution Notice of ICI at 3; Comments in response to Attribution Notice of ALTV at 6; Comments in response to Attribution Notice of M/C at 20.

[57] Comments of in response to Attribution Notice of ALTV at 6.

[58] Capital Cities/ABC is now ABC, Inc. ("ABC").

[59] Comments in response to Attribution Notice of Capital Cities/ABC at 6-7.

[60] Comments in response to Attribution Notice of CalPERS at 18-22.

[61] *Attribution Notice*, 10 FCC Rcd at 3630-31.

[62] M.J. Roe, *Strong Managers, Weak Owners* 125 (1994). In the *Attribution Order,* we declined to classify pension funds as passive investors based on evidence that pension funds manage their own investments and actively pursue social goals in their investment policies. *Attribution Order*, 97 FCC 2d at 1014-15.

[63] In the *Attribution Order*, we declined to accord passive status to SBICs and MESBICs, noting the absence of compelling reason to alter the 5 percent benchmark for these entities and the fact that while these entities are generally prohibited from assuming control of the companies in which they invest, they are authorized to exercise

circumstances, these entities are authorized to exercise control over debtor companies for temporary periods.[64] Finally, we agree with ALTV that an investment advisor, acting on behalf of its client, might exert the same level of influence or control as the client might exert on its own accord. Therefore, unlike the categories currently defined as passive investors, we do not find evidence of regulatory or other safeguards ensuring that the other types of investors proposed to be included will remain passive. While several commenters favored expanding the definition of the passive investor category, they did not supply persuasive evidence or analysis to support their case and, in particular, to contradict evidence that these institutional investors can be actively involved in the companies in which they invest.

B. **Equity/Debt Plus and Attribution Exemptions**

1. *Background*

26. In the *Attribution Notice*, we invited comment as to whether multiple cross-interests or currently nonattributable interests, when held in combination, raise diversity and competition concerns warranting regulatory oversight.[65] We anticipated that any regulation of such inter-relationships would require case-by-case review of applications, but we did not otherwise delineate specific proposals to address these concerns. We also invited comment as to whether to restrict or eliminate the current nonvoting stock and single-majority shareholder attribution exemptions, expressing concerns that some interest holders that are eligible for these exemptions might nonetheless exert significant influence such that the interest should be attributed.[66]

27. In the *Attribution Further Notice*, we proposed to adopt a targeted equity/debt plus ("EDP") attribution approach to deal with the foregoing concerns. We noted that our proposed new EDP rule[67] would operate in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad. This approach would not eliminate the nonvoting and single majority shareholder exemptions from attribution, but would limit their availability in certain circumstances. Under this approach, we proposed to attribute the otherwise nonattributable debt or equity interests in a licensee where: (1) the interest holder was also a program supplier to the licensee or a same-market broadcaster or other media outlet subject to the broadcast cross-ownership rules, including newspapers and cable operators; and (2) the equity and/or debt holding exceeds 33 percent. Under our EDP proposal, a finding that an interest is attributable would result in that interest being counted

control over debtor companies for temporary periods under specified conditions. *Attribution Order*, 97 FCC 2d at 1016-17 & n. 45.

64 *Attribution Notice*, 10 FCC Rcd at 3631, *citing Attribution Order*, 97 FCC 2d at 1016 & n. 45.

65 *Attribution Notice*, 10 FCC Rcd at 3649.

66 *Attribution Notice*, 10 FCC Rcd at 3631-33. Pursuant to the current attribution rules, minority stockholdings in corporations with a single majority shareholder are not attributable. Also nonattributable are nonvoting stock, other nonvoting instruments such as options or warrants, and debt. 47 C.F.R. § 73.3555 Note 2(b) & (f).

67 We will refer to the standard as either "equity or debt plus," or "equity/debt plus" interchangeably.

for all applicable multiple ownership rules, local and national.[68]

2. *Comments*

28. Single Majority Shareholder and Nonvoting Stock Attribution Exemptions. As discussed in the *Attribution Further Notice*, most commenters in response to the *Attribution Notice* urged us to retain the single majority shareholder and nonvoting stock attribution exemptions, but network affiliates have expressed concerns that the exemptions have allowed networks to extend their nationwide reach by structuring nonattributable deals in which the networks effectively exert significant influence if not control over licensees.[69]

29. Propriety of EDP Rule. Commenters filing in support of the EDP proposal included Media Access Project ("MAP"), Network Affiliated Stations Alliance ("NASA"), representing affiliates of the three major networks, Viacom, Inc. ("Viacom"), Knight-Ridder and Paxson.[70] NASA noted that current attribution rules "allow networks to evade the intent and spirit of the Commission's ownership rules."[71] According to NASA, networks can use non-attributable investments to create fiduciary obligations that might require the station owner to favor the network or as a quid pro quo for long-term affiliation agreements.[72] Knight-Ridder, a newspaper publishing company, supported the equity/debt plus proposal as a bright line attribution test, which would allow greater certainty and predictability in transactions and be preferable to the *ad hoc* cross-interest policy. Knight-Ridder also noted that the EDP approach would prevent abuses of the single-majority shareholder and non-voting stock exemptions.[73] Viacom strongly supported the Commission's "equity or debt plus" proposal and, indeed, argued that it should be tightened.[74] MAP supported an equity/debt plus rule but

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68 *Attribution Further Notice,* 11 FCC Rcd at 19901-02.

69 *Attribution Further Notice,* 11 FCC Rcd at 19900-01.

70 Media Access Project *et al* includes the Media Access Project, Black Citizens for a Fair Media, Center for Media Education, Minority Media and Telecommunications Council, National Association for Better Broadcasting, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Telecom Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, and Women's Institute for Freedom of the Press. NASA, according to its Comments at 1, consists of the ABC Television Affiliates Association, the CBS Television Affiliates Association, and the NBC Television Affiliates Association.

71 Comments in response to Attribution Further Notice of NASA at 2.

72 *Id*. at 3.

73 Comments in response to Attribution Further Notice of Knight-Ridder at 3. As noted below, however, Knight-Ridder urged the Commission not to classify newspapers as either same-market media broadcasters or program suppliers.

74 Comments in response to Attribution Further Notice of Viacom at 5. Viacom observed that the Commission, when adopting its current attribution rules, did not contemplate that non-voting stockholders and the licensee could, and would, enter into corollary written or unwritten agreements, including network affiliation agreements, which would permit the contracting parties to participate in the programming and/or core functions of the licensee. *Id*. Where there is no investment contract that expressly prohibits the investor's influence on the station's programming, programming personnel, or budget, Viacom argued for application of a ten percent

also argued for a tighter rule than that proposed by the Commission. MAP argued that the proposal, as a bright line test, is superior to a case-by-case approach, and that the Commission's proposal avoided unduly disrupting capital flow because it did not fully repeal the nonvoting shareholder and single majority shareholder attribution exemptions, and, specifically, would not discourage investors from assisting in the conversion to digital television.[75] Additionally, NTIA generally supported the proposal but asked the Commission to consider refinements "so that all relationships providing the ability to exercise significant influence are recognized and attributed."[76] The Department of Justice, Antitrust Division ("DOJ"), supported the proposed EDP rule and suggested that the Commission retain the flexibility to address other relationships that, combined with equity or debt interests below the applicable threshold, confer significant control and influence.[77] Finally, while CBS opposed adoption of the equity/debt plus proposal, it noted that the proposal would be preferable to continued use of the "amorphous" cross-interest policy.[78]

30. Opposition to the "equity or debt plus" proposal was voiced by ABC, Pappas Stations Partnership ("Pappas"), and TCI, among others, which argued that it was overly broad. While ABC agreed that the current attribution rules could be subject to abuse by parties that structure transactions to avoid attribution while retaining control, it argued that instead of adopting the equity/debt plus proposal, the Commission should apply a rebuttable presumption of attribution for an investment or equity stake over 50 percent.[79] TCI argued that

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benchmark; where there is such a contract, Viacom favored the 33 percent benchmark. Comments in response to Attribution Further Notice of Viacom at 3.

[75] Comments in response to Attribution Further Notice of MAP at 7-20. MAP argued, however, for an additional threshold, under which if an entity holds interests in any two categories that exceed two-thirds of the threshold percentage (22 percent if the threshold percentage is 33 percent), the interests should be attributed. Additionally, MAP argued that the 33 percent threshold is too high and advocated a 20 percent benchmark instead. *Id*.

[76] Letter from Larry Irving, NTIA, to Chairman Reed E. Hundt, Federal Communications Commission, dated May 22, 1997. NTIA suggests that the Commission not establish triggering relationships but rather identify interests or relationships that would enable an investor to exert influence even if it does not have voting control regardless of the size of the investment or the nature of the investment. According to NTIA, these include participating in the programming of the licensee, influencing the choice of programming personnel, and affecting the licensee's budget, as well as other interests it asks the Commission to identify and enumerate. NTIA also suggests a 20 percent threshold for debt.

[77] Letter to Reed E. Hundt, Chairman, Federal Communications Commission from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, dated May 8, 1997 ("DOJ Letter").

[78] Comments in response to Attribution Further Notice of CBS at 3, 6. CBS stated that: "Assuming the threshold triggering attribution is set at 33 percent and the definition of 'program supplier' for purposes of the rule is sufficiently broad so as not to discriminate against broadcast networks, fair and predictable application of the proposal appears possible." Comments in response to Attribution Further Notice of CBS at 6.

[79] Comments in response to Attribution Further Notice of ABC at 3-9; Reply Comments in response to Attribution Further Notice of ABC at 8-9.

the equity/debt plus proposal is overinclusive insofar as it would apply to debt.[80] Pappas argued for retention of the current case-by-case approach of reviewing contractual language in those cases involving nonattributable interests that raise control questions.[81] Tribune also opposed adoption of the proposed rule, arguing that there has been no finding that the single majority shareholder or nonvoting stock exemptions have resulted in even a single instance of unauthorized transfer of control or the exercise of undue influence over the affairs of a broadcast outlet, and that, under the proposal, capital availability would be greatly restricted, particularly to small and minority broadcasters, the entities that need capital the most, as broadcasters enter the transition to DTV, which will require large amounts of capital.[82]

31. Scope of Rule. MAP urged that the EDP rule should encompass same-market media entities, including cable operators and daily newspapers, as well as program suppliers. According to MAP, the incentive and ability for cable operators and newspapers to exercise influence are nearly the same as for broadcasters.[83] However, Paxson argued that newspapers or cable systems should not be included, since rules already exist restricting cross-ownership by those entities, and an equity/debt plus gloss would make these "onerous existing regulations even more burdensome."[84] Knight-Ridder also argued that newspapers should not be subject to the EDP rule, noting that as competition for viewers has increased, newspapers have sought to work more closely with broadcasters in producing news reports, documentaries and other public service programs to realize synergies between print and broadcast newsgathering operations, and that the explosion of services means that the concern about diversity that underlies the cross-ownership rules is now a thing of the past. Knight-Ridder asked that if the Commission believes that the EDP rule should apply to the broadcast-newspaper cross-ownership rule, it should at least defer any decision to include newspapers as same-market broadcasters until the next mandated review of the broadcast-newspaper cross-ownership rule. Knight-Ridder also argued that if the Commission does include newspapers as same-market media entities, it should apply the

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80 According to TCI, debt interests only raise concerns when they are accompanied by overreaching provisions, such as those ceding to the creditor operational decision-making authority or the right to participate proportionately in profits. Comments in response to Attribution Further Notice of TCI at 12.

81 Comments in response to Attribution Further Notice of Pappas at 3-4. Pappas argued that the proposed rule is overbroad and that there is no finding that standing alone, the financial arrangements arousing the Commission's concern have resulted in an unauthorized transfer of control of any broadcast station or record of systemic abuse of financing to exercise influence over broadcast outlets. Comments in response to Attribution Further Notice of Pappas at 2; Reply Comments in response to Attribution Further Notice of Pappas at 1-4.

82 Reply Comments in response to Attribution Further Notice of Tribune at 20-21. Other commenters, including BET Holdings Inc. ("BET"), and Qwest Broadcasting L.L.C. ("Qwest"), opposed the "equity or debt plus" approach on the grounds that it would chill investment for new TV and DTV entrants, including minorities, while Fox Broadcasting Company ("Fox"), Pappas, and TCI argued that the proposal would unduly restrict the flow of capital to broadcast entities, including capital needed for digital conversion. Comments in response to Attribution Further Notice of BET at 2-3; Reply Comments in response to Attribution Further Notice of BET at 2-5; Reply Comments in response to Attribution Further Notice of Qwest at 2, 7-8; Comments in response to Attribution Further Notice of Pappas at ii, 1-2; Reply Comments in response to Attribution Further Notice of Pappas at 7-9; Comments in response to Attribution Further Notice of Fox at 3; Comments in response to Attribution Further Notice of TCI at 12.

83 Comments in response to Attribution Further Notice of MAP at 7-20.

84 Comments in response to Attribution Further Notice of Paxson at 40.

same definition of "market" as used for the underlying cross-ownership rule, in order to minimize confusion among the regulated parties.[85]

32. Fox opposed application of the equity/debt plus proposal to program suppliers, noting that it would deprive local broadcast outlets of needed capital and limit the ability of program suppliers to make needed investments in their distribution infrastructure, thereby undermining the goals of competition and diversity.[86] TCI and BET also opposed applying the proposal to program suppliers.[87] BET noted that new entrants, particularly in DTV where programming may be scarce, need flexibility to form joint ventures with program suppliers to enter the DTV market.[88]

33. Definition of Program Supplier. CBS and MAP argue for a broader definition of program supplier. CBS argued that any supplier of 20 percent or more of the licensee's prime-time programming should be defined as a program supplier under the proposed rule and that the attribution rules should be applied in determining how great an interest in a program supplier a person or entity can hold without being deemed a program supplier for purposes of applying an equity/debt plus rule. MAP also argued that program suppliers should include networks, syndicators, program producers, and program providers pursuant to LMAs.[89]

34. Most commenters addressing this issue, however, argued for a narrower definition of program supplier. Paxson argued that the Commission should limit the "equity or debt plus" standard to the four major

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[85] Comments in response to Attribution Further Notice of Knight-Ridder at 1-2, 3-6.

[86] Comments in response to Attribution Further Notice of Fox at 2-3. Fox argued that network investment in affiliates may be the only way that it and other newer networks can strengthen weak affiliates to the point where they can compete effectively in their markets. According to Fox, the equity/debt plus approach is not needed because of the competitive environment in broadcasting and because the "option time" and the "right to reject" network rules prevent overreaching. Comments in response to Attribution Further Notice of Fox at 3-7. HSN Inc. ("HSN") agreed. Comments in response to Attribution Further Notice of HSN at 13-15. According to HSN, proponents of the EDP standard have not established that the theoretical harm of permitting such investments outweighs its demonstrable public interest benefits of encouraging investment in programming. Reply Comments in response to Attribution Further Notice of HSN at 7-8. In addition, Fox argued that the Commission, in implementing an equity/debt plus standard, would be overlooking relationships, such as affiliation agreements or contracts with lenders, that confer a similar level of influence as those relationships the proposed rule would capture and that the Commission has failed to identify a sufficient rationale for treating non-controlling equity or debt interests held by program suppliers more restrictively than other kinds of business relationships. Comments in response to Attribution Further Notice of Fox at 4-5. While Fox does not contend that its relationships do not confer influence, it argues that only those relationships that confer control should be attributed. Reply Comments in response to Attribution Further Notice of Fox at 1-5.

[87] TCI noted that multiple non-attributable interests should be treated on a case-by-case basis and that in most cases such interests do not pose any reasonable chance to exercise control or harm competition and diversity. Comments in response to Attribution Further Notice of TCI at 19-20.

[88] Reply Comments in response to Attribution Further Notice of BET at 4-5.

[89] Comments in response to Attribution Further Notice of CBS at 7 & n. 14; Comments in response to Attribution Further Notice of MAP at 15.

networks because they have historically exercised extraordinary influence over their affiliates.[90] King World Productions, Inc. ("King") argued that the definition should be limited to networks as defined by Section 73.658(g)(1) of the Commission's rules.[91] NASA agreed that "program suppliers" should include only networks as defined by former Section 73.662(f) of the Commission's rules (15 hours of prime time programming/75 percent of households), and other suppliers that provide substantial quantities of programming to licensees.[92] Tribune suggested that "program supplier" should be narrowly defined so as not to include syndicators that typically sell programming in separate transactions to a variety of stations within and across markets, because they have neither the means nor the incentive to control their distribution networks, and that the term should apply only to those entities that exercise control over the operations of the program supplier.[93] And, Viacom argued that syndicators should be distinguished from both networks and LMA brokers, with the networks and LMA brokers subjected to a lower capitalization benchmark.[94]

3. *Decision*

35. Overview. As we noted in the *Attribution Further Notice*, the relaxation of the multiple ownership

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[90] Comments in response to Attribution Further Notice of Paxson at iv, 39. Paxson suggested a 25 percent "equity or debt plus" attribution benchmark for the networks and their controlling entities.

[91] Comments in response to Attribution Further Notice of King at 5. Under Section 73.658(g)(1), 47 C.F.R. § 73.658(g)(1), "the term network means any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by or under common control with such person, entity, or corporation... ."

[92] Comments in response to Attribution Further Notice of NASA at 7.

[93] Reply Comments in response to Attribution Further Notice of Tribune at 22. While Tribune would support an actual control standard for purposes of determining when entities with interests in program suppliers should be deemed to be "program suppliers' for purposes of applying the proposed standard, for administrative convenience, it would also support application of the attribution rules to make this determination. *Id*. at 22-23.

[94] Comments in response to Attribution Further Notice of Viacom at 10. Viacom proposed that a network should be defined as an entity engaging in program distribution of more than two consecutive hours of programming which is required to be broadcast by a licensee in pattern with other licensees (allowing for time zone differences) where such in-pattern requirements apply to television stations serving 75 percent of total U.S. households. *Id.* It urged that a broadcast "network" be defined to include ABC, CBS, NBC, and Fox, as well as nascent networks, such as UPN (which is 50-percent-owned by Viacom), WB, the home shopping broadcast networks, such as HSN and ValueVision, and the foreign-language broadcast networks, Univision and Telemundo. Program producers and syndicators would not be considered networks. Reply Comments in response to Attribution Further Notice of Viacom at 3. Additionally, Viacom argued that any entity or person who holds a 10 percent or greater voting interest or whose investment in a network equals at least 10 percent of total capitalization of the network should be deemed a network, and that a key officer or director of a network should also be deemed a network. Moreover, Viacom suggests that investments in stations by an officer or director of a network be attributable not only to the individual but presumptively to the network. Comments in response to Attribution Further Notice of Viacom at 11. Viacom argued that the network-affiliate relationship is unique among all licensee relationships and that the network is the lifeblood of the station and that the EDP proposal is therefore the correct guideline to identify those interests with a realistic potential to affect programming decisions.

rules resulting from the 1996 Act requires neither relaxation nor tightening of our attribution rules but does underscore the importance of maximizing the precision of the attribution rules.[95] We should take care in enforcing the multiple ownership limits, which have been deliberately set at certain levels, to ensure that the attribution rules neither unduly loosen nor restrict those limits, but rather apply them with the greatest precision to entities that have the power to influence a licensee's operations. We have been mindful of this goal in the decisions that follow.

36. We will not eliminate the single majority shareholder or nonvoting stock exemptions, but, rather, to address the concerns that we raised in the *Attribution Notice* and *Attribution Further Notice*, we will adopt our equity/debt plus attribution proposal, modified as discussed herein, as a new rule that would function in addition to the other attribution rules. Under this new EDP rule, where the investor is either (1) a "major program supplier," as defined herein to include all programming entities (including networks and inter-market time brokers) that supply over 15 percent of a station's total weekly broadcast programming hours,[96] or (2) a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators, and newspapers), its interest in a licensee or other media entity in that market will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33 percent of the total asset value (equity plus debt) of the licensee or media entity. As a shorthand, we will use the term, "total assets," herein to refer to the total asset value of the licensee. In the case of a major program supplier, the EDP rule will apply and the interest will be attributable only if the investment is in a licensee to which the requisite triggering amount of programming is provided. A finding that an interest is attributable under EDP would result in attribution for purposes of applying all relevant multiple ownership rules, local and national, except that, as discussed in the *TV National Ownership Order*, we will not double-count same-market TV stations towards application of the national TV ownership rules.

37. We will define equity to include all stock, whether common or preferred and whether voting or nonvoting. We will also include equity held by insulated limited partners in limited partnerships. Debt includes all liabilities, whether short-term or long-term. Total assets, by definition, is equal to the sum of all debt plus all equity.[97] Finally, an interest that is attributable pursuant to the EDP rule will count in determining compliance with all applicable ownership rules, national as well as local.

38. We note that parties, such as ABC, while agreeing that our current attribution rules are subject to abuse and that revision is necessary, argued for a 50 percent attribution benchmark test instead, based on a control concept, or in the alternative that the EDP rule should not be adopted because the kinds of relationships it would reach do not confer control. Parties have similarly argued that there is no evidence of unauthorized transfer of control in such relationships. However, attribution is not limited to relationships that permit control, but also extends to relationships that permit sufficient influence over core operations of the licensee such that they should be subject to the multiple ownership rules. We believe that the EDP standard

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95 *Attribution Further Notice*, 11 FCC Rcd at 19898-99.

96 The 15 percent programming benchmark is the same standard now used as a threshold to attribute radio LMAs and is also adopted in this Report and Order as the standard to be used to determine whether to attribute TV LMAs. *See* Section III.C. *infra*.

97 Pursuant to standard financial accounting practices, the left-hand side of the balance sheet (or total assets) equals the right-hand side of the balance sheet (or debt plus equity).

will address such relationships that may inappropriately avoid attribution under our current rules.

39. The equity/debt plus approach is intended to resolve our concerns, expressed in the *Attribution Notice*, that multiple nonattributable business interests could be combined to exert influence over licensees.[98] As we stated in the *Attribution Notice*, we are concerned that our nonvoting stock, single majority shareholder, and debt attribution exemptions can permit nonattributable investments that could carry the potential for influence such that they implicate diversity and competition concerns and should be attributed. The record in this proceeding, including comments filed in response to the *Attribution Notice* and to the *Attribution Further Notice*, amply underscores the need to increase the precision of the attribution rules by adopting an equity/debt plus standard. In this regard, NASA, MAP, and Viacom have supported adoption of an EDP rule.[99]

40. Fox argued that none of the proponents of the EDP rule have "clearly identified the harmful conduct -- an amorphous concept of undesirable 'influence' -- that needs to be remedied by the proposed standard, or demonstrated how it will alleviate those harms." According to Fox, unless they do so, the Commission should refrain from increasing restrictions on broadcast ownership.[100] Fox cited *NAACP v. FCC*, 682 F.2d 993, 1000-01 (D.C. Cir. 1982) and *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) for the proposition that the Commission can not regulate unless it can identify the "harm" to be remedied.[101] However, the Commission has identified the potential harm it seeks to remedy. The current attribution exemptions are too broad with respect to certain currently non-attributable interests held by major program suppliers and same-market broadcasters, thus permitting them to wield a level of influence that should be subject to limitation by the multiple ownership rules. A holding that such an interest should be attributable does not rest on a specific finding that it is harmful *per se*, but rather on a finding that it is the sort of interest that should be counted in applying the multiple ownership rules. It is the multiple ownership rules, not the attribution rules, that determine how many and what kinds of interests in stations can be combined before harm to diversity and competition results. The finding necessary for attribution relates to the finding of control or influence over the core operations of the licensee.

41. The EDP rule addresses the most serious concerns we raised in the *Attribution Notice* and *Attribution Further Notice* concerning the underinclusiveness of the attribution rules, particularly those that were supported in the record. Based on the record, we have targeted our remedy and focused those concerns in shaping the EDP rule. For example, except in cases involving a same-market media entity or major program supplier, as defined herein, the single majority shareholder exemption and exemptions for nonvoting stock, preferred stock, corporate debt and other corporate liabilities will continue to apply as they do now. Moreover, the EDP rule will not apply to a program supplier's investment in a licensee or station unless the program supplier provides over 15 percent of that station's total weekly broadcast hours. Thus, a program supplier may invest without limit in the nonvoting stock, preferred stock or debt of a licensee to which it does not provide

[98] *Attribution Notice*, 10 FCC Rcd at 3649-52.

[99] While TCI argued that debt should not be encompassed under the EDP rule, NASA and others agreed with the Commission that its inclusion is proper. Given the fine line between debt and nonvoting equity in some situations, we believe that an exemption for debt might significantly undermine the rule.

[100] Reply Comments in response to Attribution Further Notice of Fox at 2.

[101] Reply Comments in response to Attribution Further Notice of Fox at 2.

the requisite level of programming without having its interest attributed.

42. Furthermore, same-market or other relationships not within the defined EDP triggering relationships described herein will continue to be non-attributable. For example, an investor that is not a major program supplier and that is not a same-market media entity (i.e., it does not have an attributable interest in a station, newspaper, or cable system in a given market) can continue to hold more than 33 percent of the total nonvoting assets of two stations or more in that same market without either interest being attributable.

43. The targeted approach embodied in the EDP rule reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions. In this regard, some commenters have urged us to retain our current approach or implement a new case-by-case approach, considering the combined impact of multiple business and financial relationships in a particular transaction. Viacom, for example, argued for attribution criteria that would require the Commission to examine, on a case-by-case basis, whether an interest holder is contractually precluded from participation in programming, personnel, or budget decisions.

44. However, we believe that the bright-line EDP test is superior to a case-by-case approach. The EDP rule will provide more regulatory certainty than a case-by-case approach that requires review of contract language. Thus, the EDP rule will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs. While an *ad hoc* approach might be more tailored than the EDP rule, it also might lead to complicated interpretation and processing difficulties and would likely add uncertainty to resolution of attribution cases. Of course, we retain discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review.[102] Such cases might occur, for example, when there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence such that the Commission's multiple ownership rules should be implicated, notwithstanding the fact that these combined interests do not come within the parameters of the EDP rule. We do not intend by this reservation of discretion to resurrect the cross-interest policy, elsewhere eliminated in this *Report and Order*. Rather, we merely emphasize our obligation under the Communications Act to apply the public interest standard and, as necessary, to scrutinize extraordinary or unanticipated circumstances that may arise.

45. In the *Attribution Further Notice*, we invited comment on the impact of a 33 percent EDP threshold on small business entities, particularly on whether there would be a disproportionate impact on small or minority entities.[103] While some parties have argued that adoption of an equity/debt plus proposal would deter capital flow to broadcasting generally and might curb investment in smaller, minority, or UHF stations,

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[102] For example, we note that we have applied a control premium, which we defined as "that percentage of increase over the book value of a block of stock which carries control of the corporation," in analyzing certain cases. *See Roy M. Speer*, 11 FCC Rcd 18393, ¶¶ 139-42 (1996), *on recon.*, 13 FCC Rcd 19911 (1998).

[103] *See Attribution Further Notice*, 11 FCC Rcd at 19906.

in particular, or in digital television, others have argued strongly that this is not the case.[104] We have no reason to believe that the EDP rule would unduly deter investment. The equity/debt plus proposal does not preclude investment by any entity; rather, it limits nonattributable investment levels for entities that have the potential to influence licensees. Moreover, the limit does not apply to all entities that might invest or help fund the transition to digital television or otherwise invest in licensees. Additionally, to help assure that our actions today do not unduly impede capital flow to broadcasting, we have raised the passive investor benchmark. As discussed above, we believe that because of the nature of passive investors, we may raise that benchmark consistent with our goal of maximizing the precision of the attribution rules. In addition, we will consider individual rule waivers in particular cases where substantial evidence is presented that the conversion to digital television would otherwise be unduly impeded or that a waiver would significantly expedite DTV implementation in that particular case.

46. While we have invited comment on those issues, it is nonetheless our view that promoting our goal of ensuring adequate funding for the transition to digital television is better accomplished through our ownership rather than our attribution rules. The attribution rules are designed to attribute entities that wield significant influence on core operations of the licensee. It is the ownership rules that limit investment based on our core policies of diversity and competition. Arguments with respect to whether additional investment should be permitted have been made in the context of our companion multiple ownership proceedings. We believe that the attribution rules should function as precisely as possible to identify influential interests and that relaxation of ownership limits, if warranted, should be accomplished directly through revision of the multiple ownership rules, not indirectly through manipulation of what is considered "ownership."

47. Triggering Relationships. As we proposed in the *Attribution Further Notice,* the EDP approach will focus directly on those relationships that may trigger situations in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence over the core operations of the licensee. The approach of focusing on specified triggering relationships would extend the Commission's current recognition that the category or nature of the interest holder is important to whether an interest should be attributed. For example, under the current broadcast attribution rules, passive investors are subject to a higher voting stock attribution benchmark,[105] since these parties are subject to fiduciary and other restraints on their exercise of influence over licensees and are, by their nature, principally concerned with investment returns rather than direct influence over the licensee. The two relationships that will trigger the rule, major program supplier and same-market media entity, are relationships that afford the interest holder the incentive and means to exert influence over the licensee.

48. In adopting the EDP rule, we affirm our tentative conclusion in the *Attribution Further Notice* that there is the potential for certain substantial investors or creditors to exert significant influence over key licensee decisions, even though they do not hold a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with

[104] For example, Viacom commented that an equity/debt plus standard would not jeopardize availability of capital to broadcasters, noting that the proposal does not preclude additional investment but merely caps it, and that any potential impact could be offset by raising the passive-investor benchmark. Comments in response to Attribution Further Notice of Viacom at 15.

[105] 47 C.F.R. § 73.3555 Note 2(c).

the licensee, exert as much, if not more, influence or control over some corporate decisions as voting equity holders whose interests are attributable.[106]

49. This conclusion is strongly supported by the record. For example, in its Comments in response to the *Attribution Notice*, AFLAC Broadcast Group, Inc. ("AFLAC"), arguing for elimination of the single-majority shareholder attribution exemption, cited evidence that "in most cases which are structured to take advantage of the single majority shareholder exemption, it is not a 'plain vanilla' stock deal. It is often a complex deal in which the stock ownership is only the 'tip of the iceberg' of the various business relationships between the two parties."[107] AFLAC noted that there also may be nonvoting investments, options to convert to voting stock, affiliation agreements, and contracts granting approval rights over certain major decisions of the licensee. AFLAC argued that the interest holder had effective influence or control under these circumstances, and its interest should be attributable.[108]

50. Viacom, which also supported the EDP rule, but urged a more restrictive version, as discussed above, pointed out that the Commission, in crafting the blanket attribution exemption for non-voting shares, did not contemplate that the non-voting shareholder and the licensee would enter into contractual arrangements requiring or predicated on the *de facto* active participation of the non-voting stockholder in the licensee's operations.[109] Viacom cited Commission cases in which the networks (or those with ownership interests in a network):

> held equity and/or debt interests constituting or exceeding one-third of the capitalization of the broadcast stations at issue. Yet, solely for purposes of avoiding attribution, the investors in each case financed the stations, not in exchange for corresponding voting rights that might trigger the Commission's attribution threshold, but, instead, in exchange for contractual rights -- through corollary written or unwritten agreements -- that permitted them the right among other things to participate in the programming and/or related core functions of the licensee. Indeed, by heavily financing television stations in return for nothing less than a quid pro quo for an affiliation, networks have been permitted to significantly extend their ownership and influence in television stations beyond their declared owned and operated (O&O) stations.[110]

51. <u>Same-Market Media Entities</u>. As we noted in the *Attribution Further Notice*, same-market broadcasters and certain other same-market media entities may raise particular concerns because of our goal

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106 *See Attribution Further Notice*, 11 FCC Rcd 19904-05.

107 Comments in response to Attribution Notice of AFLAC at 17.

108 Comments in response to Attribution Notice of AFLAC at 18-19.

109 Comments in response to Attribution Further Notice of Viacom at 5.

110 Comments in response to Attribution Further Notice of Viacom at 6. The cases cited by Viacom include *Roy M. Speer*, FCC 96-89, released March 11, 1996, *clarified*, FCC 96-258, released June 14, 1996; *BBC License Subsidiary L.P. (KHON-TV et. al)*, 10 FCC Rcd 10968 (1995); *BBC License Subsidiary L.P (WLUK-TV)*, 10 FCC Rcd 7926 (1995); *Quincy D. Jones*, 11 FCC Rcd 2481 (1995); Letter to Heritage Media, Inc. *et al.* from Roy J. Stewart, Chief, Mass Media Bureau, dated Jan. 18, 1996 (FCC File Nos. BTCCT-950911KF-KG and BALCT-950628KJ-KL), *aff'd*, 13 FCC Rcd 5644 (1998); *NBC, Inc.*, 6 FCC Rcd 4882 (1995).

of protecting local diversity and competition. Firms with existing local media interests may have an incentive and means to use financing or contractual arrangements to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations. Indeed, the Commission's cross-interest policy[111] reflected its concern for competition and diversity where an entity has an attributable interest in one media outlet and a "meaningful relationship" with another media outlet serving substantially the same area.[112] Accordingly, we will include same-market media entities as one of the relationships that will trigger application of the EDP rule.

52. As discussed above, ¶ 42, *supra* to trigger application of the EDP rule to same-market media entities, the interest held in the non-EDP media entity in the same market must be attributable without reference to the EDP rule; the holding of a non-attributable interest in one station or entity in a market does not trigger application of the EDP rule where an EDP level, but otherwise non-attributable, interest is acquired. Thus, under this prong of the EDP rule, a nonvoting interest in 34 percent of the total assets of two stations in the same market will not result in attribution of either station. This is because the EDP rule is only triggered when the entity acquiring the second interest also holds an interest in a same-market media entity that is attributable under the current attribution rules other than the EDP rule. We follow case law in the cross-interest policy context in this regard. As discussed below, that policy is implicated in situations where a party holds an attributable interest in one media outlet and has a "meaningful relationship" with another media outlet serving "substantially the same area.[113] As we proposed, we will include same-market radio and television broadcasters as well as cable operators and newspapers in the category of same-market media entities subject to the equity/debt plus attribution standard.[114] Cable operators and newspapers are subject to cross-ownership rules and have also been subject to the cross-interest policy. There is, accordingly, good reason to include them in the EDP rule.

53. For purposes of applying this prong of the EDP rule to radio stations, newspapers, and cable operators, as proposed in the *Attribution Further Notice*, we will define the "same market" by reference to the definition of the market used in the underlying multiple ownership rule that is implicated.[115] As noted by Knight-Ridder, such an approach will help avoid confusion among the regulated entities in applying the EDP

[111] We note that in this Report and Order, ¶¶ 112-16, *infra*, we eliminate the remaining elements of the cross-interest policy and adopt the EDP rule, a bright line test which we believe will increase regulatory certainty and reduce regulatory costs.

[112] For a recent application of the policy and statement of this justification, *see Roy M. Speer*, 11 FCC Rcd 18393, ¶¶ 124-25 (1996), *on recon.*, 13 FCC Rcd 19911 (1998).

[113] *Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699, 3699, 3700 (1987). *See* ¶ 103 *infra*.

[114] *See Attribution Further Notice*, 11 FCC Rcd at 19902-03.

[115] *Attribution Further Notice*, 11 FCC Rcd at 19899. For example, for purposes of the radio duopoly rule, the radio market is defined based on overlap of principal community contours. *See* 47 C.F.R. § 73.3555(a).

rule.[116] With respect to television stations, as we also noted in the *Attribution Further Notice*,[117] the definition of what is the same market for purposes of applying the EDP attribution standard is resolved in the companion television local ownership proceeding.[118]

54. Program suppliers. In the *Attribution Further Notice*, we invited comment on whether we should include program suppliers under the "equity/debt plus" attribution test to address our concern and that of some commenters that program suppliers such as networks could use nonattributable interests to exert influence over critical station decisions, including programming and affiliation choices. We cited recent transactions involving program suppliers where it appeared that nonattributable investors could be granted rights over licensee decisions that might afford them significant influence over the licensee. We invited comment as to whether we should encompass radio and television time brokerage agreements or LMAs under the proposed "equity/debt plus" attribution approach, if we specify program suppliers as a triggering category.[119]

55. We will include major program suppliers in the EDP rule. We will define the "major program suppliers" that are subject to this new attribution standard to include entities that provide more than 15 percent of a station's total weekly broadcast programming hours. We believe that the 15 percent standard should apply to all providers of programming to stations, including those that provide programming pursuant to inter-market LMAs.[120] As noted above, the EDP rule would apply only to the major program supplier's investments in a station to which it supplies the requisite amount of programming. In addition, where a person or entity has an attributable interest in a major program supplier, that person or entity will be deemed to be a major program supplier for purposes of applying the EDP rule.

56. We have decided to define a major program supplier subject to the EDP rule as all programming entities that supply over 15 percent of a station's weekly programming for the following reasons. We agree with those commenters that argue that not every program provider can exert sufficient influence such that its otherwise non-attributable financial interests in a licensee should potentially be subject to attribution. We note the views of commenters that the major networks should be subject to the EDP rule and those that argue for including providers of substantial amounts of programming to a station. Those entities that provide substantial quantities of programming to a licensee are, we believe, in a strong position to exert significant influence over that licensee, particularly when the programming connection is coupled with the requisite financial investment, such that the EDP rule should be triggered. We believe that the 15 percent standard accomplishes these goals, as it would encompass those entities providing substantial quantities of programming that also have the requisite investment in the station and would exclude those entities that provide only small amounts of

[116] Comments in response to Attribution Further Notice of Knight-Ridder at 6-7.

[117] *See Attribution Further Notice*, 11 FCC Rcd at 19902-03.

[118] *TV Local Ownership Order*, at Section IV.A.

[119] *See Attribution Further Notice*, 11 FCC Rcd at 19903.

[120] Of course, an intra-market LMA that involves more than 15 percent of a broadcast station's total programming is *per se* attributable without regard to whether there is any accompanying financial investment.

programming and that therefore do not have potential to exert significant influence over licensees.[121] Moreover, it is a standard that we have experience in applying, as it is the standard currently used in determining whether an intra-market radio LMA is *per se* attributable, and it is the standard that will be used in determining whether an intra-market TV LMA is *per se* attributable. Under our new rule, an intra-market LMA is *per se* attributable if it involves more than 15 percent of a station's programming. In contrast, an inter-market LMA is attributable, under the EDP rule, only if it involves more than 15 percent of a station's programming and if the LMA is accompanied by a financial investment that is above the 33 percent investment threshold. It would sweep too broadly to attribute inter-market LMAs that are unaccompanied by the requisite financial investment. The substantial investment provides additional incentive and ability for influence or control. Finally, it is a clear and administratively simple standard to apply, promoting our goal of making the EDP rule a bright-line test.

57. Fox, in arguing that we should not adopt an EDP rule for program suppliers, argued that we have failed to identify a sufficient rationale for treating non-controlling equity or debt interests held by program suppliers more restrictively than other kinds of business relationships that may confer influence, such as those with lenders. According to Fox, lenders may have substantial influence over station operations, particularly when the borrower is in default, and most network affiliation agreements requiring in-pattern clearance would be attributable if "influence" is the test of attribution.[122] We disagree. A clear rationale exists for not attributing network affiliation agreements not accompanied by the requisite investment or debt agreements not involving program suppliers or same-market broadcasters. We do not attribute all network affiliation agreements because, absent a substantial equity or other investment that may create accompanying obligations, the affiliate is free to negotiate with the network for particular terms.[123] With respect to lenders, such as banks, our experience indicates that their motivation is return on their investment, and that they do not have the same incentive as the networks to influence the programming or other core operational choices of the licensee.

58. While some commenters strongly argued that applying the EDP rule to program suppliers would curb investment in broadcast stations and possibly hurt weaker UHF stations and might deter investment that would facilitate the conversion to DTV, they do not provide empirical evidence to support this argument. We also note that the rule does not preclude investment, but merely provides that investments over a certain level will be deemed presumptively attributable. Networks are therefore free to invest in their affiliates, subject of course to the applicable multiple ownership rules. Moreover, the EDP rule does not attribute investments, even those by networks in their affiliates, which fall below the 33 percent threshold. Thus, a major program supplier may have an investment that is equivalent to 32 percent of the total assets of a station to which it supplies programming in excess of the 15 percent standard. This would comply with all EDP limits and the interests would not be attributable. In addition, the EDP rule does not affect investments by entities other than major program suppliers or same-market media entities. Accordingly, we believe that the EDP rule will not curb

[121] Staff analysis indicates that, as of the date of adoption of this Report and Order, the 15 percent standard would include the four major networks, HSN, Paxnet, Telemundo, Univision, and WB but would not include UPN. Our analysis is based on the assumption that the stations to which programming is provided are broadcasting 24 hours per day or 168 hours per week. Defining major program suppliers based on the percentage of total programming they provide stations is a flexible measure that will accommodate changes in program suppliers' status in the future.

[122] Comments in response to Attribution Further Notice of Fox at 4-5.

[123] *See* 47 C.F.R. § 73.658.

investment, deter new entry, or curb the conversion to DTV.

59. We have decided to focus the program supplier prong of the EDP rule on major program suppliers, which as defined herein would include the major broadcast networks, for a number of reasons. Several recent cases triggering concerns with respect to substantial nonattributable investments have involved the major broadcast networks.[124] Additionally, network affiliates have underscored our concerns in this area and supported applying the EDP rule to these networks. In response to the *Attribution Notice*, network affiliates have expressed concerns that the current attribution exemptions have allowed the broadcast networks to extend their nationwide reach by structuring nonattributable deals in which the networks effectively exert significant influence, if not control, over licensees.[125] According to NASA, which, in its Comments in response to the *Attribution Further Notice*, supported adoption of the equity or debt proposal and its application to networks, the combination of less-than-controlling interests and network affiliation potentially gives a network undue influence over a licensee's programming and other operations in a number of ways: (1) less-than-controlling interests create fiduciary obligations on the majority owner that might require the owner to favor the network; (2) long-term affiliation agreements which are a *quid pro quo* for their investments confer influence on networks; (3) affiliation agreements can contain terms that include significant financial disincentives to carry local programming or other provisions that inhibit an affiliate's flexibility to carry non-network programming at times the networks provide programming; and (4) the affiliate's willingness to accept those terms is likely to be influenced by any financial interests the network holds in the affiliate.[126] According to NASA, "[g]iven the effects of network ownership and the use of investments to gain affiliations, less-than-controlling network ownership of a station is functionally equivalent to an attributable ownership interest. In many cases, because of the dependency of affiliates, the network may have significantly more influence than a typical attributable owner."[127] NASA also noted that the networks have every reason to exploit the attribution exemptions because they are approaching their national ownership limits.[128]

60. We have decided not to sweep so broadly as to include all entities from which a licensee obtains programming but only to include those entities that provide more than 15 percent of a station's weekly total programming. We believe, based on the record, that this percentage will not include most syndicators, which

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[124] *See*, *e.g.*, *BBC License Subsidiary L.P (WLUK-TV)*, 10 FCC Rcd 7926 (1995); *BBC License Subsidiary L.P. (KHON-TV et. al*), 10 FCC Rcd 10968 (1995).

[125] *See* Consolidated Comments in response to Attribution Notice of AFLAC Broadcast Group ("AFLAC") at 15-19; Consolidated Reply Comments in response to Attribution Notice of AFLAC at 3-4; Reply Comments in response to Attribution Notice of Network Affiliated Stations Alliance ("NASA") at 2-3, 6-7.

[126] Comments in response to Attribution Further Notice of NASA at 2-3.

[127] *Id*. at 3.

[128] Comments in response to Attribution Further Notice of NASA at 4. The national television ownership rules permit common ownership of television stations with a reach of 35 percent of the country. 47 C.F.R. § 73.3555(e). According to NASA, when it filed its comments in 1996, CBS owned stations with coverage of more than 31 percent of the country and Fox more than 34 percent. Were Fox's minority interests attributed at that time, it would have covered more than 37 percent. *See* Exhibit 1 to Comments in response to Attribution Further Notice of NASA.

apparently provide less than 15 percent of a station's total weekly programming.[129] We have not been presented evidence that smaller program suppliers and syndicators that do not provide substantial quantities of programming to stations have the potential to wield significant influence such that their investment should be attributed. For example, King, in arguing for application of the EDP rule to networks, argued that there is no evidence that syndicators have engaged in the kinds of arrangements and transactions that gave rise to the proposal and no reason to believe that the nature of the contractual arrangements between a syndicator and a station are likely to confer on the syndicator the realistic potential to significantly influence programming or other core operations of the station.[130] Under these circumstances, there appears to be no real need to impose constraints on investments by these syndicators and by new networks that do not provide the triggering amount of programming. If it appears that problems arise in these areas, we can later broaden the EDP rule.

61. Investment Thresholds. Under the EDP rule, where the creditor or equity interest holder is a same-market broadcaster or major program supplier, as defined herein, in addition to applying the existing attribution criteria, we would attribute any financial interest or investment in a station or other media outlet where it exceeds 33 percent of the total assets (debt plus voting, non-voting and preferred stock) of the licensee. We intend to aggregate the equity and debt interests of such an investor (including both non-voting stock in whatever form it is held and voting stock) in a licensee or other media outlet for purposes of applying the investment threshold. Thus, when the investor's total investment in the licensee or other media outlet, aggregating all debt and equity interests, exceeds a specified threshold percentage of all investment in the licensee (the sum of all equity plus debt), that investment would be attributable. In aggregating the different classes of investment, equity and debt, we intend to use total assets (debt plus voting, non-voting, and preferred stock) as a base.[131] We will not apply the percentage threshold separately to debt and to equity interests

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[129] In its Comments in response to Attribution Further Notice, NASA noted that, unlike networks, which can supply up to 75 percent of an affiliate's programming, most program suppliers provide less than 10 percent of a typical customer's programming. According to NASA, there is little reason to be concerned about such programmers, because their potential influence is relatively modest, even if they hold non-attributable interests in stations. However, affiliates depend on networks for large parts of their broadcast day and this relationship severely diminishes affiliates' ability to make independent programming decisions. Comments in response to Attribution Further Notice of NASA at 7-8.

[130] Comments in response to Attribution Further Notice of King at 1-5. Indeed, because stations pay the program supplier in the case of syndication agreements (unlike network affiliation agreements where the network pays the station), King noted that "it is structurally impossible for a syndicator to purchase the power to influence station decisions." Comments in response to Attribution Further Notice of King at 4.

[131] For example, in the hypothetical case of a broadcast company with $100,000 of total assets, and an investor who owns 34 percent of these total assets, the investment may take the form of $30,000 of equity and $4,000 of debt in the broadcast company, or alternatively, the investment may take the form of $4,000 of equity and $30,000 of debt in the broadcast company. In either case, the investors owns a total of 34 percent of the total asset value of the firm, and if the investor is also a program supplier or same-market media entity, then the EDP rule would be triggered. In the *Attribution Further Notice,* ¶ 22, we referred to the sum of all equity and all debt of the licensee as "total capitalization." We now use the term, "total assets," which we believe is a more rigorous accounting term for the aggregate of all equity and all debt and which refers to the total asset value of the licensee. Our intent, however, remains the same. That is, the sum of all equity and all debt of the licensee will be used as a base when we aggregate different classes of investment held by an investor for purposes of determining whether the aggregate limit is exceeded. In the *Attribution Further Notice*, we sought comment as to whether preferred stock should be treated as equity or as debt for purposes of applying the threshold. *See Attribution Further Notice,* at ¶

because this could lead to distortions in applying the EDP rule, depending on the percentage of total assets that each class of interests comprises. For example, were we to apply the percentage thresholds separately, a company with only 10 percent of its capital from debt would be attributable to a creditor providing only 3.4 percent of the company's total assets, while any equity holder providing 32 percent of the total capital would be nonattributable.

62. The FCC has recognized that holding voting stock in sufficient quantities confers the ability to exert influence or control over the licensee. Our decision to expand our focus beyond voting stock to nonvoting stock and debt is buttressed by academic literature.[132] Nonvoting stock and debt may now be used to control or influence a licensee in a significant manner, especially when coupled with another meaningful relationship or when held by someone that has the incentive to influence the station or media entity.[133] There is an incentive for licensees and other entities that face regulatory constraints on their acquisition of voting stock and other currently attributable interests (*e.g.*, networks that face the 35 percent national reach cap) to seek to combine currently non-attributable investments with contractual rights in such a manner so as to gain significant influence,[134] and we believe that the current attribution exemptions have afforded such entities the ability to do so. Accordingly, the EDP rule examines not only the investment in voting stock but also nonvoting equity and debt in order to limit the ability of such entities to circumvent the attribution rules.

63. We have decided to set the threshold at 33 percent, as proposed in the *Attribution Further Notice*.[135] Some commenters have advocated a higher threshold, while others have advocated a lower threshold. ABC stated that a 50% threshold, rather than 33%, more realistically identifies the type and level of interest that conveys a realistic potential to control the core operations of a licensee. Paxson argued for a 25% benchmark, but only for the 4 major networks. MAP advocated a 20 percent benchmark. Viacom agreed with 33% in cases where the investor is contractually restricted from influencing budget, hiring and programming decisions, but argues for a 10% benchmark when contractual safeguards are not present. Viacom believes that an investment of even 10% of the capitalization of a station, particularly if coupled with the ability to influence station operations, carries as much influence as a 10% voting stake. CBS stated that the threshold should be set no lower than 33% to avoid prohibiting relationships the Commission has already deemed permissible.[136]

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22. We believe that this issue will not be significant in most cases since we aggregate equity and debt. However, in an instance where it may be relevant, we will presume that nonvoting stock should be treated as equity, but we reserve the right to treat preferred stock as debt in an appropriate case where the stock has more of the indicia of debt.

[132] R.W. Kopcke and E. Rosengren, eds., *Are the Distinctions between Debt and Equity Disappearing*, Federal Reserve Bank of Boston, Conference Series # 33 (1989).

[133] *See*, *e.g.*, DOJ Letter, at 12-14.

[134] See G.T. Garvey and P.L. Swan, *The Economics of Corporate Governance: Beyond the Marshallian Firm*, Journal of Corporate Finance 1, 2 (1994), which argues for a recognition that different stakeholders influence corporate governance.

[135] *See Attribution Further Notice*, 11 FCC Rcd at 19906.

[136] Comments in response to Attribution Further Notice of ABC at 8, Paxson at 39, Viacom at 8, n. 6, CBS at MAP at 17-20.

64. We believe that a 50 percent threshold would be inappropriately high. Our goal is not merely to attribute interests with the potential to control but also those with a realistic potential to exert significant influence. On the other hand, the suggested thresholds of 25 percent or 10 percent seem too low. In setting the threshold for attribution of these newly attributable interests, we want to be cautious not to set the limit so low as to unduly disrupt capital flow to broadcasting. In addition, we believe that the threshold for attribution of nonvoting interests should be substantially higher than the attribution level for voting interests, which give the holder a ready means to influence the company. The proposed 33% threshold seems to be an appropriate and reasonable attribution threshold. We note that we have discretion to exercise our judgment in setting a percentage threshold in this regard and to draw an appropriate line, a challenging yet inevitable task for government agencies. We have employed a 33 percent benchmark applied in the context of the cross-interest policy, and that particular benchmark does not appear to have had a disruptive effect.[137] In *Cleveland Television*, the Commission held that a one-third non-voting preferred stock interest by a broadcaster in another station in the same market conferred "insufficient incidents of contingent control" to violate the multiple ownership rules or the cross-interest policy, and that the holders, by virtue of ownership of the non-voting preferred stock interest would not retain the means to directly or indirectly control the station.[138] More recently, we have applied *Cleveland Television*'s 33 percent threshold in *Roy M. Speer*, where we limited the non-attributable equity holdings of a same-market television licensee in another local television station to 33 percent.[139] We will use this threshold in applying the EDP rule but note that we could adjust the threshold later, if warranted.

65. We recognize that the attributable status of a certain investment could change, based, for example, on a change in the firm's assets, resulting in the investor's interests dropping below the 33 percent threshold,

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[137] *See Cleveland Television Corp.*, 91 FCC 2d 1129, 1132-35 (Rev. Bd. 1982), *review denied*, FCC 83-235 (1983), *aff'd*, *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) ("*Cleveland Television*"). In its Comments in response to Attribution Further Notice, MAP argued that the factual finding in *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *review denied*, FCC 83-235 (1983), cited by the Commission in the *Attribution Further Notice*, ¶ 23, was rejected by the Court of Appeals, *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) and that the case therefore stands for the proposition that a 33 percent nonvoting interest does give control to the investor, even though MAP concedes that the Court of Appeals upheld the Commission's decision. Comments in response to Attribution Further Notice of MAP at 18. Contrary to MAP's contention, however, the Court specifically upheld the Commission's determinations that the holdings at issue did not constitute a prohibited cross-interest. First, the Court held that the holder of one-third of a corporation's equity does not constitute working control as a matter of law and that the Commission reasonably determined that the preferred stock holdings did not represent a controlling interest subject to the multiple ownership rules. 732 F.2d at 967. While the Court did note, as MAP points out, that the preferred stockholdings did not constitute a "merely passive interest," the Court then nevertheless upheld the Commission's determination that the 33 percent preferred stockholdings did not constitute a "meaningful relationship" under the cross-interest policy and noted that the Commission properly exercised its discretion to make such a determination. *Id*. at 971-72.

[138] *Cleveland Television*, 91 FCC 2d at 1132-35.

[139] 11 FCC Rcd 18393, 18442-43 (1996), *on recon.*, 13 FCC Rcd 19911 (1998).

or vice versa.[140] We will require parties to maintain compliance with the attribution criteria as any such changes occur. Where sudden, unforeseeable changes take place, however, we will afford parties a reasonable time, generally one year,[141] to come into compliance with any ownership restrictions made applicable as a result of the change in attributable status. Finally, we note that we have conditioned a number of recent cases that have raised similar concerns on the outcome of this proceeding. We intend to issue separate orders, as necessary, to apply the EDP rule to any cases that have been conditioned on the outcome of this proceeding.

C. Time Brokerage Agreements or LMAs

1. *Background*

66. An LMA or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming.[142] Currently, we do not attribute television LMAs, and, accordingly, these relationships are not subject to our multiple ownership rules. In the radio context, however, time brokerage of another radio station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours results in attribution of the brokered station to the brokering licensee for purposes of applying our multiple ownership rules.[143]

67. In the *Attribution Further Notice*, we incorporated the tentative proposal, initially set forth in the *Local Ownership Further Notice*,[144] to attribute television LMAs based on the same principles that currently apply to radio LMAs.[145] Thus, time brokerage of another television station in the same market for more than

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[140] Such a change in the attributable status of an investment is also possible under our current attribution rules and the cross-interest policy.

[141] This approach of permitting one year to come into compliance with the multiple ownership rules tracks our general approach with respect to non-grandfathered interests discussed in Section III.I. *infra*.

[142] *TV Local Ownership Further Notice,* 10 FCC Rcd at 3581-82. *See* 47 C.F.R. 73.3555(a)(4)(iii). As noted above, note 8, *supra*, for purposes of applying the radio LMA rules, the Commission's current rules define time brokerage as "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." 47 C.F.R. § 73.3555(a)(4)(iii).

[143] *See* 47 C.F.R. § 73.3555(a)(3)(i).

[144] *TV Local Ownership Further Notice*, 10 FCC Rcd at 3583-84.

[145] While we proposed to use a fifteen percent benchmark as in radio, we asked whether there are differences between radio and television services that would justify applying a different percentage to television LMAs for purposes of determining whether to attribute them. *Attribution Further Notice*, 11 FCC Rcd at 19908. We also requested quantitative information on the number and characteristics of existing television LMAs, and asked whether we can draw general conclusions about LMAs and whether there are classes or categories of LMAs that should be subject to different attribution treatment. *Id*. at 19910. Further, we issued a Public Notice requesting all parties to all existing LMAs to provide to the Commission by July 8, 1997 certain factual information regarding the terms and characteristics of these agreements. This information is intended to supplement the record in this attribution proceeding and in other rulemaking proceedings currently pending before us that relate to the treatment of television LMAs and ownership rules. *Public Notice*, DA 97-1246, "Commission Seeks Further Information

fifteen percent of the brokered station's weekly broadcast hours would be attributable and would count toward the brokering licensee's national and local ownership limits.[146] We specifically proposed to count attributed television LMAs in applying our other ownership rules, including, for example, the broadcast-newspaper cross-ownership rule,[147] the broadcast-cable cross-ownership rule,[148] and the one-to-a-market rule (or radio-television cross-ownership rule).[149]

2. *Comments*

68. Most commenters addressing this issue supported our proposal to attribute television LMAs based on the same principles that currently apply to radio LMAs.[150] For example, ABC contended that the justification presented by the Commission in the radio LMA rule -- *i.e.*, that attribution of radio LMAs is necessary to prevent the use of time brokerage to circumvent the local ownership rules -- supports adoption of a parallel attribution rule for television LMAs.[151] Bahakel contended that the current non-attributable status of LMAs undercuts the local market ownership limits,[152] while BET argued that the Commission's proposal addresses the dual problems of evasion of the station ownership limits through the use of LMAs and the potential undue concentration of programming control among a few group television owners.[153]

69. Many parties agreed with our tentative conclusion that television LMAs should be attributable because they confer significant influence over the programming of the brokered party's station.[154] MAP

Regarding Television LMAs" (June 17, 1997). *See* ¶¶ 81-82, *infra*, for a discussion of the information filed by the parties in response to this Public Notice.

146 *TV Local Ownership Further Notice*, 10 FCC Rcd at 3583-84.

147 47 C.F.R. § 73.3555(d).

148 47 C.F.R. § 76.501(a).

149 47 C.F.R. § 73.3555(c).

150 These commenters included ABC, BET, Bahakel Communications ("Bahakel"), Centennial Communications, Inc. ("CCI"), Retlaw Enterprises, Inc. ("Retlaw"), Westwind Communications, L.L.C. ("Westwind") and, with certain caveats, Post-Newsweek Stations, Inc. ("PNS"), SJL Communications, Inc. ("SJL"), Viacom, Saga Communications, Inc. ("Saga"), and MAP.

151 Comments in response to Attribution Further Notice of ABC at 10.

152 Bahakel pointed out that LMAs allow television broadcasters to effectively control and program two stations in the same market, which is unfair to those who comply with the rules by controlling and owning only one station in a market. Comments in response to Attribution Further Notice of Bahakel at 2.

153 Comments in response to Attribution Further Notice of BET at 5-6.

154 *See, e.g.*, Comments in response to Attribution Further Notice of Saga Communications, Inc. ("Saga") at 6-8. Saga contended that television LMAs are not equivalent to radio time brokerage agreements ("TBAs"), asserting that, over time, the Commission permitted TBAs to evolve from the brokering of a small portion of a licensee's potential into LMAs, whereby a single broker was allowed to purchased all or almost all of the 168 hour

contended that television LMAs, like radio LMAs, result in a diminution of voices and viewpoint diversity.[155] Retlaw declared that television LMAs should be recognized as conferring a degree of control and influence that warrants attribution, and that holding otherwise would be "completely and inexplicably inconsistent" with the Commission's earlier findings with regard to radio.[156]

70. MAP also argued that the contention that LMAs may rescue struggling stations is irrelevant for the purposes of the ownership rules. Since the recent market for the purchase of stations has been strong, it argued, it is likely that in many LMA situations the licensee could have found another buyer, thereby maintaining the same number of voices. Further, according to MAP, the importance of tight, effective attribution of same-market LMAs is magnified in light of the recent and ongoing relaxation of broadcast ownership rules. MAP argued that, because these struggling stations many times present the best, most affordable avenue for entry by minority and female owners, allowing licensees to enter into LMAs works against the Commission's "longstanding goals of promoting equal opportunity in broadcasting."[157]

71. Viacom suggested a variation of our proposal to attribute television LMAs. Viacom advocated that an LMA be defined as a right, evidenced by a formal contract or *de facto* actions, of one broadcaster to direct or participate in the programming decisions of another broadcaster with respect to more than 15 percent of that broadcaster's total weekly broadcast hours, "averaged over a rolling six months."[158] Viacom argued that television broadcasters that hold 10 percent or more of a station's capitalization and that broker that station pursuant to an LMA should be attributed ownership of the station, even if the brokered station may be in a

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broadcast week of a station. According to Saga, the Commission has tacitly permitted diminution of television licensee responsibility to that of merely controlling the programming that the broker presents on the station. Saga also argued that LMAs have not served the public interest and have been used by some broadcasters to circumvent their public interest obligations. *See also* Reply Comments in response to Attribution Further Notice of SJL at 4-6; Comments in response to TV Local Ownership Notice of MAP at 28-29.

[155] MAP noted that a recent tally of the top 100 markets found 40 LMAs in 35 markets. MAP maintained that all of these LMAs violate the intent of the duopoly rule, *i.e.*, to maintain diversity of local television outlets by preventing one entity from owning two out of a limited number of local outlets. MAP charged that the Commission's failure to attribute LMAs allows this violation. MAP also asserted that LMAs give the holder nearly total editorial control over the licensee's programming, "at least for the duration brokered." MAP argued that this makes LMAs "another powerful weapon, which has been tacitly endorsed by the Commission," to evade multiple and cross ownership limits. Comments in response to Attribution Further Notice of MAP at 20.

[156] Retlaw also asserted that LMAs and similar agreements that entail operational control over the programming, advertising and day-to-day management of a brokered station constitute a form of influence that minimizes, not enhances, diversity. Although Retlaw stated that it understands that certain business efficiencies ultimately can be achieved by such combinations, it contended that LMAs perpetuate control without legal ownership, and, as such, remove an independent voice from the marketplace. Reply Comments in response to Attribution Further Notice of Retlaw at 6. *See also* Reply Comments in response to Attribution Further Notice of Bahakel at 9-10; Reply Comments in response to Attribution Further Notice of Westwind at 11-12; Comments in response to Attribution Further Notice of CCI at 4.

[157] Comments in response to Attribution Further Notice of MAP at 21-22.

[158] Viacom stated that such a definition would not encompass producers and distributors of syndicated programming. Comments in response to Attribution Further Notice of Viacom at 11.

different market than the brokering station. For two stations that operate in the same market, Viacom advocated a *per se* rule that the mere existence of an intra-market LMA (at the 15 percent threshold, as specified in Viacom's definition of LMA) would suffice to create a cognizable interest in the brokered station, "regardless of the fact of or level of financial investment."[159]

72. DOJ noted that, under the antitrust laws, LMAs are quite similar, in their effect on competition, to station ownership.[160] It stated that, in situations where the brokering station controls the sale and pricing of a significant portion of the licensee station's advertising inventory, it is likely to consider the licensee station to be "owned" by the brokering stations for purposes of its merger analysis. Accordingly, DOJ views it as appropriate to attribute television LMAs for purposes of applying local television ownership restrictions.[161]

73. Some caveats were sounded by commenters that otherwise were generally in favor of adopting a television LMA attribution rule. For example, SJL Communications, Inc. ("SJL") argued that attributing LMA arrangements, without concurrently allowing television duopolies, would deprive the public of the significant benefits that LMAs can provide and would violate Congressional intent.[162] In addition, NTIA argued that the FCC is not in a position to promulgate a firm LMA attribution rule at this time because it lacks basic, systematic evidence about the prevalence of television LMAs and their effect on the marketplace.[163] NTIA argued that although applying the radio rule to television LMAs would be an acceptable first step toward promulgating a "firm LMA attribution rule," the radio and television markets are "likely to be sufficiently different" so that grafting the 15 percent radio rule onto the television marketplace should only be an interim measure. NTIA recommended that the Commission conduct a thorough survey of television LMAs as a prelude to establishing a final rule.[164]

74. Commenters opposed to attributing LMAs generally did not disagree that LMAs confer significant influence over the programming of the brokering party's station, but either denied that LMAs can have negative competitive or diversity effects or argued that their public interest benefits outweigh these other

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[159] Viacom refers to its comments in the local ownership proceeding, in which it urges adherence to this *per se* attribution except where the brokered station affiliates with a new network, or is a failing or failed station. *Id.* at 14 (emphasis added).

[160] DOJ Letter at 22. DOJ stated that its analysis of the ownership limits at issue in the Commission's broadcast attribution proceeding and local and national ownership proceedings considers only the competitive effects of those limits. *Id.* at 7.

[161] *Id.* at 22.

[162] According to SJL, the depth and extent of time broker involvement in the business of the brokered station "mocks the notion" that such an interest is not attributable. *See* Comments in response to Attribution Further Notice of SJL at 15-18.

[163] NTIA Letter at 11. With respect to NTIA's comments, we note that we issued a Public Notice requesting all parties to all existing LMAs to provide certain factual information regarding the terms and characteristics of these agreements. *See* n. 145, *supra*. *See* ¶¶ 81-82, *infra*, for a discussion of the information filed by broadcasters in response to this Public Notice.

[164] NTIA Letter at 11.

considerations.[165] For example, Pappas and Paxson both emphasized that Congress, in the 1996 Act, praised the public interest benefits of LMAs, and stated that the Commission has long recognized that LMAs result in significant public benefits.[166] Paxson asserted that its participation in a number of radio and television LMAs has advanced the Commission's twin regulatory goals of providing new service (with attendant diversity and competition) and minority ownership.[167]

75. Applicability to other ownership rules. Both BET and MAP favored attributing LMAs for purposes of the national audience reach cap.[168] BET argued that attributing television LMAs would subject them to the FCC's ownership rules, thus preventing further television station ownership concentration and stopping attempts to bypass national and local ownership restrictions through LMAs.[169] MAP maintained that LMAs could allow holders to violate the intent of the national ownership caps by combining outright ownership and LMAs to reach over 35 percent of the national audience.[170]

76. Paxson, however, argued that neither radio nor television LMAs should be considered attributable for purposes of Commission ownership restrictions other than the duopoly rules. According to Paxson, the Commission has never treated LMAs as attributable interests for purposes other than the duopoly rules, and there is no evidence that such treatment has created abuses or adversely affected competition and diversity. In the absence of such evidence, Paxson argued that expanding the attributable status beyond the duopoly rules is unnecessary and would disserve the public interest.[171]

77. Different attribution percentage. Knight-Ridder advocated setting a higher threshold (25 percent of a station's programming) for attribution of television LMAs, arguing that television viewers today have more

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[165] For example, Diversified Communications ("Diversified") denied that LMAs can have negative competitive or diversity effects, arguing that the Commission has failed to present evidence in this proceeding that television station licensees or brokers are abusing television LMAs in such a manner that competition or programming diversity are being adversely affected by the use of LMAs. Comments in response to Attribution Further Notice of Diversified at 5-6. *See also* Reply Comments in response to Attribution Further Notice of Pappas at 10-11; Comments in response to Attribution Further Notice of Glenwood at 2-3.

[166] *See* Comments in response to Attribution Further Notice of Pappas at 6-7; Comments in response to Attribution Further Notice of Paxson at 27.

[167] Comments in response to Attribution Further Notice of Paxson at 28. *See also* Comments in response to Attribution Further Notice of Glencairn, Ltd. and WPTT, Inc. ("Glencairn") at 2-7. Glencairn argued that the Commission fails to take into account the benefits LMAs provide and ignores important differences between radio and television programming and operation. Glencairn stated that its LMAs have resulted in tangible public interest benefits, have resulted in more operating television stations in many television markets, and, in the case of Glencairn, have directly contributed to minority ownership. *Id.*

[168] Comments in response to TV Local Ownership Second FNPRM and TV National Ownership Notice of BET at 4; Comments in response to Attribution Further Notice of MAP at 20.

[169] Reply Comments in response to Attribution Further Notice of BET at 5-6.

[170] Comments in response to Attribution Further Notice of MAP at 20.

[171] Comments in response to Attribution Further Notice of Paxson at 30.

channels and programming services to choose from than ever before. Knight-Ridder contended therefore that a 25 percent programming attribution threshold for television LMAs would fully protect local diversity and competition, while encouraging innovative and successful combinations between local television stations and other programmers in the community (such as newspapers) that would otherwise be impossible.[172]

78. Paxson argued that television stations should not be attributed based on the same standard as radio LMAs because radio stations generally are programmed entirely on a local basis, whereas many television stations rely on substantial amounts of network and syndicated programming, which would result in the 15 percent standard being "artificially low." To more closely parallel the radio LMA attribution standards, Paxson advocated that any television attribution standards should be based on the amount of "*locally produced*," *i.e.*, excluding network and syndicated, programming provided by the broker.[173]

79. Responses to Public Notice. As noted above, we issued a Public Notice requesting all parties to all existing television LMAs, or time brokerage agreements, to provide certain factual information regarding the terms and characteristics of these agreements.[174] We requested this information to supplement the record in this attribution proceeding and in other rulemaking proceedings currently pending before us that relate to the treatment of television LMAs and ownership rules.

80. Specifically, we requested information as to the number of outstanding television LMA contracts; the terms of the LMA contracts, including the origination date, duration and renewal options; the market characteristics of the brokering and brokered station, such as the Nielsen rankings and market shares of the broadcast stations, and whether the contracting parties reside in the same, adjacent or non-adjacent markets; the nature of the programming aired on the leased broadcast time, including affiliations; the degree of overlap between brokered and brokering stations; and any other relevant information, including any public interest benefits or efficiencies resulting from LMAs that the parties wish to bring to our attention.[175]

81. Of the 114 LMAs, or time brokerage agreements, reported, there are 74 in which the brokering and brokered stations are located in the same market, nine in which the two stations are in adjacent markets, and 28 in which the brokering and brokered stations are located in non-adjacent markets. In addition, three of the reported LMAs are located in Puerto Rico. Although most of the brokering stations are affiliated with one of the top four networks (ABC, CBS, FOX and NBC), the brokered stations tend to be affiliated with either UPN or WB or are unaffiliated or have yet to come on the air.[176]

82. The responses received to the questionnaire also provide information supporting our view that LMAs accord the broker significant influence that warrants attribution. First, the LMA, or time brokerage

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172 Comments in response to Attribution Further Notice of Knight-Ridder at 7-8.

173 Comments in response to Attribution Further Notice of Paxson at 29.

174 *Public Notice,* DA 97-1246, "Commission Seeks Further Information Regarding Television LMAs" (June 17, 1997).

175 *Id*.

176 FCC staff analysis of data received in response to *Public Notice*.

agreement, typically brokered most, if not all, of the brokered station's broadcast time. The percent of time brokered with both same-market and out-of-market LMA stations averaged 90 percent or greater. Second, LMA contracts tended to have extended maturities, which are renewable in the majority of cases. Same-market LMA contracts averaged seven years in duration, and ranged from one to 21 years, while out-of-market LMA contracts averaged somewhat less at five years, with a range from two to ten years. In addition, a significant number of LMA agreements contained options to purchase the station.[177]

83. Decision. We will adopt a new rule to *per se* attribute television LMAs, or time brokerage of another television station in the same market, for more than fifteen percent of the brokered station's broadcast hours per week and to count such LMAs toward the brokering licensee's local ownership limits. We have determined in the *TV National Ownership Order* that we will not count same-market LMAs towards the brokering licensee's national ownership limits, as that would constitute double-counting these LMAs.[178] We will count inter-market time brokerage agreements where they come under the EDP rule for purposes of the national ownership limits. We believe that the rationale for attributing LMAs set forth in the *Radio Ownership Order*,[179] -- *i.e.*, to prevent the use of time brokerage agreements to circumvent our ownership limits -- applies equally to same-market television LMAs. We will determine whether an LMA involves a "same market" station based upon the revised duopoly rule's standards. Thus, if the brokered station is in the same DMA as the brokering station, the LMA is "same market" for purposes of determining compliance with the ownership rules.[180] If the LMA is found to be a same-market LMA, we will then apply the other multiple ownership rules to see if they are implicated.

84. We note that in the *Radio Ownership Order,* the Commission voiced its concern that substantial time brokerage arrangements among stations serving the same market, combined with the increased common ownership permitted by the revised local rules, could undermine broadcast competition and diversity. The Commission therefore decided to preclude that possibility by attributing local time brokerage arrangements, at least until it had some experience with the effect of that new regulatory approach in broadcast markets.[181] We are convinced that the radio LMA attribution rule adopted in that Order has operated successfully to ensure that the goals set forth in the radio ownership rules are not undermined by the existence of unattributed influence over radio stations in the same market. We believe that a similar approach is warranted concerning television LMAs.

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177 In the *TV Local Ownership Order,* we update, discuss in greater detail, and evaluate more fully the information provided us in response to the Public Notice, including the information provided on the degree of overlap between brokered and brokering stations as well as the information provided us on the public interest benefits of LMAs.

178 *TV National Ownership Order,* ¶ 28.

179 *Revision of Radio Rules and Policies,* Report and Order, 7 FCC Rcd 2755, 2788 (1992) ("*Radio Ownership Order*"), *recon., Memorandum Opinion and Further Notice of Proposed Rule Making,* 7 FCC Rcd 6387 (1994) ("*Radio Ownership Reconsideration*"), *further recon., Second Memorandum Opinion and Order,* 9 FCC Rcd 7183 (1994) ("*Radio Ownership Second Reconsideration*").

180 *See TV Local Ownership Order,* at Section IV.A. As discussed in the *TV Local Ownership Order,* we will continue to allow common ownership of two stations in the same DMA if their Grade B contours do not overlap.

181 *Radio Ownership Order,* 7 FCC Rcd at 2788.

85. In the *Attribution Further Notice*, we reiterated our belief that the attribution rules must function effectively and accurately to identify all interests that are relevant to the underlying purposes of the multiple ownership rules and that should therefore be counted in applying those rules.[182] Now, based on our experience with attribution of radio LMAs and the record in this proceeding, we conclude that a stand-alone, or *per se*, rule that attributes a same-market television LMA, or time brokerage of a television station in the same market, for more than 15 percent of the brokered station's weekly broadcast hours is necessary to accomplish this goal.[183]

86. We will count attributed television LMAs toward all applicable broadcast ownership rules, which include the duopoly rule and the one-to-a-market, or radio-television cross-ownership rule.[184] We have determined in the *TV National Ownership Order* that we will not count same-market LMAs towards the brokering licensee's national ownership limits, as that would constitute double-counting these LMAs. We will count inter-market time brokerage agreements attributable under EDP because they are accompanied by the requisite financial investment for purposes of the national ownership limits. Attribution is based on influence or control that should be considered cognizable and defines what we mean by ownership. Indeed, with the exception of radio LMAs, an exception which we eliminate today, ¶ 90 *infra*, our other current attribution rules apply across the board to all the relevant ownership limits. There is no reasonable basis for treating television LMAs any differently.

87. The record in this proceeding supports our decisions to attribute television LMAs and to count attributed radio LMAs toward all applicable radio ownership limits. Our analysis, above, of the information submitted by parties to television LMAs in response to our *Public Notice* indicates that television LMAs, or time brokerage agreements, may give the brokering station influence over the programming of the brokered station such as should be recognized as an attributable relationship. Moreover, we agree with most commenters, representing a variety of interests ranging from ABC to the public interest group MAP, that television LMAs, like radio LMAs, permit a degree of influence and control that warrants ownership

[182] We also stated that, "as importantly, we seek to identify clearly those interests that do not and should not implicate concerns raised by the multiple ownership rules and that should not, therefore, be counted." *Attribution Further Notice*, 11 FCC Rcd at 19898.

[183] We believe that such a threshold for *per se* attribution will identify the level of control or influence that would realistically allow holders of such influence to affect the programming decisions of licensees or other core operating functions, while, at the same time, allowing a station the flexibility to broker a small amount of programming through an LMA with another station in the same market without that brokerage rising to an attributable level of influence. We are not adopting NTIA's suggestion that the 15 percent threshold should be only an interim measure. NTIA argued that although applying the radio rule to television LMAs would be an acceptable first step toward promulgating a "firm LMA attribution rule," the radio and television markets are "likely to be sufficiently different" so that grafting the 15 percent radio rule onto the television marketplace should only be an interim measure. NTIA also recommended that the Commission conduct a thorough survey of television LMAs as a prelude to establishing a final rule. We, of course, may revisit this decision if we receive evidence that a different threshold than the one we adopted for radio LMAs is indicated for television LMAs.

[184] *See TV Local Ownership Order*; *TV National Ownership Order*.

attribution.[185] We find it particularly noteworthy that commenters that opposed attributing television LMAs did not disagree that such LMAs confer substantial influence over brokered stations. Instead, these commenters argued that LMAs are beneficial and provide diversity benefits, an issue relevant to the question of how much common ownership should be permitted, consistent with our competition and diversity goals, rather than the cognizability of the interest. This issue is being considered in the TV Local Ownership and TV National Ownership proceedings.[186]

88. We also note that, under the EDP rule, above, we will attribute an inter-market time brokerage agreement or LMA (or any other program supply arrangement) that brokers more than 15 percent of a station's programming (*i.e.*, a program supplier, as defined above) when held in combination with more than 33 percent of the total assets (debt plus voting, non-voting and preferred stock) of a station. Prior to the EDP rule, an inter-market LMA would not have been attributed regardless of the level of non-voting equity and debt interests held by the brokering station. With the exception of the EDP rule, we will not attribute television time brokerage agreements between stations in different markets. We disagree with Pappas, which asserted that our proposal to treat television LMAs as cognizable interests must also apply to television network affiliation agreements and argued that, for attribution purposes, there is little substantive difference between an LMA and a network affiliation agreement, in that both involve the provision of television programming and the sale of television advertising time.[187]

89. In the *Radio Rules Order*, the Commission stated that time brokerage agreements involving radio stations licensed to different markets "raise little public interest concern; indeed they can be difficult to distinguish from network affiliation agreements, of which the Commission has long approved."[188] Both LMAs and network affiliation agreements clearly confer some level of influence over the programming and commercial time of a licensee. Neither, however, taken alone, constitutes an attributable interest. It is the combination of ownership of a *local* competing media interest *and* programming and direct operational influence via a substantial same-market LMA that raises our concern and drives our decision to attribute such LMAs under

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[185] Of course, a licensee's unauthorized abdication or transfer of control over the station would violate Section 310(d) of the Communications Act, 47 U.S.C. § 310(d). Moreover, with respect to whether an LMA confers control over a station, the Mass Media Bureau found that, in the instance of a single broker that purchased 140 hours out of a station's 168 hours, there was no unauthorized transfer of control under Section 310(d) as the complainant had not documented its allegations that the broker had taken over station operation in a manner outside the ordinary course of time brokerage agreements. *See* Letter to Roy R. Russo, Esquire and Lawrence N. Cohn, Esquire, Counsel, Spanish Radio Network, from Roy J. Stewart, Chief, Mass Media Bureau, Federal Communications Commission, 5 FCC Rcd 7586-87 (1990) ("*Russo*").

[186] *See TV Local Ownership Order*; *TV National Ownership Order*.

[187] To the extent there is a distinction between network affiliation agreements and LMAs, Pappas contended that the potential to exert control and/or influence over a television station's programming is substantially greater under an affiliation agreement. Pappas argued that, for example, there is no Commission rule limiting the amount of time that networks may provide under an affiliation agreement; affiliation agreement preemption and related penalty provisions are substantially more restrictive than such provisions in LMAs; and, more importantly, established networks have nationwide influence that result in stronger control over affiliates than a brokering station could ever attain under an LMA. Comments in response to Attribution Further Notice of Pappas at 12-13.

[188] *Radio Ownership Order*, 7 FCC Rcd at 2788, n. 126.

our multiple ownership rules. This concern does not arise where there is no such combination of interests, as for example, network affiliation contracts or out-of-market LMAs unaccompanied by substantial investment in the programmed station. It is only when an out-of-market LMA provides more than 15 percent of a station's programming, in addition to holding an investment of more than 33 percent of total assets of the station, that we deem the level of influence sufficient to warrant attribution.[189] Under those circumstances, as discussed more fully in Section III.B. hereof, where substantial investment in the licensee is combined with provision of substantial quantities of programming, we believe that the level of influence is sufficient to warrant attribution regardless of the fact that the programming provider is not a media entity in the same market. And, as we have noted, where the program supply agreement takes the form of a network affiliation agreement, the network, like the out-of-market LMA broker, will have its interest in its affiliate attributed if it invests in the affiliate above the EDP threshold.

90. Modify radio rules. In our *Attribution Further Notice*, we stated that if we adopt our proposal for attributing television LMAs, we would also consider similarly modifying the radio LMA rules (47 C.F.R. § 73.3555(a)(3)), because radio LMAs are currently considered only for purposes of applying the radio duopoly rule (47 C.F.R. § 73.3555(a)(1)), and invited comment on how the radio LMA attribution rules should be modified in this regard.[190] Paxson, the only commenter to address this issue, generally argued against attributing radio or television LMAs for purposes of ownership restrictions other than the duopoly rules.[191] We have decided to adopt our proposal to attribute same-market radio LMAs for purposes of applying our other multiple ownership rules that are applicable to radio stations, including, for example, the daily newspaper cross-ownership rule,[192] and the one-to-a-market (or radio-television cross-ownership) rule.[193] The other attribution rules apply across the board, and there is no reason not to apply attribution of radio LMAs consistently to all applicable radio ownership rules. Accordingly, we will modify our radio LMA attribution rules to reflect this change.[194]

91. Grandfather Newly Attributable Radio LMAs. We are unaware of whether and to what extent there may be existing intra-market radio LMAs that would violate the newspaper-radio cross ownership rule or the one-to-a-market rule (or radio-television cross-ownership rule). Accordingly, we intend to review the issue of grandfathering in any such existing cases on a case-by-case basis so that we can take account of any equities and particular factual circumstances that inform such cases. We invite any holder of a radio LMA that now finds itself in violation of the radio-television cross-ownership rule or the newspaper-radio cross-ownership

[189] *See* the discussion regarding attribution of program suppliers holding investments of more than 33 percent of the total assets of the licensee, Section B, *supra.*

[190] *Attribution Further Notice*, 11 FCC Rcd at 19908.

[191] *See* ¶ 76, *supra*.

[192] 47 C.F.R. § 73.3555(d).

[193] 47 C.F.R. § 73.3555(c).

[194] For example, under our modified radio LMA attribution rule, a radio station that brokers more than 15 percent of the programming of another station in the same service (*i.e.*, AM or FM service) in the same market would have the brokered station attributed to it and counted in determining whether it complies with the one-to-a-market rule.

rule to bring that case to our attention and seek a ruling on the issue of grandfathering. The new rules will apply to all cases arising after their effective date.

92. Requirement to File TV LMAs. In our *Attribution Further Notice*, we incorporated from the *TV Local Ownership Further Notice* the tentative proposal that attributable television LMAs be filed with the Commission in addition to being kept at the stations involved in an LMA.[195] In the *Radio Ownership Order*, the Commission required that all radio time brokerage contracts be placed in the public inspection files of the stations involved, and that local time brokerage agreements be filed with the Commission within 30 days of execution.[196] The Commission noted that these requirements would impose only a minimal burden on licensees but would permit it and others to monitor time brokerage agreements to ensure that licensees retain control of their stations and adhere to the Communications Act, Commission Rules and policies and the antitrust laws.[197] We believe that these same reasons are valid today with respect to television time brokerage agreements.

93. DOJ supported our proposal for a notification and filing requirement for television LMAs. According to DOJ, the fact that television LMAs (unlike similar arrangements in the radio industry) historically have not been subject to any type of reporting requirement has had the practical effect of limiting scrutiny of such arrangements by either the Commission or antitrust authorities. DOJ urged the Commission to adopt some form of reporting requirement for television LMAs that will allow meaningful review and monitoring of these arrangements by the Commission, and, where appropriate, by antitrust enforcement authorities through a review of materials provided by the Commission.[198]

94. We will require stations involved in television time brokerage agreements (inter-market as well as intra-market agreements) to keep copies of those agreements in their local public inspection files, with confidential or proprietary information redacted where appropriate, and require the licensee that is the brokering station to file with the Commission, within 30 days of execution of such agreement, a redacted copy of any time brokerage agreements that would result in the arrangement being attributed in determining the brokering licensee's compliance with the multiple ownership rules.[199] We will amend our rules accordingly.[200]

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[195] *See TV Local Ownership Further Notice*, 10 FCC Rcd at 3583. *See* 47 C.F.R. § 73.3613(d).

[196] This requirement parallels the existing provisions of our rules which oblige licensees to file other relevant contractual agreements within 30 days of their execution. *See* 47 C.F.R. Section 73.3613.

[197] *Radio Ownership Order*, 7 FCC Rcd at 2789.

[198] DOJ Letter, at 22-23.

[199] For example, a television station would be required to file a time brokerage agreement with the Commission where: (1) that agreement involves providing more than 15 percent of the weekly programming hours of another television station in the same market (as the agreement would therefore be *per se* attributable), or (2) where that agreement involves providing more than 15 percent of the programming of a station in another market and the brokering station has an interest in the brokered station that exceeds the EDP threshold.

[200] We will amend 47 C.F.R. § 73.3613(d) (filing of radio time brokerage agreements) to include our new requirements for filing television LMAs, and we will delete reference to "contracts relating to the sale of television broadcast time to`time brokers' for resale" from 47 C.F. R. § 73.3613(e) (contracts and agreements not filed but kept available at the station for inspection upon request by the FCC).

We note that these provisions impose an affirmative obligation on licensees to determine, in the first instance, whether a particular LMA is attributable (either under the *per se* rule or the EDP rule), and to file the agreement with the Commission if it is.

95. Programming responsibility safeguards. In our *Attribution Further Notice*, we emphasized, as we did in our radio ownership proceeding,[201] "that the licensee is ultimately responsible for all programming aired on its station, regardless of its source," and invited comment on what, if any, specific safeguards we should adopt with respect to television LMAs to ensure a brokered station's ability to exercise its programming responsibility.[202] We believe that attribution of same-market television LMAs, along with our new filing requirements, will subject LMAs arrangements to sufficient scrutiny by competitors, the public and the Commission, that brokering stations will have strong incentives to avoid unauthorized acquisition of control of the brokered station. We remind all parties to LMAs that, as we noted in the *Radio Ownership Order*, "our rules require the licensee to maintain control over station management and ultimate programming decisions, regardless of any time brokerage agreements that may exist."[203]

96. Simulcasting. In our *Attribution Further Notice*, we stated that we would resolve the issue, raised in the *Local Ownership Further Notice*,[204] as to whether the program duplication or simulcasting limits that apply to commonly owned or time brokered radio stations should apply to television LMAs.[205] No commenters addressed this particular question, although some argue generally that LMAs result in duplicative programming.[206] Other commenters disagree, pointing out that, from the perspective of a time broker, time brokerage agreements pay off through the ability to attract additional, new audiences to the brokered station. A duplication of programming would not attract additional audiences, but would merely divide the audience currently enjoyed by the time broker's owned station with the audience of the brokered station.[207]

97. With respect to radio broadcasting, "simulcasting," or program duplication, refers to the simultaneous broadcasting of a particular program over co-owned stations serving the same market, or the broadcasting of a particular program by one station within 24 hours before or after the identical program is broadcast over the other station.[208] In the *Radio Ownership Order*, the Commission limited simulcasting on commonly owned stations in the same service serving substantially the same area to 25 percent of the broadcast

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201 *Radio Ownership Reconsideration*, 7 FCC Rcd at 6401.

202 *Attribution Further Notice*, 11 FCC Rcd at 19910.

203 *Radio Ownership Order*, 7 FCC Rcd at 2761, n. 30.

204 *TV Local Ownership Further Notice*, 10 FCC Rcd at 3583.

205 *Attribution Further Notice*, 11 FCC Rcd at 19908.

206 *See e.g.*, Comments in response to Attribution Further Notice of Centennial at 6-7.

207 *See e.g.*, Reply Comments in response to Attribution Further Notice of SJL at 7.

208 *Radio Ownership Order*, 7 FCC Rcd at 2783, n. 110.

schedule,[209] stating that it saw no benefit to the public from permitting commonly owned same-service stations in the same market to substantially duplicate programming. The Commission reasoned that the limited amount of available radio spectrum[210] could be used more efficiently by other parties to serve competition and diversity goals, and that substantial same-service simulcasting would not aid economically disadvantaged stations because the audience for the programming in question would be shared by two or more stations.[211]

98. At this time, we will not apply simulcasting limits to television LMAs. We are not aware that broadcasters involved in television LMAs are simulcasting their programming to any significant extent. Moreover, we believe such simulcasting is unlikely to occur because it would most likely work to the disadvantage of the stations engaged in the LMA. We note that television coverage differs from radio, in that there are fewer television stations per market, and those stations cover a larger market area than do radio stations.[212] We assume that if television stations commonly operated under an LMA in the same market simulcast programming, they would split the audience for that programming between themselves, losing the audience for alternative programming to other television stations in that market. Because stations' advertising revenues are generally based on audience share, revenue and basic profits would be negatively affected by such practices. There consequently appears to be a significant market disincentive against simulcasting in the context of same-market television LMAs. To the extent that simulcasting occurs, it may reflect the owner's (or broker') attempt to maximize the audience reach within the DMA. As indicated above, we received no comments specifically addressing this question, nor have we seen any evidence that the concerns with respect to simulcasting by commonly owned or time brokered radio stations apply to television stations operating under LMAs. Should we find evidence to the contrary at a future date, we may, of course, revisit this decision.

99. Grandfather Existing LMAs. In our *Attribution Further Notice,* we stated that if we decided to attribute television LMAs as we proposed in this proceeding, we intended to resolve the issues of grandfathering, renewability and transferability of existing TV LMAs in the separate TV Local Ownership proceeding so that we could evaluate the extent to which grandfathering might be needed based on the nature of the local ownership rules we adopt.[213] These issues are outside the scope of this proceeding, and, as we noted in the *Attribution Further Notice*, will be resolved in the *TV Local Ownership Order*.

D. **Cross-Interest Policy**

1. *Background*

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[209] *Radio Ownership Order*, 7 FCC Rcd at 2784.

[210] 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. *Id*.

[211] The Commission noted that limited simulcasting, particularly where expensive, locally produced programming such as on-the-spot news coverage is involved, could economically benefit stations and would not so erode diversity or undercut efficient spectrum use as to warrant preclusion. It stated its belief that the restriction it adopted appropriately balanced those competing concerns. *Id*.

[212] Television DMAs are generally larger than radio metro markets.

[213] *Attribution Further Notice*, 11 FCC Rcd at 19910.

100. Overview. The cross-interest policy has been applied to preclude individuals or entities from holding an attributable interest in one media property (broadcast station, newspaper, cable system) and having a "meaningful" albeit nonattributable interest in another media entity serving "substantially the same area."[214] This policy originally developed as a supplement to the multiple ownership "duopoly" rule which prohibited the common ownership, operation, or control of two stations in the same broadcast service serving substantially the same area. Ownership, operation or control as contemplated by this rule was originally defined as actual control or ownership of 50 percent or more of the stock of a licensee. Since this definition did not encompass minority stock ownership, positional interests (such as officers and directors), and limited partnership interests, the cross-interest policy was developed to address the competitiveness and diversity concerns created when a single entity held these types of otherwise permissible interests in two (or more) competing outlets in the same market.[215] In essence, the cross-interest policy filled gaps in our attribution criteria that had become apparent through our case-by-case application of the ownership rules.

101. Through case-by-case adjudication, the following relationships came to be viewed as constituting "meaningful" interests subject to the cross-interest policy: key employees, joint ventures, nonattributable equity interests, consulting positions, time brokerage arrangements, and advertising agency representative relationships.[216] The cross-interest policy did not prohibit these interests outright, but required an *ad hoc* determination regarding whether the nonattributable interests at issue in each case would be permitted.

102. In 1989, after a comprehensive review to assess the continuing need for the cross-interest policy, the Commission issued a *Policy Statement* limiting the scope of the cross-interest policy so that it would no longer apply to consulting positions, time brokerage arrangements and advertising agency representative relationships.[217] The Commission decided that it no longer needed to apply the cross interest policy to those relationships because: (1) the need for the policy had decreased based on new attribution provisions that had superseded it; (2) the costs to the public and the Commission of administering the policy were difficult to justify given the reduced need for continued oversight of these relationships; (3) growth of media outlets had undercut the notion that any single individual or entity could skew competition through the cross-interests at issue; and (4) alternative safeguards, such as antitrust laws, fiduciary duties and private contract rights were available to curb anti-competitive conduct.[218]

103. Current Aspects of the Cross-Interest Policy. After the *Policy Statement*, three aspects of the cross-interest policy remain in effect:

> (1) Key employee relationships. The cross-interest policy has generally prohibited an individual who serves as a key employee, such as general manager, program director, or sales

[214] *Notice of Inquiry* in MM Docket No. 87-154, 2 FCC Rcd 3699 (1987) ("*Cross-Interest Notice of Inquiry*").

[215] *See Attribution Notice*, 10 FCC Rcd at 3643.

[216] *See Cross-Interest Notice of Inquiry*, 2 FCC Rcd at 3699-3700.

[217] *Policy Statement* in MM Docket No. 87-154, 4 FCC Rcd 2208 (1989) ("*Cross-Interest Policy Statement*").

[218] *Id*. at 2211-13.

manager, of one station from having an attributable ownership interest in or serving as a key employee of another station in the same community or market.[219] The application of the cross-interest policy in these situations is premised on the potential impairment to competition and diversity and the apparent conflict of interest arising from the ability of key employees to implement policies to protect their substantial equity interest in the other station.

(2) Nonattributable equity interests. The cross-interest policy has also typically proscribed an individual who has an attributable interest in one media outlet from holding a substantial nonattributable equity interest in another media outlet in the same market.[220] The Commission's concern with these relationships has been that the individual could use the attributable interest in one media outlet to protect the financial stake in the other media outlet, thus impairing arm's length competition. (Two or more separate non-attributable interests in a market are not proscribed by this policy, as neither gives rise to the potential to influence station operations that would concern us.)

(3) Joint venture arrangements. The cross-interest policy has prevented two local broadcast licensees from entering into joint associations to buy or build a new broadcast station, cable television system, or daily newspaper, in the same market. These joint ventures have triggered cross-interest scrutiny because the successful operation of the joint venture was thought to require a cooperative relationship between otherwise competing stations, and this would impair competition in the local market.[221]

104. Prior Notices. In the *Cross-Interest Notice*, we asked for comments as to whether we should retain our cross-interest policy in these three areas -- key employees, non-attributable equity interests, and joint ventures. We also invited comment as to whether we should amend the attribution rules to incorporate the key employee portion of the cross-interest policy. We sought further comment on whether retention of the remaining named components of the cross-interest policy was necessary to prevent anticompetitive practices, whether alternative deterrent mechanisms exist to assure competition and diversity, and whether continued regulation of relationships not specifically addressed by the Commission's attribution rules is necessary. We also questioned whether regulatory oversight of one or more of these interests should be limited to geographic markets with relatively few media outlets. Five comments and reply comments were filed in response to the

[219] *See Cross-Interest Notice*, 4 FCC Rcd at 2035.

[220] Such nonattributable interests might include nonvoting stock, insulated limited partnership interests and minority stock interests in corporations having a single majority stockholder.

[221] We note, however, that certain joint ventures are now covered by our attribution and ownership rules. For example, our ownership rules would now cover the case in which the cross-interest policy was first applied to joint ventures, *Macon Television Co.*, 8 RR 703 (1952). In that case, we found that the cross-interest policy prohibited a joint venture involving two radio stations in the same market from acquiring a television station in that market. Today, each radio station's 50 percent interest in the television station would trigger the Commission's rule governing the common ownership of a commercial radio station and a commercial television station in the same market (one-to-a-market ownership rule). *See* 47 C.F.R. § 73.3555(c).

Cross-Interest Notice.[222] The majority of commenters urged the Commission to eliminate the cross-interest policy as it applies to all of these relationships.[223] One commenter, CFA/TRAC, urged the Commission to retain the policy. In the *Attribution Notice*, we sought to update the record with respect to retention of the cross-interest policy in light of changes in the multiple ownership rules and additional changes we were proposing to the attribution rules. In the *Attribution Further Notice*, we sought additional comment as to the effect on our cross-interest policy of our proposed equity/debt plus approach, which would apply to cases raising concerns of competition and diversity normally reflected in the cross-interest policy.[224] We also sought comment on whether the equity/debt plus approach would be preferable to a case-by-case approach, which is used to administer the cross-interest policy. We specifically noted that the bright line approach could provide certainty and minimize regulatory costs.[225]

2. *Comments*

105. Most commenting parties expressly discussing this issue favored eliminating at least portions, if not all of the cross-interest policy. ALTV, Capital Cities/ABC, CBS, CCA, Fox, FOE, M/C, and Group W urged complete elimination of the policy.[226] According to Capital Cities/ABC, the concerns about blunting competitive incentives that are the historical underpinning of the policy can be safeguarded in the context of antitrust enforcement. Capital Cities/ABC also argued that the administrative burdens and uncertainty of *ad hoc* decision making that impede the ability of broadcasters to raise capital outweigh the Commission's concerns where the FCC itself has determined that the interests in question lack the potential for influence sufficient to justify attribution.[227]

106. According to CBS, as well as others,[228] retention of the policy is unjustifiable in light of the growth of media outlets, the development of the attribution and ownership rules, other regulatory restrictions and legal remedies, the unnecessary burdens on media transactions, and the overall uncertainty which the policy

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[222] *See* Comments of CBS, Inc. ("CBS"), National Association of Broadcasters ("NAB"), and Home Shopping Network, Inc. ("HSN"); Reply Comments of Consumer Federation of America and Telecommunications Research and Action Center ("CFA/TRAC"); Capital Cities/ABC.

[223] *See* Comments of CBS at 2; Comments of NAB at 2; Reply Comments of Capital Cities/ABC at 5 (All filed in response to the *Cross Interest Notice*).

[224] *See Attribution Further Notice*, 11 FCC Rcd at 19902-03.

[225] *See Attribution Further Notice*, 11 FCC Rcd at 19907-08.

[226] *See* Comments in response to Attribution Notice of ALTV at 8-9; Comments in response to Attribution Notice of Capital Cities/ABC at 18-19; Comments in response to Attribution Notice of CBS at 16; Comments in response to Attribution Notice of CCA at 11; Comments in response to Attribution Notice of Fox at i-ii and Note 5; Comments in response to Attribution Notice of FOE at 14; Comments in response to Attribution Notice of M/C at 33; Comments in response to Attribution Notice of Westinghouse Broadcasting Company ("Group W") at 10.

[227] Comments in response to Attribution Notice of Capital Cities/ABC at 18-19.

[228] *See, e.g.*, Comments in response to Attribution Notice of M/C at 31-32; Comments in response to Attribution Notice of Group W at 10-11.

imposes. They argued that these detriments are not counterbalanced by any benefits. Since the Commission has adopted clear attribution rules based on its judgment as to which interests hold sufficient potential to influence or control a media property's operation to warrant regulatory restriction, CBS stated that there is no reason to retain a separate ambiguous policy to regulate the same kinds of interests. CBS added that although it does not support adoption of the equity/debt plus standard, it would be preferable to the "amorphous" cross-interest policy.[229] Knight-Ridder agreed that the equity or debt plus approach would be preferable to retaining the cross-interest policy.[230] Finally, Cook Inlet urged the Commission not to apply the cross-interest policy where refraining from applying the policy would enable a disadvantaged enterprise to benefit from training or expertise offered by another broadcast licensee.[231]

107. A few commenters either opposed elimination of the cross-interest policy, or urged the Commission not to change the rules. CFA/TRAC supported retaining the current cross-interest policy.[232] NABOB urged retention of the existing attribution rules, but did not specifically mention the cross-interest policy.[233] Finally, TCI stated that it favors the present case-by-case approach.[234]

108. Key Employees. Most commenters who addressed this aspect of the policy supported eliminating the cross-interest policy as it applies to key employees.[235] ALTV, CBS, NAB, and Capital Cities/ABC contended that key employees, particularly in smaller corporations, are frequently also officers, directors, or cognizable shareholders and, therefore, are regulated by the current attribution rules.[236] Moreover, CBS contended that to the extent that key employees are not restricted by the attribution rules, they are obligated to act in the best interests of their employer and to avoid potential conflicts of interest. According to CBS, internal conflict of interest policies and common law fiduciary duty and contract remedies ensure this.[237] CBS and FOE maintained that licensees have the incentive to police potential employee conflicts of interest, given

[229] Comments in response to Attribution Further Notice of CBS at 3, 6.

[230] Comments in response to Attribution Further Notice of Knight-Ridder at 3.

[231] Comments in response to Attribution Notice of Cook Inlet Region Inc. at 17-18.

[232] *See* Comments in response to Cross Interest Notice of CFA/TRAC at 15.

[233] Comments in response to Attribution Notice of NABOB at 10-11.

[234] Comments in response to Attribution Further Notice of TCI at 20.

[235] *See, e.g.,* Comments in response to Attribution Notice of ALTV at 9; Comments in response to Attribution Notice of NAB at 4; Comments in response to Attribution Notice of Capital Cities/ABC at 18-19; Comments in response to Cross Interest Notice of CBS at 18.

[236] *See* Comments in response to Attribution Notice of ALTV at 9; Comments in response to Attribution Notice of Capital Cities/ABC at 18-19; Comments in response to Cross Interest Notice of CBS at 18; Comments in response to Cross Interest Notice of NAB at 5-6.

[237] *See* Comments in response to Cross-Interest Notice of CBS at 18-19; Comments in response to Cross-Interest Notice of NAB at 5. CBS attached to its comments a copy of its conflict of interest policy.

the competitive marketplace in which they operate.[238]

109. CFA/TRAC and London Bridge Broadcasting, Inc., on the other hand, urged the Commission to retain the cross-interest policy as it applies to key employees, contending that the influence of key employees on station operations is akin to that of station owners, and therefore they should be treated similarly for purposes of attribution. These parties questioned the efficacy of the conflict of interest policies and other remedies in deterring abuse.[239]

110. Nonattributable Equity Interests. Most commenters urged the Commission to stop applying the cross-interest policy to nonattributable equity interests, questioning the continued need for cross-interest review in light of the amended attribution provisions of the multiple ownership rules.[240] They argued that any residual concerns not covered by the Commission's ownership rules can be deterred by the competitive marketplace as well as remedies provided by private contracts, federal and state antitrust laws, and fiduciary duties and that the *ad hoc* nature of the cross-interest policy imposes administrative burdens and creates uncertainty, impeding the ability of broadcasters to raise capital. According to CalPERS, this uncertainty imposes administrative burdens on investors and impedes the ability of broadcasters to attract equity investment capital because this policy can be invoked to prohibit a seemingly permissible transaction. In contrast, CFA/TRAC urged the Commission to retain the cross-interest policy as it applies to nonattributable equity interests, arguing that this policy continues to serve an important role and that the uncertainty produced by *ad hoc* application of the policy is not as great as other commenters indicate.[241]

111. Joint Ventures. Most commenters urged the Commission to eliminate cross-interest review of joint ventures. In support of this position, the commenters argued that cross-interest regulation of joint ventures has been largely displaced by the current attribution rules. They maintained that where the interests involved are not attributable, such interests lack the requisite potential for influence to warrant regulatory scrutiny. These parties also asserted that the marketplace is sufficiently competitive to deter abuse in this area, and that the antitrust laws provide an additional safeguard.[242] Only CFA/TRAC disagreed. It argued that continued

[238] *See* Comments in response to Attribution Notice of FOE at 15-16; Comments in response to Cross-Interest Notice of CBS at 19.

[239] Comments in response to Cross Interest Notice of CFA/TRAC at 9-13; Comments in response to Cross Interest Notice of London Bridge at 1-2.

[240] *See* Comments in response to Cross-Interest Notice of CBS at 15-17; Comments in response to Cross-Interest Notice of NAB at 5-7; Comments in response to Cross-Interest Notice of HSN at 3-6; Comments in response to Cross-Interest Notice of Cox at 8-13; Comments in response to Cross-Interest Notice of Morgan Stanley at 17-19; Comments in response to Attribution Notice of CalPers at 23; Comments in response to Attribution Notice of EZ Communications, Inc. ("EZ") at 5; Comments in response to Attribution Notice of Goldman Sachs at 11; Comments in response to Attribution Notice of Silver King Communications Inc. ("SK") at 10.

[241] Comments in response to Cross-Interest Notice of CFA/TRAC at 5.

[242] Comments in response to Cross-Interest Notice of NAB at 6; Comments in response to Attribution Notice of Capital Cities/ABC at 18-19; Comments in response to Attribution Notice of CBS at 16; Comments in response to Attribution Notice of CCA at 11; Comments in response to Attribution Notice of M/C at 31; Comments in

regulation of joint ventures pursuant to the cross-interest policy is necessary, especially given the Commission's relaxation of the multiple ownership rules. CFA/TRAC questioned whether joint venturers will compete vigorously at all times, and argued that "advertising and promotion practices, sales territories and audience selection -- not to mention cross-interest -- can complement the interests of joint venturers."[243]

3. *Decision*

112. We will eliminate the above noted remaining components of the cross interest policy. Our goals in initiating this proceeding include maximizing the clarity of the attribution rules, providing reasonable certainty and predictability to parties to allow transactions to be planned, and easing application processing.[244] As discussed above, commenters have argued that the vagueness and uncertainty imposed by the *ad hoc* application of the cross-interest policy have chilled investment. As CalPERS argues, this uncertainty impedes the ability of broadcasters to enter into transactions because the policy can be invoked to prohibit a seemingly permissible transaction.[245]

113. Today, we have revised the attribution rules to adopt the EDP rule, a bright line test, which we believe will increase regulatory certainty and reduce regulatory costs. In adopting that rule, we will reach those situations involving formerly nonattributable interests that raised the most concern with respect to issues of competition and diversity, some of which were previously addressed in administering the cross-interest policy. We agree with commenters who argue that adoption of the EDP rule, as well as the existence of the other attribution rules, provides additional grounds for elimination of the cross-interest policy.

114. We note that the EDP rule directly covers concerns treated under the non-attributable interests prong of the cross-interest policy, as it would attribute a substantial nonattributable interest by a media entity in a second media outlet in the same market. We recognize, however, that the EDP rule does not cover all the areas encompassed by the cross-interest policy. It would not cover key employees, for example. We nonetheless believe, as commenters have pointed out, that internal conflict of interest policies, common law fiduciary duty, and contract remedies provide adequate substitutes for our administration of the policy with respect to key employees.[246] In addition, many key employees are also officers and directors and are thus already covered by the attribution rules. In any event, we believe that the very small risk of harm to competition by a key employee in an instance not covered by any of these other regulations and remedies is greatly outweighed by the benefits of minimizing our case-by-case approach to transactions and applying bright line tests, such as the EDP test and our other attribution rules.

115. With respect to joint ventures, we believe that application of a cross-interest policy is

response to Attribution Notice of Group W at 11.

243 Reply Comments in response to Cross-Interest Notice of CFA/TRAC at 15.

244 *See Attribution Notice*, 10 FCC Rcd at 3610.

245 *See* Comments in response to Attribution Notice of CalPers at 23.

246 *See* Comments in response to Cross-Interest Notice of CBS at 18-19; Comments in response to Cross-Interest Notice of NAB at 5.

unwarranted. The ownership and attribution rules define the level of combined ownership that is permissible in the local market. Many joint ventures are already covered by the attribution/ownership rules, and they may also be covered to some extent by the EDP rule. Accordingly, a joint venture between two licensees in a market to acquire additional broadcast entities in the same market may be subject to the radio-television cross-ownership rule or the relevant duopoly rule. As CBS contended, to continue to regulate these interests under a separate policy when many are covered by the attribution rules is redundant. In addition, according to CBS, the *ad hoc* application of the cross-interest policy has "clouded the future of potential joint ventures with uncertainty" regarding their eventual approval by the Commission.[247] We agree that the cross-interest policy as applied to joint ventures is largely subsumed by the application of the current multiple ownership rules. To the extent that the cross-interest policy is not so subsumed, we believe that it should be eliminated. We have made a judgment to limit combined local ownership to certain degrees, as delineated in our local ownership rules. Accordingly, it makes no sense to have a routine additional layer of case-by-case review for those joint ventures that fully comply with those rules. In these cases, the burdens of case-by-case review are not justified for transactions that already comply with the multiple ownership rules. Furthermore, as other commenters noted, the application of the antitrust laws should prevent or remedy any abuses of joint venture relationships not already subject to the multiple ownership rules.[248]

116. In sum, we believe that the regulatory costs and the chilling effects of the cross-interest policy and the benefits of applying a clear and discernable standard outweigh any risks of potential abuses in eliminating the policy. Moreover, many remaining aspects of the cross-interest policy are subsumed under our attribution rules, as revised herein. Of course, as stated above, ¶ 44, supra, we retain the discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review.

E. **Joint Sales Agreements (JSAs)**

117. Background. In the *Attribution Notice*, we requested comment on whether, through multiple cooperative arrangements or contractual agreements, broadcasters could so merge their operations as to implicate our diversity and competition concerns.[249] We noted, however, that we did not intend to reopen our earlier decisions permitting joint sales practices in radio and television. These decisions had allowed joint sales agreements ("JSAs") (*i.e.*, agreements for the joint sales of broadcast commercial time), subject to compliance with the antitrust laws.

118. After issuing the *Attribution Notice*, the staff was presented with cases involving joint sales agreements that raised diversity and competition concerns. These cases raised questions as to whether non-ownership mechanisms such as JSAs that might convey influence or control over advertising shares should be considered attributable under certain circumstances. Accordingly, in the *Attribution Further Notice* we invited

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[247] Comments in response to Cross Interest Notice of CBS at 23; Comments in response to Attribution Notice of CBS at 17.

[248] Comments in response to Attribution Notice of Capital Cities/ABC at 18-19; Comments in response to Attribution Notice of CBS at 16; Comments in response to Attribution Notice of CCA at 11; Comments in response to Attribution Notice of M/C at 31; Comments in response to Attribution Notice of Group W at 11.

[249] *Attribution Notice*, 10 FCC Rcd at 3649-3651.

additional comments on the potential effects of JSAs among same-market broadcasters on diversity and competition. We also sought comment on whether we should attribute JSAs among licensees in the same market, including both radio and television licensees, irrespective of whether they are accompanied by the holding of debt or equity. In addition, we sought general information concerning the typical contractual terms of JSAs.[250]

119. Comments. Most commenters opposed attributing JSAs. Paxson argued that JSAs, even if coupled with debt or equity interests, should not be considered attributable interests. Paxson noted that the Conference Report on the 1996 Act "praised" the public interest benefits of JSAs, as well as LMAs and other cooperative arrangements.[251] According to Paxson, JSAs affect only a limited aspect of station operations, namely sales, and hence JSAs do not raise concerns equivalent to those associated with LMAs. In particular, Paxson argued, JSAs do not implicate the diversity concerns that underlie the Commission's ownership rules. To the extent that JSAs may raise competitive concerns, Paxson argued that such concerns can be addressed by antitrust review by the Department of Justice.[252]

120. Diversified also opposed making same-market JSAs attributable under any circumstances, even if the parties have other relationships which relate to the debt or equity of the station in question. Diversified cited the cooperative benefits of JSAs, in terms of advertising sales and other matters, that do not require stations to give up their independence. Diversified also argued that the Commission has not presented evidence demonstrating that licensees are losing ultimate control over their stations through JSAs. According to Diversified, changing Commission policy now to regulate JSAs more strictly is unwarranted, especially in light of Congressional deregulation of the telecommunications industry and increasing competition from other video operators within the video marketplace.[253]

121. BET and DOJ argued that JSAs should be attributable. DOJ specifically focused on JSAs between same-market radio stations. According to BET and DOJ, control over spot sales by one station affords significant power over the other, and non-attribution of JSAs would allow entities to bypass restrictions on national and local ownership and increase consolidation in the TV market.[254] BET contended that such consolidation would adversely affect competition by increasing barriers for new entrants.[255] DOJ further contended that since radio JSAs place pricing and output decisions for the affected stations under the control of a single firm, competitive rivalry between those stations is eliminated, just as it would be in a merger.

[250] *Attribution Further Notice*, 11 FCC Rcd at 19911-12.

[251] Comments in response to Attribution Further Notice of Paxson at 27.

[252] Comments in response to Attribution Further Notice of Paxson at 29. We note that several issues raised in the *Attribution Further Notice* related to JSAs were not addressed by commenters. These included questions concerning typical contractual terms of JSAs (contract lengths, renewability, compensation, and package deals), whether the broker gets involved in station operations, and whether time brokerage agreements usually accompany JSAs.

[253] Comments in response to Attribution Further Notice of Diversified at 6-7.

[254] Comments in response to Attribution Further Notice of BET at 6; DOJ Letter at 8-9.

[255] Comments in response to Attribution Further Notice of BET at 6.

According to DOJ, the competitive concerns that arise from increased concentration in a market, therefore, are directly implicated by radio JSAs. DOJ also recommended that the Commission adopt rules requiring the disclosure of radio JSAs to the Commission to enable monitoring of these arrangements by the Commission and antitrust enforcement authorities.[256]

122. Decision. We will not attribute JSAs. Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be attributed.[257] We define JSAs as contracts that affect primarily the sales of advertising time, as distinguished from LMAs, which may affect programming, personnel, advertising, physical facilities, and other core operations of stations. We note that in our *DTV Fifth Report and Order*, we stated that we would look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology.[258] JSAs may be one such joint business arrangement. We recognize the significant competitive concerns about same-market radio JSAs raised by DOJ, but we also note that the factors considered by DOJ and the Commission in analyzing business arrangements may differ in some respects. Although both DOJ and the Commission are concerned about the competitive consequences of business agreements such as JSAs, our concerns are not identical. DOJ's comments explicitly recognize that in addition to competition issues, the Commission is also concerned with issues of diversity and reducing unnecessary administrative burdens.[259] Some JSAs may actually help promote diversity by enabling smaller stations to stay on the air. Furthermore, to reduce administrative burdens, we will not require the routine filing of JSAs with the Commission.

123. Accordingly, after weighing competition, diversity, and administrative concerns, we decline to impose new rules attributing JSAs as long as they deal primarily with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs.[260] We will retain our current policies concerning JSAs.[261] Furthermore, in the absence of specific evidence of widespread abuse of JSAs by broadcasters, we also decline to adopt the

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[256] DOJ Letter at 9-10.

[257] As stated in the *Attribution Notice*, in considering revisions to the mass media attribution rules, we seek to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under the multiple ownership rules. Our judgment as to what level of "influence" should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions. *Attribution Notice*, 10 FCC Rcd at 3609-10.

[258] *See DTV Fifth Report and Order*, 12 FCC Rcd at 12834-35.

[259] DOJ Letter at 7.

[260] With respect to attribution of LMAs, see ¶¶ 83-99, *supra*.

[261] As we reiterated in the *Attribution Further Notice*, separately owned stations can function cooperatively in terms of advertising sales and other aspects "so long as each licensee retains control of its station and complies with the Communications Act, the Commission's rules and policies and the antitrust laws." *Attribution Further Notice*, at n. 57, *quoting*, *Radio Ownership Order*, 7 FCC Rcd at 2787.

general disclosure and reporting requirement for radio JSAs recommended by DOJ in its comments. We will, however, require broadcasters who have entered into JSAs to place such agreements in their public inspection files, with confidential or proprietary information redacted where appropriate.[262] This requirement will facilitate monitoring of JSAs by the public, competitors and regulatory agencies. We do, however, retain discretion, in any event, to review cases involving radio or television JSAs on a case by case basis in the public interest, where it appears that such JSAs do pose competition or other concerns.[263] Finally, we emphasize that all JSAs are of course still subject to antitrust laws and independent antitrust review by the Department of Justice.[264]

F. **Partnership Interests**

124. Background. Under the Commission's current attribution rules governing partnership interests, general partners and non-insulated limited partnership interests are attributable, regardless of the amount or percentage of equity held. An exception from attribution applies only to those limited partners who meet the Commission's insulation criteria and certify that they are not materially involved in the management or operations of the partnership's media interests.[265]

125. The *Attribution Notice* asked for comment on whether the insulation criteria remain effective and specifically whether the insulation criteria needed to be tightened or relaxed to meet the needs of certain new types of business entities. For example, widely-held limited partnerships, and in particular business development companies, may be required by federal and state statutes to grant voting rights to limited partners in such matters as the selection and removal of general partners. However, the insulation criteria require that such voting rights be restricted, except under certain circumstances, in order to support a presumption of

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262 We will accordingly amend Section 73.3526 of the Commission's Rules, 47 C.F.R. § 73.3526, which sets forth the public inspection file requirements for broadcasters, and Section 73.3613(e) of the Commission's Rules, 47 C.F.R. § 73.3613(e), which discusses station agreements that must be kept on file at the station and made available for inspection by Commission personnel upon request.

263 *See*, *e.g*., *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135, 19142 (1996).

264 *See Radio Ownership Order*, 7 FCC Rcd at 2787; *Notice of Proposed Rulemaking, Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3281 (1991).

265 These "insulation criteria" include the following: (1) the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company; (2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises; (3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its business; (4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions; (5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) the limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business; and (7) the limited partner may not become actively involved in the management or operation of the media businesses of the partnership. *See Attribution Reconsideration*, 58 RR2d at 618-20, *on recon*., 1 FCC Rcd at 802-03.

partner non-involvement in the management of the partnership. The *Attribution Notice* inquired whether the insulation criterion should be relaxed to remove this potential conflict with state law, or whether equity benchmarks combined with a more limited relaxation of the insulation criteria should be applied to these widely-held limited partnerships. We noted that commenters in response to the *Capital Formation Notice* had argued that allowing specific voting rights would not compromise our attribution rules since: (1) the remaining insulation criteria are sufficient to prevent material involvement of a partnership member in media operations; and (2) the dispersed interests in a widely-held limited partnership would preclude member involvement in management and operations.[266]

126. In addition, the *Attribution Notice* asked whether an equity benchmark, such as 5 percent, should be used to establish attribution with respect to all "widely-held" limited partnerships, and if so, how should the Commission define widely-held limited partnerships, and what factors could be used to guarantee that these entities remain widely-held. More generally, the *Attribution Notice* asked whether an equity benchmark, under which investments below the threshold would be exempted from the insulation criteria and would be held non-attributable, should be applied to all partnership forms, widely-held or not. In this latter case, the *Attribution Notice* asked whether we should set the equity benchmarks for partnership interests along lines similar to those used for voting corporate equity interests. We stated, however, that, based on the record thus far, we were not inclined to apply an equity benchmark to limited partnerships but would instead retain the insulation criteria, and that parties that disagreed must provide us with more data and analysis to demonstrate that our earlier decision to apply the insulation criteria is no longer justified. We also asked for information on the financial and legal structures of limited partnerships to enable us to determine whether there is a uniform equity level below which we need not be concerned with the application of the insulation criteria.[267]

127. Comments. No commenters favored adding to the current list of insulation criteria. M/C asked the Commission to clarify: (1) that when the limited partnership is the licensee, or holds a controlling interest in the licensee, then an insulated limited partner may not serve as an employee or contractor, or perform broadcast-related services to the licensee, but that it is not precluded from providing such general services as "banking, insurance, legal and accounting services, real estate management, and the like"; (2) that no insulation restrictions apply to a limited partner if the limited partnership holds a noncontrolling interest in the licensee; (3) that no insulation restrictions apply to officers and directors of the limited partner when the limited partner is an entity, rather than a natural person; and (4) that an insulated limited partner may vote to remove a general partner for cause.[268]

128. Commenters such as CalPERS, FOE and ALTV argued that the insulation criteria should be

[266] *Attribution Notice*, 10 FCC Rcd at 3635-36.

[267] *Attribution Notice*, 10 FCC Rcd at 3637-38.

[268] Comments in response to Attribution Notice of M/C at 30-31. CalPERS and Freeman Spogli & Co., Inc. ("Freeman") echoed this last question. Comments in response to Attribution Notice of CalPERS at 7; Comments in response to Attribution Notice of Freeman at 7. Goldman also sought clarification on whether limited partners are precluded from providing investment banking services to the licensee under the insulation criteria. Comments in response to Attribution Notice of Goldman at ii.

modified to avoid conflicts with state law.[269] M/C suggested using RULPA (Revised Uniform Limited Partnership Act) standards or applicable state law requirements in place of the current criteria.[270] Capital Cities/ABC argued that the insulation criteria should be replaced with a simple pledge by the interest holder of non-involvement. Capital Cities/ABC also inquired whether insulation of a network's limited partnership interests precluded an affiliation agreement with the broadcaster.[271] Finally, Fox argued that the insulation criteria should be eliminated, and equity benchmarks substituted in their place.[272]

129. On the issue of equity benchmarks for limited partnerships, CalPERs maintained that the participation and influence of a 5 percent interest holder in a limited partnership is essentially indistinguishable from that of such an interest holder in a corporation and should be treated under identical attribution rules. CalPERS also argued that business development companies should not be treated separately, and stated that it is unclear how to define a widely-held limited partnership.[273] Freeman urged the Commission to adopt a 20 percent equity benchmark for limited partners in investment partnerships, and to retain insulation criteria for partners that exceed the benchmark level. Freeman argued that the insulation criteria are designed for smaller "operating" partnerships, rather than for large "investment" partnerships whose limited partners are mostly institutional investors and that some type of passive investor approach should be adopted to encourage investments from this latter form of limited partnership.[274] Finally, M/C also favored using an equity benchmark approach, if a control standard is not adopted.[275]

130. Decision. We see no reason to revise our previous decision to treat limited partnership interests as distinct from corporate voting equity interests,[276] and therefore elect not to adopt equity benchmarks for limited partnership interests. As we stated in the *Attribution Further Reconsideration*, "[t]he partners in a limited partnership, through contractual arrangements, largely have the power themselves to determine the rights of the limited partners."[277] Therefore, the insulation criteria adopted by the Commission serve to identify those situations within which it is safe to assume that a limited partner cannot be "materially involved" in the media management and operations of the partnership.[278] As we also stated therein, the powers of a limited

[269] Comments in response to Attribution Notices of CalPERS at 6; Comments in response to Attribution Notice of FOE at 10-12; Comments in response to Attribution Notice at 8.

[270] Comments in response to Attribution Notice of M/C at 24.

[271] Comments in response to Attribution Notice of Capital Cities/ABC at 11.

[272] Comments in response to Attribution Notice of Fox at 18-21.

[273] Comments in response to Attribution Notice of CalPERS at 2.

[274] *Id*.

[275] Comments in response to Attribution Notice of M/C at 25-27.

[276] *Attribution Further Reconsideration*, 1 FCC Rcd at 803-04.

[277] *Id*.

[278] *Id*.

liability holder to exert influence or control are not necessarily proportional to their equity investment in the limited partnership, since the extent of these powers can be modified by the contractual arrangements of the limited partnership.[279] In the *Attribution Notice*, we stated our disinclination to change our approach of applying insulation criteria in favor of an equity benchmark, and we have not been provided sufficient evidence to revise that view and to indicate that these original reasons for declining to adopt an equity benchmark for limited partnerships are no longer valid.

131. We also see no need at this time to add to, relax, or otherwise revise our limited partnership insulation criteria. Some commenters suggested that the insulation criteria should be modified to eliminate conflicts with state law, or that RULPA or other relevant standards should be used in their place. However, in our *Attribution Reconsideration*, the Commission decided for several reasons to abandon the use of RULPA, combined with a no material involvement standard, as a standard for judging whether limited partners were exempt from attribution.[280] First, we judged the joint use of these two disparate standards for determining limited partner exemptions from attribution to be unnecessarily complicated. Second, we noted that there was a lack of uniform interpretation of the RULPA provisions, and that the scope of permissible limited partner activities was not statutorily set by RULPA, but rather was determined by the limited partnership agreement itself. Third, we determined that reliance on the RULPA provisions did not provide sufficient assurance that limited partners would not significantly influence or control partnership affairs. We are convinced that these conclusions remain valid today, and therefore we see no reason to revise our insulation criterion in favor of a RULPA standard. We also feel that similar considerations apply to state laws that regulate limited partnership activities, since these statutes may vary significantly from state to state, and may fail to provide sufficient assurance that the limited partner will lack the ability to significantly influence or control the partnership's media activities.

132. We will not create exceptions for widely-held limited partnerships, such as Business Development Companies, from the current insulation criteria applicable to limited partnerships or otherwise revise those insulation criteria. The essential character of these new business forms for determining attributable interests is the contractual flexibility they allow in setting up and managing the association. Therefore, we believe that the insulation criteria are needed for these business forms to insure "lack of material involvement" on the part of investors. This would imply that in some limited number of cases, interests may not be insulated because of state laws that require investor rights that conflict with the insulation criterion. However, commenters have not provided sufficient evidence concerning the number or importance of such instances that would compel the Commission to create special exemptions for these specialized business forms. Since these entities are allowed greater contractual flexibility under state law than are limited partnerships, we believe that greater caution is warranted in dealing with these novel forms. Further, we have not been presented with evidence to demonstrate that the current insulation criteria are no longer valid or effective in achieving their goals.

133. A number of commenters have asked us to clarify certain issues with respect to the scope or other aspects of the insulation criteria. We do not believe that this is the proper forum for declaratory rulings as to the scope of the insulation criteria. Indeed, the questions raised by commenters as to the application of the criteria to specific activities are best resolved by the Commission on a case-by-case basis based on the facts of the case. In addition, some of the proposed clarifications would, in effect, amount to a relaxation of the

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[279] *Id*.

[280] *Attribution Reconsideration*, 58 RR 2d at 616-18.

criteria. For example, Capital Cities/ABC asked the Commission to confirm that an insulated limited partner's interest in a licensee does not preclude the interest holder from also holding an affiliation agreement with the licensee.[281] However, a contractual arrangement to provide programming would be inconsistent with the insulation criterion that "the limited partner may not perform any services for the partnership materially relating to its media activities,"[282] and therefore would not allow insulation of the limited partner's interest. As discussed above, we decline to relax the insulation criteria. Moreover, we believe that the insulation criteria have worked effectively in the past, and that there is no need for further clarification on a general basis in this Report and Order. Any issues that may arise as to the application of the criteria to particular transactions will be resolved on a case-by-case basis.

G. **LLCs and Other Hybrid Business Forms**

134. Background. In the *Attribution Notice*, we sought comment as to how we should treat, for attribution purposes, the equity interest of a member in a limited liability company or LLC, a then relatively new form of business association regulated by state law, or in other new business forms, such as Registered Limited Liability Partnerships ("RLLPs").[283] LLCs are, in general, unincorporated associations that possess attributes of both corporations and partnerships. The specific attributes of LLCs may vary, since their form is regulated by state statutes.[284] LLCs are, however, generally intended to afford limited liability to members, similar to that afforded by the corporate structure, while also affording the management flexibility and flow-through tax advantages of a partnership, without many of the organizational restrictions placed on corporations or limited partnerships.[285] Depending on the requirements of the applicable state statute, LLCs afford their members broad flexibility in organizing the management structure and permit members to actively participate in the management of the entity without losing limited liability. Thus, with some variation depending on the applicable statute, LLCs may be organized with centralized management authority residing in one or a few managers (who may or may not be members) or decentralized management by members.[286]

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[281] Comments in response to Attribution Notice of Capital Cities/ABC at 11.

[282] See (6) in note 265, *supra*.

[283] Some states have enacted statutes permitting partnerships to elect to become RLLPs. RLLPs afford the benefits of a partnership, while permitting a mid-level of liability protection, unlike LLCs, which provide full limited liability protection. *Attribution Notice*, 10 FCC Rcd at 3639 n. 120.

[284] As of August, 1996, all 50 states and the District of Columbia had enacted statutes permitting LLCs. Larry E. Ribstein and Robert R. Keatinge, *Limited Liability Companies* § 1.06 (1996). For a general discussion of LLCs, see *id.*, Vol. 1.

[285] Limited liability means that no owner as such is vicariously liable for the obligations of the LLC. *See* Larry E. Ribstein and Robert R. Keatinge, *supra*, § 1.04. Unlike a limited partnership, which must have at least one general partner who has unlimited liability, all the members of an LLC may have limited liability. Additionally, a limited partner may lose limited liability protection if he participates actively in the management of the partnership. By contrast, members of an LLC may maintain limited liability while actively participating in the management of the LLC. *Attribution Notice*, at 3639 n. 123.

[286] Larry E. Ribstein and Robert R. Keatinge, *supra* at § 8.02.

135. In the *Attribution Notice*, we tentatively proposed to treat LLCs and RLLPs like limited partnerships and adopted that proposal as an interim processing policy. Thus, membership in an LLC or RLLP would be attributed unless the applicant certifies that the member is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the LLC or RLLP. We proposed that such certification should be based on our limited partnership insulation criteria and invited comment on whether those insulation criteria developed with respect to limited partnerships are sufficient to insulate members of LLCs and RLLPs or whether other criteria would be more effective.[287] We also tentatively concluded that we were not prepared to adopt an equity benchmark for non-insulated LLC interests, but we invited comment on that conclusion. In addition, we invited comment on whether, if we adopt the certification approach, we should, either routinely or on a case-by-case basis, require parties to file copies of the organizational filings and/or operating agreements with the Commission when an application is filed.[288] Finally, we asked whether we should differentiate our treatment of LLCs based on whether their management form is centralized or decentralized.

136. Comments. Capital Cities/ABC, FOE, and M/C argued that the Commission should treat LLCs under the current limited partnership attribution rules, since an LLC form of business association is pursued mostly for its tax and liability advantages.[289] Capital Cities/ABC did urge the Commission to relax the insulation criterion that requires the non-involvement of equity holders in the management and operations of the media-related interests of the partnership or association, and rather to allow limited partners to certify in writing that they have not and will not attempt to exercise any influence over the core operations of a broadcast station.[290] FOE argued that the insulation criterion should approximate the Revised Uniform Limited Partnership Act ("RULPA") rules for limited partnerships, under which limited partners can consult with or advise the general partner, attend a partners' meeting, and vote with respect to major financial decisions of the partnership without losing limited liability.[291] Finally, M/C suggested that an LLC be allowed to insulate their interests by incorporating the insulation criteria directly in their governing documents, and that non-insulated

[287] The insulation criteria required to be contained in the limited partnership agreement are discussed in note 265 *supra*. We noted our disinclination to treat LLCs as we currently treat corporations, exempting from attribution the interests of "nonvoting" shareholders without regard to the presence or absence of insulating provisions in an operating agreement. We added that this interim view reflects both our relative lack of experience with this new business form and also our concern that there are no requirements intrinsic to this business form to require members to be uninvolved in the management of the business, absent insulation provisions agreed to by them. *Attribution Notice*, 10 FCC Rcd at 3640-41. We invited comment on whether we should provide an exception to our tentative proposal, on a case-by-case basis, where doing so would advance our policy of enhancing opportunities for broadcast station ownership by minorities. *Id*. at 3640.

[288] *Attribution Notice*, 10 FCC Rcd at 3641. We justified such a possible filing requirement because the organizational variation among such entities may be broad.

[289] Comments in response to Attribution Notice of Capital Cities/ABC at 13; Comments in response to Attribution Notice of FOE at 12-14; Comments in response to Attribution Notice of M/C at 31.

[290] Comments in response to Attribution Notice of Capital Cities/ABC at 12.

[291] Comments in response to Attribution Notice of FOE at 13-14.

LLC interests should be judged by an equity benchmark based on a "control" test.[292]

137. Tribune suggested that the Commission should differentiate LLCs organized as corporations from those organized as partnerships, and apply the corporate attribution rules and the partnership attribution rules, respectively, to these different organizations, which would correspond to the differentiation made by the IRS in treating LLCs for tax purposes.[293] In contrast, Fox argued that all LLCs should be treated as corporations and only those investors who are part of the "control group" should be held attributable, or alternatively, at a minimum the corporate form of an LLC should be treated under voting equity attribution rules.[294] In addition, Qwest argued that the single-majority shareholder rule should be available for LLCs, in those cases where one owner holds over 50 percent of the ownership rights.[295] Fox also argued that programming agreements between program suppliers and LLCs should not be attributable.[296] Finally, CalPERS argued that a uniform equity benchmark should be applicable to all organizational forms.[297]

138. Decision. We adopt our tentative conclusion in the *Attribution Notice* to treat LLCs and other new business forms including RLLPs under the same attribution rules that currently apply to limited partnerships. The insulation criteria that currently apply to limited partnerships would apply without modification to these new business forms. Therefore, LLC or RLLP owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations of the media-related activities of the LLC or RLLP based on existing insulation criteria. We will not distinguish among LLCs based on whether they adopt a more centralized or decentralized form.

139. We believe that this decision is justified for the reasons discussed in the *Attribution Notice*, which are supported by the record. State laws grant more liberal organizational powers to LLCs and RLLPs than to limited partnership forms. Thus, equity holders can retain their limited liability even though they participate in the management of the entity. Under these circumstances, we believe that it is important to apply the insulation criteria to assure that those equity holders that purport to be insulated from management are in fact so insulated. In addition, even when an LLC adopts a "corporate form" of organization, there is still sufficient discretion afforded by state law so that the owners of the enterprise may retain some level of operational control on their own part. The organizational restrictions applicable to corporations do not necessarily apply. The Commission could also apply a control test to determine attribution, or require these companies to incorporate insulation criteria directly into their governing documents. However, these case-by-case solutions would reduce regulatory certainty and delay processing of applications. We also believe that using equity benchmarks would be inappropriate for reasons similar to those discussed above in terms of limited partnerships. In addition, we have been applying the interim processing policy, it has worked well and effectively, and we see no reason to

[292] Comments in response to Attribution Notice of M/C at 31.

[293] Comments in response to Attribution Notice of Tribune at 6-14.

[294] Comments in response to Attribution Notice of Fox at 6.

[295] Comments in response to Attribution Notice of Qwest at 8-9.

[296] Comments in response to Attribution Notice of Fox at 19.

[297] Comments in response to Attribution Notice of CalPERS at 18.

change it.

140. We agree with those commenters who argued that business associations, such as LLCs, are similar to partnership forms in terms of organizational flexibility, and we will treat them comparably for attribution purposes. Indeed, the greater flexibility in governance granted such entities under state law, to elect either a "corporate form" or a "partnership form" of governance, underscores the need for caution in our approach to the attribution of new business forms. The current insulation criteria serve to directly address our concerns over the influence of an interest holder. Creating specialized attribution standards for new business forms as they arise will serve only to complicate the attribution rules, without better addressing our core concerns over the potential influence exerted by the owners of a particular entity, however organized.[298]

141. To reduce paperwork burdens, we will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will require the same "non-involvement" statement for LLC members who are attempting to insulate themselves from attribution that we require for limited partners who are attempting to insulate themselves. We will also require LLC members who submit the foregoing statement to submit a statement that the relevant state statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Attribution Notice*,[299] that may arise if we require filing of organizational documents.

H. **Cable/MDS Cross-Ownership Attribution**

142. Background. The *Attribution Further Notice* considered changes to the cable/Multipoint Distribution Service ("MDS")[300] cross-ownership attribution rule. Section 21.912 of the Rules, which implements Section 613(a) of the Communications Act, generally prohibits a cable operator from obtaining an MDS authorization if any portion of the MDS protected service area overlaps with the franchise area actually served by the cable operator's cable system.[301] In addition, Section 21.912(b) prevents a cable operator

298 In the *Attribution Notice*, we sought comment as to whether we should create an exception, on a case-by-case basis, to the application of limited partnership attribution criteria to LLCs where doing so would advance our policy of enhancing opportunities for broadcast station ownership by minorities. *Attribution Notice*, 10 FCC Rcd at 3640. However, relief from the attribution rules based on these policies is more properly addressed in the context of the appropriate minority/female ownership proceeding. *Notice of Proposed Rule Making* in MM Docket Nos. 94-149 and 91-140, 10 FCC Rcd 2788 (1995).

299 *Attribution Notice*, 10 FCC Rcd at 3641.

300 For purposes of this item, MDS also includes single channel Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS").

301 47 C.F.R. § 21.912(a); *see also Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6828, 6843 (1993) ("*Implementation Order*"), *reconsidered on other grounds*, 10 FCC Rcd 4654 (1995). We note here that the statutory and rule cross-ownership prohibitions do not apply if the cable operator is subject to "effective competition" in its franchise area. *See* 47 U.S.C. § 533(a)(3); 47 C.F.R. § 21.912(e)(3).

from leasing MDS capacity if its franchise area being served overlaps with the MDS protected service area.[302] For purposes of this rule, the attribution standard used to determine what entities constitute a "cable operator" or an MDS licensee, is generally defined by the Notes to § 76.501.[303] In sum, we presently consider a cable operator to have an attributable interest in an MDS licensee if the cable operator holds five percent or more of the stock in that licensee, regardless of whether such stock is voting or non-voting. We also attribute all officer and director positions and general partnership interests. However, unlike the broadcast attribution standard, our current cable/MDS standard contains no single majority shareholder exception, and attributes limited partnership interests of five percent or greater, notwithstanding insulation.

143. As we recognized in the *Attribution Further Notice*, the strictness of the existing attribution standard severely limits investment opportunities that would advance our goals of strengthening wireless cable and providing meaningful competition to cable operators. We also saw no reason to have different attribution criteria for broadcasting and MDS, and reiterated our previous observation that the broadcast attribution criteria could be used for the purpose of determining attribution in the context of cable/MDS cross-ownership.[304] Thus, in the *Attribution Further Notice*, we invited comment on whether we should apply broadcast attribution criteria, as modified by this proceeding, in determining cognizable interests in MDS licensees and cable systems. In addition, we sought comment as to whether we should add an equity/debt plus attribution rule where the competing entity's holding exceeds 33 percent or some other benchmark. We further stated our belief that these proposed modifications of our attribution rules would increase the potential for investment and further diversity, while preventing cable from warehousing its potential competition.[305]

144. Comments. The Wireless Cable Association International, Inc. ("Wireless Association")[306] and two finance companies, Blackstone Group L.P. ("Blackstone") and Boston Ventures Management, Inc. ("Boston Ventures"), filed comments on the cable/MDS cross-ownership attribution issues in this proceeding. Reply comments were filed by the Wireless Association, Blackstone, the National Cable Television Association ("NCTA") and GTE Service Corporation ("GTE").

145. All of the commenting parties, except GTE, agreed that the existing attribution rules for cable/MDS cross-interests are overly restrictive and that the less restrictive broadcast attribution rules should apply. Generally supporting our proposal to apply the modified broadcast attribution criteria, the commenters contended that the current attribution rules should be relaxed because they have severely restricted investment for the development of both the MDS and the cable industries.[307] In particular, Blackstone maintained that,

[302] 47 C.F.R. § 21.912(b).

[303] 47 C.F.R. § 21.912 (note 1(A)).

[304] *Attribution Further Notice* at 11 FCC Rcd at 19916, citing *Implementation Order* at 6843. These criteria are contained in the Notes to Section 73.3555 of our Rules, 47 C.F.R. § 73.3555.

[305] *Attribution Further Notice,* 11 FCC Rcd at 19916, citing S. Rep. No. 92, 102d Cong., 1st Sess. 46-47 (1991).

[306] It has since changed its name to the Wireless Communications Association International, Inc.

[307] For example, Blackstone contended that, where no cable/MDS service area overlap exists and the cable and MDS companies share a common institutional investor, each company would have to forego opportunities to

if given the choice between two investment opportunities, investors are more likely to choose an established industry, like cable, over a fledgling industry, such as MDS. As a result, the capital available to the newer industry is thereby diminished. Blackstone further asserted that, by prohibiting investments essential to the development of both industries, the current attribution rules also harm passive investors, such as investment companies and their clients, who would not be involved in the day-to-day activities of the cable or MDS companies.[308]

146. The Wireless Association, moreover, agreed with our assessment that there is no reason to have different attribution criteria for broadcasting and MDS. In addition, it stated that the cable/MDS cross-ownership rule was adopted not to preserve diversity of broadcast programming, but to prevent cable operators from precluding competition by warehousing MDS spectrum.[309] As for our current cable/MDS attribution rules, the Wireless Association maintained that attributing small equity interests and insulated limited partnership interests chills investment in the wireless cable industry by institutional investors or venture capital firms that have already invested or would like to invest in the cable industry.[310]

147. Notwithstanding their general support, the Wireless Association and Boston Ventures opposed our proposed 33 percent EDP provision.[311] According to the Wireless Association, the Commission "should not put any sort of artificial cap on simultaneous investment in cable and wireless cable industries absent any indicia that the investor holds voting control."[312] The Wireless Association and Boston Ventures recommended, moreover, that the modified broadcast attribution criteria, with the exception of the 33 percent "equity or debt plus" provision, likewise be applied to the cable/MDS and cable/ITFS cross-leasing rules.[313] Boston Ventures asserted that relaxation of the attribution rules in this way will give investors additional flexibility to structure their cable and wireless cable investments, reduce transactional costs involved in obtaining waivers, and thereby provide additional capital to the cable and wireless cable industries.[314] In addition, the Wireless Association pointed out that the cable/ITFS cross-leasing rule, 47 C.F.R. § 74.931(h) and (i), is not followed by a supplemental note defining the ownership attribution standard applicable to that rule. Given this absence, the

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expand into the service area of the other, even though the institutional investor would have no input into the day-to-day operations of either company. Comments in response to Attribution Further Notice of Blackstone at 5.

[308] Blackstone cited a specific example of the difficulties it experienced as a finance company seeking to make investments within the confines of our current attribution standard. Comments in response to Attribution Further Notice of Blackstone at 3-4.

[309] Comments in response to Attribution Further Notice of Wireless Association at 7.

[310] Comments in response to Attribution Further Notice of Wireless Association at 7.

[311] Comments in response to Attribution Further Notice of Wireless Association at 9; Comment in response to Attribution Further Notices of Boston Ventures at 5.

[312] Comments in response to Attribution Further Notice of Wireless Association at 9.

[313] Comments in response to Attribution Further Notice of Wireless Association at 9; Comments in response to Attribution Further Notice of Boston Ventures at 5.

[314] Comments in response to Attribution Further Notice of Boston Ventures at 5.

Wireless Association suggested that we include a supplemental note stating that the attribution standard applicable to cable/MDS cross-ownership also applies to the cross-leasing rules.[315]

148. In their reply comments, the Wireless Association and Blackstone essentially reaffirmed the statements made in their respective comments. In order to allow greater investment, Blackstone also lent its support to Boston Ventures' proposal that we adopt even less restrictive attribution rules that track those used for CMRS spectrum aggregation limits.[316] The Wireless Association, on the other hand, focused on our proposed 33 percent EDP provision. According to the Wireless Association, the existing cable/MDS attribution rules chill investment in the wireless cable industry, and this problem would not be alleviated by the 33% (or any other) equity or debt "cap" where the investor does not hold voting control. The Wireless Association asserted that we recently recognized this problem when we established cable/LMDS cross-ownership rules, which include no restrictions on debt. Since wireless cable operators will be competing directly with LMDS operators for outside investment, the Wireless Association claims it would be unfair to impose a debt limitation on cable/MDS cross-ownership that would place the wireless cable industry at a disadvantage.[317] It noted that no commenter expressed support for applying an EDP test to the cable/MDS cross-ownership rule. Further, the Wireless Association contended that the main issue being debated regarding the EDP test (the influence of program providers, especially of networks over their affiliates) has no relevance to the cable/MDS cross-ownership rule, which was adopted to prevent the warehousing of spectrum by cable operators.[318] Lastly, the Wireless Association addressed ABC's suggestion that there should be a presumption of attribution for an investment or equity stake over 50%. To the extent that this would also apply to cable/MDS cross-ownership, the Wireless Association opposed ABC's proposal, stating that the record does not indicate a basis for imposing any "equity or debt plus" test at all.[319]

149. In addition, Boston Ventures recommended that we generally permit investments in voting stock within the limits used to regulate CMRS spectrum aggregation. This means that voting stock and other nonpassive investments that exceed 10 percent, but that are not greater than 20 percent, should be considered nonattributable. Boston Ventures further stated that, as a safeguard, we could require a party to demonstrate that diversity and competition will not be harmed by the proposed investment in cases where the overlap is more than *de minimis*. Then, if experience shows this policy has not harmed competition or diversity, we could simply consider any investment under 20 percent as nonattributable.[320]

150. NCTA generally supported relaxing the existing cable/MDS attribution rules and, in particular, supported the increased ownership thresholds, non-voting stock exemptions and exemptions for certain limited

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[315] Comments in response to Attribution Further Notice of Wireless Association at 10.

[316] Comments in response to Attribution Further Notice of Blackstone at 2-3, citing 47 C.F.R. § 20.6(c) & (d). The Commission is currently considering modifications to the CMRS attribution standard. *Notice of Proposed Rule Making* in WT Docket Nos. 98-205 & 96-59 & GN Docket No. 93-252, 13 FCC Rcd 25132 (1998).

[317] Comments in response to Attribution Further Notice of Wireless Association at 1-2.

[318] *Id*. at 3.

[319] *Id*. at 2.

[320] Comments in response to Attribution Further Notice of Blackstone at 6.

partnerships that were proposed in the *Attribution Further Notice*. However, like the Wireless Association and Boston Ventures, NCTA opposed the proposed 33 percent EDP provision. NCTA maintained that the underlying cable/MDS cross-ownership rule is unnecessary because cable operators have no incentive to warehouse MDS spectrum when they face so much competition from other video programmers.[321] NCTA, along with the Wireless Association and Boston Ventures, urged us to amend, or request Congress to amend, the substance of other MDS, cable, and ITFS cross-ownership and cross-leasing restrictions.[322]

151. As the only party opposing any modification to the cable/MDS attribution rules, GTE argued that a dominant wireline carrier[323] would have an unfair competitive advantage if the rules were modified. First, such a carrier "could use its existing headend facilities for MDS transmission, resulting in possible cross-subsidization of wireline cable and the MDS wireless offering that could increase the costs underlying the franchise area's regulated cable television rates."[324] Another means by which a dominant wireline carrier could gain an unfair competitive advantage, GTE argued, involves our recent approval of Basic Trading Area ("BTA") rights for MDS licensees. According to GTE, a BTA will sometimes represent an area larger than a dominant wireline cable operator's franchise area. If the dominant wireline cable operator had an economic interest in some of the MDS channels within the BTA, then a non-affiliated MDS operator would find it harder to compete. GTE also asserted that the dominant wireline operator could use the incentive of the larger BTA area to subsidize its wireline cable operation and insulate itself from competitive pressures. Still another competitive consideration, GTE maintained, concerns a dominant wireline cable operator's potential ability "to `triple dip' by gaining economic benefit from its programming ownership, its wireline cable delivery operation, and the wireless MDS delivery operation within a BTA market area."[325] Lastly, GTE also discussed issues concerning the substance of cable/MDS cross-ownership, as distinguished from how to attribute ownership.[326] Those matters, however, are beyond the scope of the *Attribution Further Notice*.

152. <u>Decision</u>. After reviewing all of the comments submitted on our proposals to relax the cable/MDS attribution rules, we are persuaded that the broadcast attribution criteria, as modified by this proceeding, should be applied in determining what interests in MDS licensees and cable systems are cognizable. We continue to see no reason, and none has been suggested by any of the commenters, that would warrant different attribution criteria for broadcasting and MDS. As we have discussed here and in the *Attribution Further Notice*, investment opportunities critical to the development of MDS as a competitive

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321 Comments in response to Attribution Further Notice of NCTA at 3-4.

322 Comments in response to Attribution Further Notice of Blackstone at 3, Comments in response to Attribution Further Notice of NCTA at 4-7; Comments in response to Attribution Further Notice of Wireless Association at 4-5.

323 GTE defined as dominant any entity controlling 50% of the multichannel market, which includes wireline cable, MDS, and DBS.

324 Comments in response to Attribution Further Notice of GTE at 3-4.

325 Comments in response to Attribution Further Notice of GTE at 4.

326 Comments in response to Attribution Further Notice of GTE at 4-5.

service to cable have been severely limited by the current attribution standard.[327] Therefore, continued application of the current cable/MDS attribution standard would frustrate our goals of strengthening wireless cable, providing meaningful competition to cable operators and benefitting the public interest by offering consumers more choice in their selection of video programming providers. In view of these considerations and the record before us, we conclude that the public interest would be better served if the modified broadcast attribution criteria were employed for the purpose of determining attribution in the context of cable/MDS cross-ownership. Such modification of our existing attribution standard will increase investment possibilities without adversely affecting competition. Thus, we believe this attribution standard will identify ownership interests with the potential to exert significant influence on a licensee's management and operations, and the cross-ownership provision by its very nature will address the concern that common ownership of different multichannel video programming distributors may reduce competition and limit diversity. We are persuaded, moreover, that relaxing our current attribution standard will have genuine meaning for institutional investors who, though not involved in the day-to-day activities of either cable or MDS companies, have been precluded from making investments in MDS due to pre-existing or anticipated investments in cable.

153. We are not persuaded by GTE's arguments that the proposed modifications to our attribution rule will give dominant wireline carriers an unfair competitive advantage. As we have already determined, the modified, less restrictive broadcast attribution criteria, coupled with the adoption of an EDP standard, will enable the MDS industry to avail itself of increased investment opportunities. This will help, rather than hinder, wireless cable's efforts to become a stronger, more viable competitor to cable, while safeguarding against the anticompetitive concerns which the cable/MDS cross-interest rules were designed to prevent. Since we remain convinced that shareholders with a 5 percent or greater ownership interest may well be able to exert significant influence on a licensee's management and operations, we reject Boston Ventures' proposal that we adopt even less restrictive attribution rules that track those used for CMRS spectrum aggregation limits.

154. The Wireless Association also fails to persuade us that it would be unfair to impose a debt limitation on cable/MDS cross-ownership when no such limitation has been placed on cable/LMDS cross-ownership. We consider it significant that, unlike our recently adopted cable/LMDS cross-ownership rules, the cable/MDS cross-ownership rule implements a statutory prohibition, Section 613(a) of the Act. Therefore, in revisiting our cable/MDS attribution standard, we must consider both the rule and the statutory implications. As we tentatively concluded in the *Attribution Further Notice*, the potential exists:

> for certain substantial investors or creditors to have the ability to exert significant influence over key licensee decisions through their contract rights, even though they are not granted a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much or more influence or control over some corporate decisions as voting equity holders whose interests are attributable.[328]

[327] We have recently taken additional steps to expand investment opportunities to further strengthen MDS. *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998), *recon.*, FCC 99-178, released July 29, 1999.

[328] *See Attribution Further Notice*, 11 FCC Rcd at 19904-05.

That tentative conclusion has been affirmed here, and we believe applies with equal force to our competitive concerns underlying cable/MDS cross-ownership. We have also determined that our broadcast attribution rules will be triggered when the aggregated debt and equity interests in a licensee exceed a 33 percent benchmark. Our EDP broadcast attribution provision is intended to address our concerns that multiple nonattributable interests could be combined to exert influence over licensees such that they should be attributable. Based on the same reasons, we likewise regard the 33 percent EDP provision as an appropriate addition to the modified cable/MDS attribution standard. Furthermore, by adopting the 33 percent EDP provision for cable/MDS attribution, we believe that we are acting in a manner consistent with the statutory directive by furthering congressional intent to promote competition among video providers.

155. Accordingly, we will adopt the broadcast attribution criteria, as modified in this proceeding, for determining cognizable interests in MDS licensees and cable systems. The modified attribution criteria will also apply to the cable/MDS and cable/ITFS cross-leasing rules. A supplemental note will follow those cross-leasing rules and state that the attribution standard applicable to cable/MDS cross-ownership also applies to them. In addition, given the considerations discussed above, and for the same reasons we are adopting the 33 percent EDP provision for the broadcast attribution standard, we will adopt the 33 percent EDP provision as part of the cable/MDS attribution standard. A description of the resulting changes to our existing cable/MDS attribution standard follows.

156. In assessing cable/MDS attribution, we will distinguish passive investors from non-passive investors, applying the voting stock attribution benchmark applicable to each. As a preliminary matter, the definition of "passive investors" will be identical to that used in the context of broadcast attribution, and thus limited to bank trust departments, insurance companies and mutual funds. Passive investors will be subject to the same 20 percent voting stock benchmark as we adopt today for broadcast passive investors. With regard to a non-passive voting equity benchmark, we have already determined that shareholders with a five percent or greater ownership interest still have the ability to wield significant influence on the management and operations of the firms in which they invest. Therefore, we will continue to apply our five percent benchmark to determine the attributable interests of non-passive investors. We believe that employing a more liberal voting stock benchmark for passive investors than that used for non-passive investors will provide the MDS industry with increased access to much needed investment capital, while maintaining the Commission's ability to apply its ownership rules to influential interests.

157. Though positions such as officers and directors will remain attributable interests, we will further relax the current cable/MDS standard by exempting from attribution minority stockholdings in corporations with a single majority shareholder and non-voting stock, to the extent permitted by the other rule changes made in this proceeding. However, here as in broadcasting,[329] we will carefully scrutinize cases to ensure that nonattributable minority or non-voting shareholders are not able to exert greater influence than what their attribution status should allow.

158. We further note that adoption of the EDP attribution rule for cable/MDS will limit, under certain circumstances, the availability of the single majority shareholder and non-voting stock exemptions from attribution. Under the EDP rule as adopted for cable/MDS attribution, where a cable franchise area and an MDS protected service area overlap, we will consider an investor (including a cable operator or MDS

[329] *See* ¶ 44, *supra*.

licensee) that has already invested in either the cable operator or MDS licensee, to have an attributable interest in the other entity if that interest exceeds 33 percent of the total assets of that entity. Thus, when the investor's total investment in the other entity, aggregating all debt and equity interests, exceeds 33 percent of all investment in that entity (the sum of all equity plus debt), attribution will be triggered. We will use total assets as a base in aggregating the different classes of investment, equity and debt, and will presume that nonvoting stock should be treated as equity.[330] We will set the threshold at 33 percent for the cable/MDS EDP rule because we see no reason to have a different benchmark than that which will be used for the broadcast EDP rule.

159. We will also modify the existing cable/MDS attribution standard with respect to partnership interests and new business forms, such as LLCs and RLLPs, consistent with our treatment of such entities in the broadcast context. First, we will continue to hold all partnership interests attributable, regardless of the extent of their equity interests, unless they satisfy the insulation requirements. However, we will not attribute sufficiently insulated limited partnership interests when the limited partner certifies that it is not materially involved, directly or indirectly, in the management or operation of the partnership's cable or wireless cable activities.[331] Nor will we adopt voting equity benchmarks for limited partnership interests. A limited partnership interest will not be attributable if the limited partner meets the Commission's insulation criteria and makes the requisite certification. Second, consistent with our earlier findings, we will subject widely-held limited partnerships, such as Business Development Companies, to the same set of attribution rules as limited partnerships. We will also treat LLCs and other new business forms, including RLLPs, under the same attribution rules that currently apply to limited partnerships. We believe that these changes, which generally relax our existing cable/MDS attribution standard and make them consistent with the broadcast attribution rules, will afford increased opportunities for investment in the wireless cable and cable industries.

I. **Broadcast-Cable Cross-Ownership Attribution Rules**

160. In the *Attribution Further Notice*, we stated that we would address, in this proceeding, the attribution criteria applicable to the broadcast-cable cross-ownership rule, Section 76.501(a) of the Commission's Rules.[332] While we recognized that the attribution standards used in a number of other cable rules were implicitly or explicitly based on Section 76.501 of the Commission's Rules, we stated that we were considering establishing a separate proceeding to modify the attribution criteria for the other cable multiple ownership rules.[333]

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330 *See* ¶ 61, *supra*.

331 To qualify for the exception from attribution, the limited partner must meet the Commission's "insulation criteria" listed in n. 265, *supra*. A limited partner who is a party to an application for a new MDS station (Form 304), or the assignment (Form 702) or transfer of control (Form 704) of an MDS license and seeks this exemption from attribution must submit, as an exhibit to the application, a certification which addresses the Commission's "insulation criteria."

332 *Attribution Further Notice,* 11 FCC Rcd at 19897 n. 6.

333 *Id*. at n. 6. We have, in fact, established a separate proceeding to consider the attribution criteria applicable to the other cable multiple ownership rules. *Notice of Proposed Rule Making* in CS Docket No. 98-82, 13 FCC Rcd 12990 (1998).

161. Accordingly, we will modify the attribution criteria applicable to the cable/broadcast cross-ownership rule to conform to the new broadcast attribution criteria adopted in this Report and Order. In this manner, all the broadcast attribution criteria will remain consistent. When we revised the cross-ownership attribution rules in 1984, we stated that there did not seem to be a justification for separate benchmarks as applicable to cable systems. We did not receive comments in this proceeding to justify treating the cable/broadcast cross-ownership attribution rules differently from the other broadcast attribution rules at issue in this proceeding. We reiterate that the attribution revisions made herein apply only to the cable/broadcast and the cable/MDS cross-ownership rules (and cable/ITFS cross-leasing rules) and that revisions to the other cable attribution rules will be addressed CS Docket No. 98-82.[334] We also note that because these cross-ownership rules apply where the entities at issue are in the same market, these entities will always be subject to the EDP rule assuming that the requisite financial interest is held.

Transition Issues

162. Background. In the *Attribution Notice*, we stated our concern that any action taken in this proceeding not disrupt existing financial arrangements, and accordingly invited comment as to whether we should grandfather existing situations or allow a transition period for licensees to come into compliance with the multiple ownership rules if we adopted more restrictive attribution rules.[335] As we stated in the *Attribution Further Notice*, commenters who addressed this issue in response to the *Attribution Notice* overwhelmingly urged the Commission to grandfather existing interests indefinitely if it adopted more restrictive attribution rules because of the disruptive effect and the unfairness to the parties of mandatory divestiture.[336]

163. In light of significant changes in the multiple ownership rules mandated by the 1996 Act, we sought additional comment on these issues, particularly on the option of a transition period, in the *Attribution Further Notice*. We stated that the impact of attributing previously nonattributable interests after a transition period and following a relaxation of the multiple ownership rules, could be far less onerous than if the attribution rules were changed without such a relaxation of the multiple ownership rules. We tentatively concluded that any grandfathering should apply only to the current holder, and that if the joint holdings were later sold, the ownership grandfathering would not transfer to the assignee or transferee. Further, we tentatively concluded that any interests acquired on or after December 15, 1994, the date of adoption of the *Attribution Notice* in this proceeding, should be subject to the final rules adopted in the *Report and Order* in this proceeding.[337]

164. Comments. ABC supported the Commission's proposed grandfathering rule, *i.e.*, that those interests acquired before December 15, 1994 should not be subject to new attribution rules, as long as they are not assigned or transferred.[338] Tribune urged the Commission to grandfather any interests made attributable in cases conditioned on the outcome of this proceeding if the underlying application for Commission consent

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[334] *Notice of Proposed Rule Making* in CS Docket No. 98-82, 13 FCC Rcd 12990 (1998).

[335] *Attribution Notice*, 10 FCC Rcd at 3615.

[336] *Attribution Further Notice*, 11 FCC Rcd at 19913-14 & n. 62.

[337] *Attribution Further Notice*, 11 FCC Rcd at 19913-15.

[338] Comments in response to Attribution Further Notice of ABC at 10.

was filed before the *Attribution Notice* was adopted in this proceeding, *i.e.*. December 15, 1994.[339] Viacom suggested that the Commission should order that all transactions made subject to the new attribution rules should be brought into compliance within a reasonable time (such as 18 months) of the release date of the order adopting the new attribution rules.[340]

165. Paxson argued that existing station combinations that do not conform to the new rules adopted in this proceeding should be grandfathered and allowed to be sold in combination without the need for additional showings. Further, Paxson stated that if waivers of the new rules are granted, successful applicants should be permitted to sell the affected stations in combination and should not be forced to split them up. Common ownership permitted by waivers should be grandfathered upon sales of the stations. According to Paxson, if the Commission does not accord full grandfathering to existing LMAs and JSAs under new attribution standards, termination of existing business relationships would penalize entities that reasonably relied on an existing regulatory scheme in taking risks to provide expanded service in the public interest.[341]

166. In this same vein, Pappas and Qwest believed that it would be inequitable and constitute a grave injustice to force licensees under a new, radically different guideline to somehow restructure their financial arrangements or potentially lose their station. Therefore, to the extent the Commission revises its attribution rules to prohibit existing financial arrangements which were entered into in reliance upon the Commission's longstanding policies, according to these commenters, they argue that the Commission should grandfather all financial arrangements that were entered into prior to November 5, 1996, when the *Attribution Further Notice* was adopted.[342]

167. BET opposed grandfathering existing relationships, arguing that the proposed attribution rule changes should not greatly disrupt existing financial and operational arrangements in light of relaxation of the ownership rules. Instead, BET proposed the use of predictable waivers based on market concentration and size, where the waiver would not increase market consolidation. In addition, BET urged the Commission to adopt a 24-month transition period for relationships that would be affected by a rule change.[343]

168. Decision. We conclude that any interests acquired on or after November 5, 1996, the date of adoption of the *Attribution Further Notice* in this proceeding, should be subject to the rules adopted in this *Report and Order*. We believe this cutoff date is reasonable and appropriate. We proposed the new EDP rule in the *Attribution Further Notice*, and it was therefore then that parties were on notice of the proposed new rule and that any interests acquired on or after that date could be subject to any rule changes. Thus, we believe that

339 Reply Comments in response to Attribution Further Notice of Tribune Broadcasting Company ("Tribune") at 22-23.

340 Comments in response to Attribution Further Notice of Viacom at 13.

341 Comments in response to Attribution Further Notice of Paxson at 18-19, 30.

342 Comments in response to Attribution Further Notice of Pappas at 6; Reply Comments in response to Attribution Further Notice of Pappas at 15; Reply Comments in response to Attribution Further Notice of Qwest Broadcasting L.L.C. ("Qwest") at 8.

343 Comments in response to Attribution Further Notice of BET at 6-7.

the November 5, 1996 grandfathering date is more reasonable than the earlier grandfathering date we proposed.[344] Accordingly, any interests (other than radio LMAs) newly attributable pursuant to this *Report and Order* that would result in violations of the ownership rules, will be grandfathered if the triggering interest was acquired before November 5, 1996. Except in the case of TV and radio LMAs, such grandfathering will be permanent until such time as the grandfathered interest is assigned or transferred.

169. In this Report and Order, we have decided to count attributable radio LMAs for purposes of applying all applicable multiple ownership rules, including the one-to-a-market rule and the radio-newspaper cross-ownership rule, not just the radio duopoly rules. As discussed above, we will treat grandfathering of radio LMAs on case-by-case basis. The issue of grandfathering television LMAs is resolved in the television local ownership proceeding.

170. We will apply the November 5, 1996 grandfathering date to interests, newly attributable under our EDP rule, that would result in new violations of the multiple ownership rules. Such grandfathering will be permanent so long as the interest is not transferred or renewed. Thus, if an inter-market LMA triggers the EDP rule, grandfathering will be for the term of the LMA, since the LMA cannot be renewed. Grandfathering will apply only to the current holder of the attributable interest. If the grandfathered interest is later assigned or transferred,[345] the grandfathering will not transfer to the assignee or transferee.[346] New owners cannot demonstrate the same equitable considerations that prompt us to grandfather existing owners whose current interests are now unavoidably placed in violation of the multiple ownership rules based on adoption of the EDP rule. Such new owners will be given a year to come into compliance with the multiple ownership rules.

171. For non-grandfathered interests that are now attributable, *i.e.*, those acquired on or after November 5, 1996, and which must be divested to comply with our multiple ownership rules, we believe that a twelve-month period should be sufficient for parties to identify buyers.[347] Accordingly, parties holding such non-grandfathered interests must come into compliance, filing an appropriate application if necessary, within 12 months of the date of adoption of this *Report and Order*.[348]

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[344] While we tentatively concluded in the *Attribution Notice* that any interests acquired on or after December 15, 1994 should be subject to the final rules adopted in the *Report and Order* in this proceeding, we have decided to use the date of adoption of the *Attribution Further Notice* as the grandfathering date.

[345] In the case of an inter-market LMA, this would include both the brokered and the brokering station.

[346] This limitation on grandfathering of attributable interests is consistent with past Commission practice. *In re Applications of Stauffer Communications, Inc.*, 10 FCC Rcd. 5165 (1995); *In re Applications of Multimedia, Inc.*, 11 FCC Rcd. 4883 (1995).

[347] This 12-month transition period is consistent with previous Commission practice. *See Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in MM Docket 91-140, 7 FCC Rcd 6387, 6402 (1992) ("Revision of Radio Rules and Policies") ("...licensees currently engaged in time brokerage will have one year from the effective date of these rules to modify their time brokerage agreements to account for both the 15 percent attribution restriction and the 25 percent limitation on same-service, same-market simulcasting.").

[348] We recognize that we have specified a different divestiture period in some of the cases that have been conditioned on the outcome of this proceeding. In all of these cases, we will apply the one-year divestiture period. Thus, in a case conditioned on the outcome of this proceeding, where, for example, a six-month divestiture period

172. We note that grandfathering treatment of television LMAs that result in violations of the multiple ownership rules varies depending on whether they are intra-market LMAs that are attributable under the *per se* LMA attribution rule or inter-market LMAs that are attributable under the EDP rule because they are accompanied by a financial investment that exceeds the 33 percent threshold. For intra-market LMAs, the grandfathering period is as discussed in the *TV Local Ownership Report and Order*. Grandfathering for interests newly attributable under the EDP rule is permanent, and, accordingly, for inter-market LMAs attributable under EDP, grandfathering will last for the length of the LMA term since no renewal or transfer is permitted.

173. Different considerations apply to these two kinds of LMAs. As discussed fully above, ¶ 89, *supra*, intra-market LMAs are attributed because they affect the local market. Inter-market LMAs are attributed only under the EDP rule as program supply contracts accompanied by a substantial financial investment. There is no reason to exempt inter-market LMAs from the grandfathering treatment accorded to other program supply contracts newly attributable under the EDP rule because they are accompanied by a financial investment that exceeds the EDP threshold. Indeed, like these other program suppliers, and unlike the holder of an intra-market LMA, the holder of an inter-market LMA can simply come into compliance by adjusting its financial investment so that the EDP threshold is not exceeded.

K. **Ownership Report, Form 323**

174. We intend to modify the Ownership Report form, Form 323, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this *Report and Order*. We direct the Mass Media Bureau to make the necessary modifications to the form to reflect these changes. Further, the Mass Media Bureau is delegated authority to revise the Ownership Report rule, Section 73.3615, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this *Report and Order*. Thereafter, we will issue a public notice with the revised Ownership Report Form and Ownership Report rule to reflect and incorporate these changes.

IV. **Administrative Matters**

175. Paperwork Reduction Act of 1995 Analysis. This R&O contains either new or modified information collections. Therefore, the Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to comment on the information collections contained in this R&O as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this R&O in the Federal Register. Comments should address: (a) whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C1804, 445 12th Street S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy

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is specified, the twelve-month period specified herein would nonetheless be operative.

Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503, or via the Internet to fain_al.eop.gov.

176. For additional information concerning the information collections contained in this R&O contact Judy Boley at 202-418-0217.

177. Pursuant to the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. § 601 et seq., the Commission's Final Regulatory Flexibility Analysis in this *Report and Order* is attached as Appendix B.

Ordering Clauses

178. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i), (j) 303(r), 307, 308, and 309, Part 73 of the Commission's Rules is amended as set forth in Appendix A, below.

179. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix A SHALL BE EFFECTIVE sixty days after publication in the Federal Register.

180. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order* in MM Docket Nos. 94-150, 92-51, and 87-154, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

181. IT IS FURTHER ORDERED that the new or modified paperwork requirements contained in this *Report and Order* (which are subject to approval by the Office of Management and Budget) will go into effect upon OMB approval.

182. IT IS FURTHER ORDERED that this proceeding is hereby terminated.

183. For additional information concerning this proceeding, contact Mania K. Baghdadi, Mass Media Bureau, Policy and Rules Division, (202) 418-2120; or Jane Gross, Mass Media Bureau, Policy and Rules Division, Legal Branch, (202) 418-2130; or Berry Wilson, Mass Media Bureau, Policy and Rules Division, Policy Analysis Branch, (202) 418-2170.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A
Rule Changes

Parts 21, 73, 74 and 76 of Title 47 of the Code of Federal Regulations are amended to read as follows:

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554.

2. Section 21.912 is amended by revising the title to add at the end of the title "and MDS/cable cross-ownership" and by revising Note 1 as follows:

§ 21.912 Cable television company eligibility requirements and MDS/cable cross-ownership.

* * * * *

Note 1: In applying the provisions of this section, ownership and other interests in MDS licensees or cable television systems will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate MDS licensee or cable television system will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate MDS licensee or cable television system in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate MDS licensee or cable television system, or if any of the officers or directors of the MDS licensee or cable television system are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interests in an MDS licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in

"Licensee" would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant MDS licensee or cable television system are subject to said trust.

(f) Subject to paragraph (j) of this Note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (j) of this Note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership and the licensee or system so certifies.

(2) In order for a licensee or system that is a limited partnership to make the certification set forth in paragraph (g)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership. In order for a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (g)(2) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the MDS or cable television businesses of the partnership or LLC or RLLP.

(h) Officers and directors of an MDS licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of MDS or cable television service, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of an MDS licensee or cable television system, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the MDS licensee or cable television system subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the Licensee Qualification Report.] The officers and directors of a sister corporation of an MDS licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

(i) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (i)(1) of this section plus the sum of the interests computed under paragraph (i)(2) of this section is equal to or exceeds 20 percent.

(j) Notwithstanding paragraphs (b), (f), and (g) of this Note, the holder of an equity or debt interest or interests in an MDS licensee or cable television system subject to the MDS/cable cross-ownership rule ("interest holder") shall have that interest attributed if:

(1) the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (all equity plus all debt) of that MDS licensee or cable television system; and

(2) the interest holder also holds an interest in an MDS licensee or cable television system that is attributable under paragraphs of this Note other than this paragraph (j) and which operates in any portion of the franchise area served by that cable operator's cable system.

(k) The term "area served by a cable system" means any area actually passed by the cable operator's cable system and which can be connected for a standard connection fee.

(l) As used in this section "cable operator" shall have the same definition as in § 76.5.

* * * * *

PART 73 - BROADCAST RADIO SERVICES

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

Authority: 47 U.S.C. 154, 303, 334 and 336.

2. Section 73.3555 is amended by removing paragraphs (a)(3) and (a)(4)(iii), renumbering paragraph (a)(4) to read as paragraph (a)(3), revising the first sentence of Note 2(b) to add at the beginning of the sentence "Subject to paragraph (j) of this Note," by revising Notes 2(c), 2(f), 2(g), and 2(i) as follows, and by adding Notes 2(j) and 2(k):

§ 73.3555 Multiple Ownership.

* * * * *

Note 2 * **

(b) * * *

(c) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. * * *

* * * * *

(f) Subject to paragraph (j) of this Note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (j) of this Note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(2) In order for a licensee or system that is a limited partnership to make the certification set forth in paragraph (g)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. In order for a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (g)(1) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

* * * * *

(i) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (i)(1) of this section plus the sum of the interests computed under paragraph (i)(2) of this section is equal to or exceeds 20 percent.

(j) Notwithstanding paragraphs (b), (f), and (g) of this Note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

(1) the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

(2) (i) the interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this Note other than this paragraph (j); or

(ii) the interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held.

For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple or cross-ownership rule that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the television duopoly rule contained in paragraph (b) of this section.

(k) "Time brokerage" is 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.

(1) Where the principal community contours (predicted or measured 5 mV/m groundwave contour for AM stations computed in accordance with § 73.183 or § 73.186 and predicted 3.16 mV/m contour for FM stations computed in accordance with § 73.313) of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(2) Where two television stations are both licensed to the same market, as defined in the television duopoly rule contained in paragraph (b) of this section, and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the

brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(3) Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b) through (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) if the brokering station is a radio station.

* * * * *

3. Section 73.3526 is amended by revising paragraph (e)(14) to read as follows, and by adding (e)(16) as follows:

§ 73.3526 Local public inspection file of commercial stations.

* * * * *

(e) * * *

(14) For commercial radio and television stations, a copy of every agreement or contract involving time brokerage of the licensee's station or of another station by the licensee, whether the agreement involves stations in the same markets or in differing markets, with confidential or proprietary information redacted where appropriate. These records shall be retained as long as the contract or agreement is in force.

(16) <u>Radio and television joint sales agreements</u>. For commercial radio and commercial television stations, a copy of agreement for the joint sale of advertising time involving the station, whether the agreement involves stations in the same markets or in differing markets, with confidential or proprietary information redacted where appropriate.

* * * * *

4. Section 73.3613 is amended by revising paragraphs (d) and (e) to read as follows:

§ 73.3613 Filing of contracts.

* * * * *

(d) Time brokerage agreements: Time brokerage agreements involving radio stations, where the licensee (including all parties under common control) is the brokering entity, there is a principal community contour overlap (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) overlap with the brokered station, and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving television stations where licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both licensed to the same market as defined in the television duopoly rule contained in Section

73.3555(b), and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving radio or television stations that would be attributable to the licensee under Section 73.3555 Note 2(j). Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC: contracts relating to the joint sale of broadcast advertising time that do not constitute time brokerage agreements pursuant to Section 73.3555 Note 2(k); subchannel leasing agreements for Subsidiary Communications Authorization operation; franchise/leasing agreements for operation of telecommunications services on the TV vertical blanking interval and in the visual signal; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

* * * * *

PART 74 - EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

1. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, and 554.

2. Section 74.931 is amended by adding Note 1 at the end of 74.931(i) as follows:

Note 1: In applying the provisions of paragraphs (h) and (i) of this section, an attributable ownership interest shall be defined by reference to the Notes contained in § 21.912.

* * * * *

PART 76--MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.501 is amended by adding Note 6 as follows:

§ 76.501 Cross-ownership.

* * * * *

Note 6: In applying the provisions of paragraph (a) of this Section, Notes 1 through 4 shall apply, provided however that:

(a) The attribution benchmark for passive investors in paragraph (c) of Note 2 shall be 20 percent and the benchmarks in paragraph (i)(1) and (i)(3) of Note 2 shall be 20 percent;

(b) An interest holder in a Limited Liability Company or Registered Limited Liability Partnership shall be subject to the provisions of paragraph (g) of Note 2 in determining whether its interest is attributable; and

(c) Notwithstanding paragraphs (b), (f), and (g) of Note 2, the holder of an equity or debt interest or interests in a broadcast licensee or cable television system ("interest holder") shall have that interest attributed if:

(1) the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (defined as the aggregate of all equity plus all debt) of that media outlet; and

(2) (i) the interest holder also holds an interest in another broadcast licensee or cable television system which operates in the same market and is attributable without reference to this paragraph (c); or

(ii) the interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held.

APPENDIX B

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[349] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51, & 87-154, 11 FCC Rcd 19895 (1996) ("*Attribution Further Notice*").[350] The Commission sought written public comment on the proposals in the *Attribution Further Notice*, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[351]

I. Need For, and Objectives of the Report and Order:

The attribution rules seek to identify those interests in or relationships to licensees or media entities that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions. The attribution rules are used to implement the Commission's broadcast multiple ownership rules. Our goals in this proceeding are to maximize the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees, ease application processing, and provide for the reporting of all the information we need in order to make our public interest finding with respect to broadcast applications. While our focus is on the issues of influence or control, at the same time, we must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry. The rules adopted meet these goals.

II. Summary of Significant Issues Raised by the Public in Response to the IRFA:

One comment, filed specifically in response to the IRFA contained in the *Second Further Notice of Proposed Rulemaking* in MM Dockets 91-221 and 87-8, FCC 96-438 (released November 7, 1996), addressed an issue relevant to all the Commission's proceedings dealing with the mass media multiple ownership rules. This comment, filed by the Media Access Project, the Center for Media Education, the Minority Media and Telecommunications Council, the United Church of Christ, Office of Communications ("MAP"), addressed the Commission's characterization of certain radio and television stations as "small entities."

Specifically MAP argues that the Commission overstated the number of small entities that will be

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[349] *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. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[350] An IRFA pursuant to Pub. L. No. 96-354, § 603, 94 Stat. 1165 (1980) was incorporated into the *Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51 & 87-154, 10 FCC Rcd 3606 (1995) ("*Attribution Notice*").

[351] *See* 5 U.S.C. § 604.

affected by changes to the ownership rules. According to MAP, the Commission acknowledged that Commission estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies. MAP also argued that the Commission's estimates do not take into consideration licensees with 10, 20, 30 or more broadcast stations, or those licensees that have entered into LMAs. Instead, the Commission's estimates look at the revenues of each station, individually, to determine if it qualifies as a small business. MAP argued that under this approach, individual broadcast properties of Fortune 500 companies might be defined as small businesses.

Furthermore, MAP argued that changing the Commission's multiple ownership rules will harm small broadcasters in numerous ways. First, it will put small broadcasters at a competitive disadvantage with larger stations that can offer advertisers lower rates and/or greater exposure. Second, it will drive up the costs of stations, eliminating the ability of small broadcasters (especially female and minority broadcasters and potential new entrants) to purchase stations. In addition, according to MAP, small advertisers will be disadvantaged if a broadcaster owns several broadcast stations in a market, since a broadcaster could drive up advertising rates as a condition of access to those stations.

Other commenters did not specifically respond to the IRFA, but did address small business issues. TCI, Pappas, Qwest, and BET opposed the equity/debt plus rule, believing that it would preclude important sources of investments by same-market broadcasters and networks, and that it would therefore be particularly detrimental to small and minority broadcasters.

Viacom, in contrast, stated that the equity/debt plus rule would not jeopardize the availability of capital to broadcasters. It further asserted that any potential impact could be offset by increasing the passive-investor benchmark to 33 percent under its own proposal.

III. Description and Estimate of the Number of Small Entities To Which Rules Will Apply:

1. Definition of a "Small Business"

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. 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 Small Business Administration ("SBA"). According to the SBA's regulations, entities engaged in television broadcasting Standard Industrial Classification ("SIC") Code 4833 -- Television Broadcasting Stations, may have a maximum of $10.5 million in annual receipts in order to qualify as a small business concern.[352] Similarly,

[352] This revenue cap appears to apply to noncommercial educational television stations, as well as to commercial television stations. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833)" as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial,

entities engaged in radio broadcasting, SIC Code 4832 -- Radio Broadcasting Stations, have a maximum of $5 million in annual receipts to qualify as a small business concern. 13 C.F.R. §§ 121.101 *et.seq*. This standard also applies in determining whether an entity is a small business for purposes of the RFA.

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 SBA 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." While we tentatively believe that the foregoing definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the new rules on small television and radio stations, we did not propose an alternative definition in the IRFA. Accordingly, for purposes of this *Report and Order*, we utilize the SBA's definition in determining the number of small businesses to which the rules apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations and to consider further the issue of the number of small entities that are radio and television broadcasters in the future. Further, in this FRFA, we will identify the different classes of small radio and television stations that may be impacted by the rules adopted in this *Report and Order*.

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We were unable at this time to define or quantify the criteria that would establish whether a specific television or radio station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any television or radio station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We attempted to factor in this element by looking at revenue statistics for owners of television stations. However, as discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 C.F.R. § 121.104(d)(1). The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, 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 C.F.R. § 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Instead of making an independent determination of whether radio and television stations were affiliated based on SBA's definitions, we relied on the data bases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules amended by this *Report and Order* will apply to full service television and radio licensees and permittees, potential licensees and permittees, cable services or systems, MDS and ITFS, and newspapers.

Radio and Television Stations

The rules adopted in this *Report and Order* will apply to full service television and radio stations. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business.[353] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[354] Included in this industry are commercial, religious, educational, and other television stations.[355] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[356] Separate establishments primarily engaged in producing taped television

[353] 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

[354] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

[355] *Id*. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

[356] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

program materials are classified under another SIC number.[357]

There were 1,509 television stations operating in the nation in 1992.[358] That number has remained fairly constant as indicated by the approximately 1,594 operating television broadcasting stations in the nation as of June 1999.[359] For 1992[360] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[361]

The rule changes will also affect radio stations. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[362] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[363] Included in this industry are commercial, religious, educational, and other radio stations.[364] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[365] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.[366] The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992.[367] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[368] As of June 1999,

357 *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

358 FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

359 FCC News Release Broadcast Totals as of June 30, 1999 (released July 19, 1999).

360 Census for communications establishments are performed every five years ending with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra,* note 356.

361 The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

362 13 C.F.R. § 121.201, SIC 4832.

363 Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

364 *Id.*

365 *Id.*

366 *Id.*

367 The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

368 FCC News Release No. 31327, Jan. 13, 1993.

official Commission records indicate that 12,560 radio stations are currently operating.[369]

Thus, the rule changes will affect approximately 1,594 television stations, approximately 1,227 of which are considered small businesses.[370] Additionally, the rule changes will affect 12,560 radio stations, approximately 12,057 of which are small businesses.[371] These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

Cable Services or Systems

SBA has developed a definition of small entities for cable and other pay television services (SIC 4841), which includes all such companies generating $11 million or less in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services, and 1,423 had less than $11 million in revenue.

The Commission has developed its own definition of a small cable company for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[372] Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.[373] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules proposed in this *Report and Order*. The Commission's rules also define a "small system," for the purposes of cable rate regulation, as a cable system with 15,000 or fewer subscribers.[374] We do not request nor do we collect information concerning cable systems serving 15,000 or fewer subscribers and thus are unable to estimate at this time the number of small cable systems nationwide.

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369 FCC News Release, Broadcast Station Totals as of June 30, 1999 (released July 19, 1999.

370 We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1999 total of 1,594 TV stations to arrive at 1,227 stations categorized as small businesses.

371 We use the 96 percent figure of radio station establishments with less than $5 million revenue from the Census data and apply it to the 12,560 individual station count to arrive at 12,057 individual stations as small businesses.

372 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995).

373 Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

374 47 C.F.R. § 76.901(c).

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[375] Section 76.1403(b) of the Commissions' rules defines a small cable system operator as one which serves in the aggregate fewer than 617,000 subscribers, and whose total annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[376] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.[377] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS and ITFS

Other pay television services are also classified under Standard Industrial Classification (SIC) 4841, which includes cable systems operators, closed circuit television services, direct broadcast satellite services (DBS), multipoint distribution systems (MDS), satellite master antenna systems (SMATV), and subscription television services.

The Commission refined the definition of "small entity" for the auction of MDS as an entity that together with its affiliates has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[378] This definition of a small entity in the context of the Commission's *Report and Order* concerning MDS auctions that has been approved by the SBA.[379]

The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas ("BTAs"). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MDS is an especially competitive service, with approximately 1573 previously authorized and proposed MDS facilities as of 1996. Information available to us indicates that no MDS facility generates revenue in excess of $11 million annually. We tentatively conclude that for purposes of this IRFA, there are approximately 1634 small MDS providers as defined by the SBA and the Commission's auction rules.

Newspapers

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375 47 U.S.C. § 543(m)(2).

376 47 C.F.R. § 76.1403(b).

377 Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

378 47 C.F.R. § 21.961(b)(1).

379 *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

Some of the rule changes may also apply to daily newspapers that hold or seek to acquire an interest in a broadcast station that would be treated as attributable under the rules. A newspaper is an establishment that is primarily engaged in publishing newspapers, or in publishing and printing newspapers.[380] The SBA defines a newspaper that has 500 or fewer employees as a small business.[381] Based on data from the U.S. Census Bureau, there are a total of approximately 6,715 newspapers, and 6,578 of those meet the SBA's size definition.[382] However, we recognize that some of these newspapers may not be independently owned and operated and, therefore, would not be considered a "small business concern" under the Small Business Act.[383] We are unable to estimate at this time how many newspapers are affiliated with larger entities. Moreover, the rule changes would apply only to daily newspapers, and we are unable to estimate how many newspapers that meet the SBA's size definition are daily newspapers. Consequently, we estimate that there are fewer than 6,578 newspapers that may be affected by the rule changes in this *Report and Order*.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

The *Report and Order* imposes compliance with the amended attribution rules set forth in the *Report and Order*. Compliance will require licensees to file with the Commission amended Ownership Report Forms (FCC Form 323) to reflect interests attributable under the amended attribution rules. Compliance will also require licensees that have entered into Joint Sales Agreements (JSAs) to place such agreements in their public inspection files with confidential or proprietary information redacted where appropriate. In addition, pursuant to the new rules, certain television time brokerage agreements will be required to be filed with the Commission where they are intra-market agreements or are inter-market agreements that come under the equity/debt plus attribution standard adopted by the *Report and Order*. Finally, compliance may require some licensees whose ownership interests under the amended attribution rules violate the multiple ownership rules, to divest the prohibited interests within the time periods specified in the *Report and Order*.

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

The *Report and Order* retains the current 5 percent active voting stock attribution benchmark. We believe that our original decision to set a 5 percent benchmark to capture influential interests remains valid and will not unduly restrict capital availability. Further, we note that our concerns over capital availability that originally prompted the proposal to increase the active voting stock benchmark have eased somewhat, particularly in light of the increasing strength shown by the communications sector and financial markets in general over the past several years. This increase in capital spending occurred within the context of our current attribution rules, and therefore provides us with strong evidence of the continued availability of capital in the communications industry. And, to the extent that there are still concerns about not impeding capital flow to

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[380] 13 C.F.R. § 121.201 (SIC 2711).

[381] *Id*.

[382] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 3, SIC Code 2711 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[383] 15 U.S.C. § 632.

broadcasting, we believe that they will be adequately addressed since the *Report and Order* increases the passive investor benchmark.

The *Report and Order* increases the voting stock benchmark from 10 percent to 20 percent for passive investors. We believe that increasing the passive investor benchmark to 20 percent will give broadcasters increased access to investment capital, while preserving the Commission's ability to effectively enforce its ownership rules. This decision takes into account the special nature of the passive investor category, in terms of the legal and fiduciary requirements that constrain passive investors' involvement in the management and operational affairs of the firms in which they invest. In addition, passive investors have become an increasingly important source of investment capital to the corporate sector. Finally, the Commission recognizes that the pace of technological change within broadcasting, particularly the transition to DTV, might require access to such new sources of investment capital.

Further, we note that the record strongly supports an increase in the passive investor benchmark and supports our belief that such an increase will help assure that the attribution changes adopted herein will reinforce the trends in broadcast investment and growth in passive investment levels noted above, particularly at a time when television broadcasters are undertaking the conversion to digital television. We believe that increasing the passive investor benchmark is a relatively safe way to increase capital flows into broadcasting, without compromising the ability of our attribution rules to capture influential interests. The *Report and Order* retains the current definition of "passive investors," which is limited to bank trust departments, insurance companies and mutual funds.

The *Report and Order* does not eliminate the single majority shareholder or nonvoting stock exemptions, but, rather, to address the concerns that we raised in the *Attribution Notice* and *Attribution Further Notice*, we will adopt our equity and/or debt plus ("EDP") attribution proposal, as a new rule that would function in addition to the other attribution rules. Under this new EDP rule, where the investor is either (1) a "major program supplier," as defined herein to include all programming entities (including networks and time brokers) that supply over 15 percent of a station's total weekly broadcast programming hours, or (2) a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators, and newspapers), its interest in a licensee will be attributed if that interest exceeds 33 percent of the total asset value (equity plus debt) of the licensee. The *Report and Order* refers to total asset value as "total assets." In the case of a major program supplier, the investment will be attributable only if the investment is in a licensee to which the requisite triggering amount of programming is provided.

The targeted approach embodied in the EDP rule reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions. The bright-line EDP test will provide more regulatory certainty than a case-by-case approach that requires review of contract language. Thus, the EDP rule will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs.

In the *Attribution Further Notice*, we invited comment on the impact of a 33 percent EDP threshold on small business entities, particularly on whether there would be a disproportionate impact on small or minority entities. While some parties have argued that adoption of an equity/debt plus proposal would deter capital flow to broadcasting generally and, in particular, for digital television, others have argued strongly that this is not the case. We have no basis to conclude or reason to believe that the EDP rule would unduly deter investment. The equity/debt plus proposal does not preclude investment by any entity; rather, it caps nonattributable investment levels for entities that have the potential to influence licensees. The limit does not apply to all entities that might invest or help fund the transition to digital television or otherwise invest in licensees. Additionally, to help assure that our actions today do not unduly impede capital flow to broadcasting, we have raised the passive investor benchmark. As discussed above, we believe that because of the nature of passive investors, we may raise that benchmark consistent with our goal of maximizing the precision of the attribution rules. In addition, we will consider individual rule waivers in particular cases where compelling evidence is presented that the conversion to digital television would otherwise be unduly impeded or that a waiver would significantly expedite DTV implementation in that particular case.

While some commenters strongly argued that applying the EDP rule to program suppliers would curb investment in broadcast stations and possibly hurt weaker UHF stations and might deter investment that would facilitate the conversion to DTV, they do not provide empirical evidence to support this argument. We also note that the rule does not preclude investment, but merely provides that investments over a certain level will be deemed presumptively attributable. Networks are therefore free to invest in their affiliates, subject of course to the applicable multiple ownership rules. Moreover, the EDP rule does not attribute investments, even those by networks in their affiliates, which fall below the 33 percent threshold. Thus, a major program supplier may hold 32 percent of the total assets of a station to which it supplies programming in excess of the 15 percent standard. This would comply with all EDP limits and the interests would not be attributable. In addition, the EDP rule does not affect investments by entities other than major program suppliers or same-market media entities. Under these circumstances, we believe that the EDP rule will not curb investment, deter new entry, or curb the conversion to DTV.

The *Report and Order* also adopts a new rule to attribute television LMAs, or time brokerage of another television station in the same market, for more than fifteen percent of the brokered station's broadcast hours per week and to count such LMAs toward the brokering licensee's local ownership limits. We believe that the rationale for attributing LMAs set forth in the *Radio Ownership Order*, -- *i.e.*, to prevent the use of time brokerage agreements to circumvent our ownership limits -- applies equally to same-market television LMAs.

The record in this proceeding supports our decisions to attribute television LMAs and to count attributed radio LMAs toward all applicable radio ownership limits. We agree with most commenters, representing a variety of interests ranging from ABC to the public interest group MAP, that television LMAs, like radio LMAs, represent a degree of influence and control that warrants ownership attribution and that, to decide otherwise, based on the precedent of the attribution of radio LMAs, would be inconsistent.

We will require stations involved in television time brokerage agreements (inter-market as well as intra-market agreements) to keep copies of those agreements in their local public inspection files, with confidential or proprietary information redacted where appropriate, and to file, with the Commission, within 30 days of execution, a copy of any local time brokerage agreements that would result in the arrangement being counted in determining the brokering licensee's compliance with the multiple ownership rules. We note that these provisions impose an affirmative obligation on licensees to determine, in the first instance, whether a particular LMA is attributable (either under the *per se* rule or the EDP rule), and to file the agreement with the Commission if it is.

The *Report and Order* also eliminates the cross interest policy. Our goals in initiating this proceeding include maximizing the clarity of the attribution rules, providing reasonable certainty and predictability to parties to allow transactions to be planned, and easing application processing. Commenters have argued that the vagueness and uncertainty imposed by the *ad hoc* application of the cross-interest policy have chilled investment. As CalPERS argues, this uncertainty impedes the ability of broadcasters to enter into transactions because the policy can be invoked to prohibit a seemingly permissible transaction.

We note that the EDP rule directly covers concerns treated under the non-attributable interests prong of the cross-interest policy. In adopting that rule, we will reach those situations involving formerly nonattributable interests that raised the most concern with respect to issues of competition and diversity, some of which were previously addressed in administering the cross-interest policy. We recognize, however, that the EDP rule does not cover all the areas encompassed by the cross-interest policy. It would not cover key employees, for example. We nonetheless believe, as commenters have pointed out, that internal conflict of interest policies and common law fiduciary duty and contract remedies provide adequate substitutes for our administration of the policy with respect to key employees. In addition, many key employees are also officers and directors and thus already covered by the attribution rules. In any event, we believe that the very small risk of harm to competition by a key employee in an instance not covered by any of these other regulations and remedies is greatly outweighed by the benefits of minimizing our case-by-case approach to transactions and applying bright line tests, such as the EDP test and our other attribution rules.

With respect to joint ventures, we believe that application of a cross-interest policy is unwarranted. The ownership and attribution rules define the level of combined ownership that is permissible in the local market. We recognize that the cross-interest policy as applied to joint ventures is mostly, if not completely, subsumed by the application of the current multiple ownership rules. To the extent that it is not so subsumed, we believe that it should be eliminated. We agree that the burdens of case-by-case review are not justified for transactions that already comply with the multiple ownership rules. Furthermore, as other commenters noted, the application of the antitrust laws should prevent or remedy any abuses of joint venture relationships not already subject to the multiple ownership rules.

The *Report and Order* declines to attribute JSAs. Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be fully attributed. We define JSAs as contracts that affect primarily the sales of advertising time, as distinguished from LMAs, which may affect programming, personnel, physical facilities, and core operations of stations. We note that in our *DTV Fifth Report and Order*, we stated that we would look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology. JSAs may be one such joint business arrangement. Although both DOJ and the Commission are concerned about the competitive consequences of business agreements such as JSAs, our concerns are not necessarily identical. DOJ's comments explicitly recognize that in addition to competition issues, the Commission is also concerned with issues of diversity and reducing unnecessary administrative burdens.

Accordingly, upon considering and weighing competition, diversity, and administrative concerns, we decline to impose new rules attributing JSAs as long as they are truly JSAs that deal with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs. We will retain our current policies concerning JSAs.

Furthermore, in the absence of specific evidence of widespread abuse of JSAs by broadcasters, we also decline to adopt the general disclosure and reporting requirement for radio JSAs recommended by DOJ in its comments. We will, however, require broadcasters who have entered into JSAs to place such agreements in their public inspection files, pursuant to 47 C.F.R. Sections 73.3526 and 73.3613(e) of the Commission's Rules, with confidential or proprietary information redacted where appropriate. This requirement will facilitate monitoring of JSAs by the public, competitors and regulatory agencies. We do, however, retain discretion, in all events, to review cases involving radio or television JSAs on a case-by-case basis in the public interest, where it appears that such JSAs do pose competition, diversity, or administrative concerns. Finally, we emphasize that all JSAs are of course still subject to antitrust laws and independent antitrust review by the Department of Justice.

We see no reason to revise our previous decision to treat limited partnership interests as distinct from corporate voting equity interests, and therefore elect not to adopt equity benchmarks for limited partnership interests. As we stated in the *Attribution Further Reconsideration*, "[t]he partners in a limited partnership, through contractual arrangements, largely have the power themselves to determine the rights of the limited partners." Therefore, the insulation criteria adopted by the Commission serve to identify those situations within which it is safe to assume that a limited partner cannot be "materially involved" in the media management and operations of the partnership. As we also stated therein, the powers of a limited liability holder to exert influence or control are not proportional to their equity investment in the limited partnership, since the extent of these powers can be modified by the contractual arrangements of the limited partnership. In the *Attribution Notice*, we stated our disinclination to change our approach of applying insulation criteria in favor of an equity benchmark, and we have not been provided sufficient evidence to revise that view and to indicate that these original reasons for declining to adopt an equity benchmark for limited partnerships are no longer valid.

We also see no need at this time to add to, relax, or otherwise revise our limited partnership insulation criteria. Some commenters suggested that the insulation criteria should be modified to eliminate conflicts with state law, or that RULPA or other relevant standards should be used in their place. However, in our *Attribution Reconsideration*, the Commission decided for several reasons to abandon the use of RULPA, combined with a no material involvement standard, as a standard for judging whether limited partners were exempt from attribution.[384] First, we judged the joint use of these two disparate standards for determining limited partner exemptions from attribution to be unnecessarily complicated. Second, we noted that there was a lack of uniform interpretation of the RULPA provisions, and that the scope of permissible limited partner activities was not statutorily set by RULPA, but rather was determined by the limited partnership agreement itself. Third, we determined that reliance on the RULPA provisions did not provide sufficient assurance that limited partners would not significantly influence or control partnership affairs. We are convinced that these conclusions remain valid today, and therefore we see no reason to revise our insulation criterion in the direction of a RULPA standard. We also feel that similar considerations apply to state laws that regulate limited partnership activities, since these statutes may vary significantly from state to state, and may fail to provide sufficient assurance that the limited partner will lack the ability to significantly influence or control the partnership's media activities.

We will not create exceptions for widely-held limited partnerships, such as Business Development Companies, from the current insulation criteria applicable to limited partnerships or otherwise revise those

[384] *Attribution Reconsideration*, 58 RR 2d at 616-18.

insulation criteria. The essential character of these new business forms for determining attributable interests is the contractual flexibility they allow in setting up and managing the association. Therefore, we believe that the insulation criteria are needed for these business forms to insure the "lack of material involvement" on the part of investors. This would imply that in some limited number of cases, interests may not be insulated because of state laws that require investor rights that conflict with the insulation criterion. However, commenters have not provided sufficient evidence concerning the number or importance of such instances that would compel the Commission to create specialized exemptions for these specialized business forms. Since these entities are allowed greater contractual flexibility under state law than are limited partnerships, we believe that greater caution is warranted in dealing with these novel forms. Further, we have not been presented with evidence to demonstrate that the current insulation criteria are no longer valid or effective in achieving their goals.

We adopt our tentative conclusion in the *Attribution Notice* to treat LLCs and other new business forms including RLLPs under the same attribution rules that currently apply to limited partnerships. The insulation criteria that currently apply to limited partnerships would apply without modification to these new business forms. Therefore, LLC or RLLP owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations of the media-related activities of the LLC or RLLP. We will not distinguish among LLCs based on whether they adopt a more centralized or decentralized form.

We believe that this decision is justified for the reasons discussed in the *Attribution Notice*, which were also supported in the record and fully discussed in the *Report and Order*. In addition, we have been applying the interim processing policy, and it has worked well and effectively, and we see no reason to change it.

We will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will require the same "non-involvement" statement for LLC members who are attempting to insulate themselves. We will also require LLC members who submit the foregoing statement to submit a statement that the relevant state enabling statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Attribution Notice*, that may arise if we require filing of organizational documents.

After reviewing all of the comments submitted on our proposals to relax the cable/MDS attribution rules, we are persuaded that the broadcast attribution criteria, as modified by this proceeding, should be applied in determining cognizable interests in MDS licensees and cable systems. We continue to see no reason, and none has been suggested by any of the commenters, to warrant different attribution criteria for broadcasting and MDS. As we have discussed here and in the *Attribution Further Notice*, investment opportunities critical to the development of MDS as a competitive service to cable have been severely limited by the current attribution standard. Therefore, continued application of the current cable/MDS attribution standard would frustrate our goals of strengthening wireless cable, providing meaningful competition to cable operators and benefitting the public interest by offering consumers more choice in their selection of video programming providers. In view of these considerations and the record before us, we conclude that the public interest would be better served if the modified broadcast attribution criteria were employed for the purpose of determining attribution in the context of cable/MDS cross-ownership. Such modification of our existing attribution standard will increase investment possibilities and further diversity, while preventing cable from warehousing its potential competition. We are persuaded, moreover, that relaxation of our current attribution standard will have genuine meaning for institutional investors who, though not involved in the day-to-day activities of either cable or MDS companies, have been precluded from making investments in MDS due to pre-existing or desired investments in cable.

We are not persuaded, however, by GTE's arguments that the proposed modifications to our attribution rule will give dominant wireline carriers an unfair competitive advantage. As we have already determined, the modified, less restrictive broadcast attribution criteria, coupled with the adoption of our proposed 33 percent "equity or debt plus" provision, will enable the MDS industry to avail itself of increased investment opportunities. This will help, rather than hinder, wireless cable's efforts to become a stronger, more viable competitor to cable, while safeguarding against the anticompetitive and warehousing concerns which the cable/MDS cross-interest rules were designed to prevent. For these same reasons, we reject Boston Ventures' proposal that we adopt even less restrictive attribution rules that track those used for CMRS spectrum aggregation limits.

The *Report and Order* also adopts a 33 percent equity or debt provision as an appropriate addition to the modified cable/MDS attribution standard. Furthermore, by adopting the 33 percent "equity or debt plus" provision for cable/MDS attribution, we believe that we are acting in a manner consistent with the statutory directive, as well as furthering congressional intent to promote competition and prevent warehousing by cable operators. Accordingly, we will adopt the broadcast attribution criteria, as modified in this proceeding, for determining cognizable interests in MDS licensees and cable systems. The modified attribution criteria will also apply to the cable/MDS and cable/ITFS cross-leasing rules.

The *Report and Order* adopts grandfathering and transition measures for interests that become newly attributable pursuant to the new rules adopted. Grandfathering and transition measures for TV LMAs are discussed in the *TV Local Ownership Order*.

We intend to modify the Ownership Report form, Form 323, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this Report and Order.

VI. Report to Congress

The Commission shall send a copy of the Report and Order in MM Docket Nos. 94-150, 92-51, and 87-154, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission shall send a copy of the Report and Order in MM Docket Nos. 94-150, 92-51, and 87-154, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Report and Order in MM Docket Nos. 94-150, 92-51, and 87-154 and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

Appendix C

Comments

ABC, Inc.
AK Media Group, Inc.
Bahakel Communications
Bet Holdings, Inc.
Blackstone Group L.P.
Boston Ventures Management, Inc.
Canwest Global Communications Corporation
CBS, Inc.
Centennial Communications, Inc.
Diversified Communications
Fox Broadcasting Company
Glencairn, Ltd. and WPPT, Inc.
Glenwood Communications Corporation
HSN, Inc.
Jet Broadcasting Company, Inc.
King World Productions, Inc.
Knight-Ridder, Inc.
Local Station Ownership Coalition
McGillen, Cynthia L. and James P.
Media Access Project
Miller Broadcasting, Inc.
Montclair Communications, Inc.
National Association of Broadcasters
Network Affiliated Stations Alliance
Pappas Stations Partnership
Paxon Communications Corporation
Post-Newsweek Stations, Inc.
Press Broadcasting, Inc.
Saga Communications, Inc.
Sinclair Broadcast Group, Inc.
SJL Communications, Inc.
Tele-Communications, Inc.
The Project on Media Ownership
Viacom, Inc.
Waterman Broadcasting Corporation
Wireless Cable Association International, Inc.

Reply Comments

ABC, Inc.
AK Media Group, Inc.
Bahakel Communications, Ltd.
Bet Holdings, Inc.
Blackstone Group, L.P.
Clear Channel Communications, Inc.
Fox Broadcasting Company
GTE Service Corporation
HSN, Inc.
Lockwood Broadcasting, Inc.
Media Access Project
Mt. Mansfield Television, Inc.
National Cable Television Association, Inc.
Pappas Stations Partnership
Qwest Broadcasting L.L.C.
Retlaw Enterprises, Inc.
SJL Communications, Inc.
Tele-communications, Inc.
Tribune Broadcasting Company
Viacom, Inc.
Westwind Communications, L.L.C.
Wireless Cable Association International, Inc.

August 5, 1999

SEPARATE STATEMENT OF
CHAIRMAN WILLIAM E. KENNARD
AUGUST 5, 1999 MEETING

Today, we are bringing to a close proceedings that have been pending since 1991. These rule changes are long overdue. For far too long it's been a case of administration by waiver, not by rule. Parties have presented us with a variety of business arrangements and combinations, and we have not been able to set a bright line test as to what's permitted and what's not, and so the problem just keeps getting worse.

Today we are cleaning up our rules and providing the certainty that the market needs.

But more than that, we are adopting commonsense rules that recognize the dramatic changes that the media marketplace has undergone since our broadcast ownership rules were adopted 30 years ago. Back then, there were three broadcast networks; cable was still a novelty; and interactive TV meant yelling at your kids to turn it down. Now, cable systems serve almost 65 million TV households; other multi-channel video programmers -- such as Direct Broadcast Satellite -- offer hundreds of channels to viewers; since 1970, the number of radio and television stations has increased by more than 85 percent; and people are watching everything from hip-replacement surgery to the local weather on their PC's linked to the Internet. As we cross over into the next millennium, we are clearly entering a new media age.

In such an age, we need to provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace. These items will not only help them compete with the growing number of alternative media. They will also help preserve free local broadcast service. It is this localism that makes broadcasters so special. That is why we are taking steps, for example, to allow a television licensee to buy another station in the same market, as long as the market will continue to be served by at least eight independently-owned television stations and at least one of the merging stations is not one of the top four stations in the market. It is also why we will waive the rule in situations involving financially-troubled and unbuilt stations. In these cases, allowing a small station to combine with another station in the market -- and take advantage of shared costs and operating efficiencies -- will increase competition and outlet diversity in the local market and at times keep a station on the air that otherwise would go dark. For these same reasons, we are also relaxing our radio-television cross-ownership rule.

This is not, however, the time to completely deregulate broadcast ownership. Our ownership rules have always reflected core values of competition, diversity, and localism. The changes we are making today are tailored to grant broadcasters more flexibility while at the same time ensuring that consolidation will only occur in markets where these core values will not be undermined. Our action today thus strikes an appropriate balance, by relaxing the rules but maintaining a diversity floor.

We are also taking steps to better identify broadcasters' real ownership interests in media properties, which will make our ownership rules more meaningful and easier to apply. Our new "equity/debt plus" attribution rule, for example, will ensure that our rules take account of the ways that debt instruments can be a source of influence over a licensee. And by making LMA's attributable, our rules will prevent the use of time brokerage agreements to circumvent our ownership limits.

Many existing LMA's will meet our new television duopoly rules. But as to the others, we do not wish to upset established business relationships entered into before we made clear our proposal to attribute LMA's. We are, therefore, providing significant grandfathering relief for those LMA's entered into before November 1996, and we are allowing those entered into after that date two years to comply with our new rules. We are also providing significant grandfathering relief to parties holding conditional waivers of our radio-television cross ownership rule or with a pending application for such a waiver. These steps reflect our concern that parties' established business interests not be unduly upset, and a balance between the need to maintain a diversity floor in local markets and the recognition that in some cases LMA's have enhanced competition and outlet diversity in local markets.

That being said, I think we need to consider more broadly the role of LMAs in broadcasting. While they have no doubt produced some benefit, they represent a kind of artifice. I believe we need to consider whether the benefits of LMAs could be attained through other arrangements, such as actual joint ownership, that do not raise questions concerning the responsibility and accountability of the actual licensee of a station.

It may well be that as a result of our action today, most of these problems will fade away because LMAs will be converted into duopolies. But I will be watching what happens in this regard, because I'm concerned about the degree of control that is conferred by an LMA.

In sum, our actions today will provide broadcasters with the certainty they need to make rational business judgments in the marketplace. These items recognize the competitive realities of the new media age while honoring our nation's oldest values. For these reasons, I am pleased to bring these long-pending proceedings to a conclusion.

August 5, 1999

Separate Statement
of
Commissioner Susan Ness

Re: *Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154; Broadcast Television National Ownership Rules, MM Docket No. 96-222.*

I welcome today's long-overdue revision and clarification of the Commission's broadcast ownership and attribution rules. The decision today takes its direction largely from the Telecommunications Act of 1996, in which Congress decided to allow significantly increased concentration of ownership in the broadcast marketplace. It also takes into account recent, dramatic changes in the communications marketplace, as well as insights gained from experience with our previous rules. The result is a forward-looking regime that provides increased flexibility and clarity, while still avoiding the dangers of undue concentration of ownership of vital sources of news and information.

The media landscape has changed enormously since I joined the Commission in 1994. There was the Telecommunications Act of 1996 -- which set the stage for significant consolidation of ownership, especially in radio. There is the now-significant presence of DBS, which was just being launched a few years ago but now has over 10 million subscribers. There is the continued growth of cable, with system “clustering” rapidly replacing the crazy quilt ownership patterns of the last twenty years in major metropolitan areas. The financial interest and syndication and prime time access rules are gone. TV broadcasters are beginning their conversion to digital broadcasting. The Internet is experiencing explosive growth.

These and other changes make it timely (at best!) for us to conclude our long-pending ownership and attribution proceedings.

I believe our rules and policies must be based on the present and future characteristics of broadcasting, not our perceptions of the medium as it existed 50 or even five years ago. At the same time, broadcasting remains a distinctly special service -- with unique privileges and unique responsibilities.

Broadcasting continues to be the primary source of news and information for the American public. It is free and ubiquitous. No preexisting hookup or bottleneck provider stands between speaker and listener. Diversity of media ownership is fundamental to the preservation of our democratic values.[1] The public benefits greatly from "diverse and antagonistic" voices in the broadcast marketplace. The special characteristics of broadcasting have been recognized by Congress, the courts, and this Commission.

It wasn't so long ago that broadcasters were limited to owning no more than 12 AM, 12 FM, and 12 TV stations, nationwide, with no more than two AM, two FM, and one TV station in any market. Yet today, some radio groups encompass several hundred stations, with as many as eight in a single market, and perhaps a TV station and an LMA as well.

I have long felt that our rules were susceptible to "gaming." We have been too willing to permit through the back door what we would not countenance through the front. We have been too willing to grant conditional waivers while we dithered about what the rules should be. As a consequence, we have penalized those who most diligently followed the letter and spirit of our rules, and rewarded those who "pushed the envelope" most aggressively.

Today's decision should put us on a more defensible and sustainable course. Greater clarity in the rules -- and less subjectivity -- will promote fairness among market participants. It will also provide greater certainty to investors. And it should lead to more expeditious decisions by the Commission.

I am pleased that we are eliminating the worst anomalies of the old regime. Who can explain why LMAs are considered attributable interests when they involve radio stations, but not when they involve TV? Many LMAs have produced demonstrable programming and other public interest benefits for their communities. Others have not. I welcome our decision to attribute LMAs, as well as our decision to grandfather those that were entered into before November 5, 1996 - the date when all parties were clearly on

[1] This is widely recognized. As Peter Jennings has observed, “The fewer large organizations there are owning more media – in very general terms – the potential for that being worse for the media and not better is just obvious. Because when you have a lot of media owned by a lot of people, there is an obvious opportunity for much more free expression.” John Malone put it this way, “I think that what protects our free society is the fact that no one power broker can control enough of the media in any market, let alone the national market, to basically get away with compressing or slanting or distorting the news.”

notice of our intention to move in this direction. Those that meet our going-forward rules may continue, and we are giving those that are grandfathered generous relief.

I have previously raised concerns about the potential for an investor with a 49 percent ownership interest to exert "influence" over the affairs of a broadcast licensee, even in a corporation with a single majority shareholder. I support the compromise we have reached to adopt an "equity/debt plus" concept of attribution that limits the single majority shareholder exemption in situations involving a major program supplier or same-market media entity. These are the entities whose incentive to influence a broadcaster weighs most heavily in favor of attribution. Our targeted approach embodied in the "equity/debt plus" concept balances our competing concerns of maximizing the precision of our attribution rules, avoiding undue disruption of the flow of capital, and establishing a bright-line test that affords certainty to those planning transactions.

There are a few narrow areas where I would have preferred to go a different way from the majority, for reasons that have less to do with ownership concentration than with concerns about fundamental fairness. I believe that we have been too lenient in grandfathering situations that were previously allowed under conditional waivers -- waivers that were supposed to expire at the outcome of these proceedings. We started down the conditional waiver path because of a desire temporarily to accommodate major acquisitions, permitting them to close without awaiting a resolution of our broadcast ownership dockets. Everyone recognized when the conditional waivers were granted that the licensee would have to conform to the new rules, with six months to divest any nonconforming properties.

This accommodation became an albatross around our necks. And now we are perpetuating the waivers, creating a special class of broadcasters who, for as long as they own the stations, can own more properties in a market than their competitors. This isn't fair. It isn't good precedent. And it undermines our credibility in considering future conditional waiver requests in other contexts.

I also would have preferred a somewhat different result with respect to our revised one-to-a-market rule. In determining compliance with the voice test, I would count only independent radio and TV voices in the market. These are the media encompassed by this cross-service rule, and I believe it makes most sense to compare the number of radio and TV voices held jointly in a market only to the number of independent radio and TV voices remaining in that market. Today's item goes further, however, and also considers as voices daily newspapers and cable TV. I disagree with the inclusion of these media in the voice count.

Once we include newspapers and cable, it becomes difficult if not impossible to validly distinguish them from other media that arguably serve as a source of competition and diversity in the market, such as MDS, the Internet, cable overbuilds, and OVS systems. Rather than make arbitrary decisions on whether to include these media as "voices," it would be far simpler and administratively easier to count only radio and TV and, if necessary, to adjust the voice count accordingly. However, as the decision was made to include newspapers and cable, I do agree with the decision to limit those newspapers counted to those published and widely circulated in the market. I also agree that, if we must count cable, it should count as only one voice.

But, despite these misgivings -- as well as a more generalized concern that we have not adequately analyzed the cumulative effect of all the changes that have occurred as a result of the 1996 Act -- I support these orders as a compromise that I believe will provide a much stronger foundation for the future. As Senators Hollings and Dorgan observed in a letter to Chairman Kennard, “It is imperative . . . that the Commission remain mindful of the careful balancing struck in [the Telecommunications Act] between updating the rules to reflect changes in the marketplace and maintaining the robust diversity of voices, localism, and competition in the broadcast industry that was evident at the time of enactment.” I believe that we have done so.

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH
DISSENTING IN PART AND CONCURRING IN PART

In the Matter of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154.

I support the Commission's decision in the matter of Reexamination of the Commission's Cross-Interest Policy to repeal the cross-interest rules. I thus join in Part III.D of this Report & Order. I disagree, however, with the decisions reached in the matter of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests and in the Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry. I thus dissent from the rest of the item. I do so for the reasons expressed below.

The biggest problem with our attribution rules -- these new ones included -- is that it is next to impossible to say what sorts of counting rules one should fashion for broadcast interests if one is unable coherently to articulate the need for counting interests. In other words, the purpose of the broadcast ownership rules must be clearly identified before one can know how to craft implementing regulations, such as attribution standards. For instance, if one were concerned with antitrust matters (assuming authority to do so), notions of "control" might be tied to market power and the ability to discipline markets. If, on the other hand, one were concerned with programming content (assuming this were constitutional, which it is presumptively not), notions of "control" would go to the ability to buy or sell programming to stations. This is not to say that we should not aim to harmonize our various attribution rules to the greatest extent possible, but that without a clear sense of *why* to count, it is hard to know *how* to count.

As I argue in the broadcast ownership rulemaking, the Commission has not answered this threshold question -- the purpose of the ownership rules -- with the rigor and clarity necessary to the task. *See* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; and in the Matter of Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8.* Not only is the legitimacy of the broadcast ownership rules themselves thus diminished, but corollary rules such as the attribution rules suffer from the same frailty. I, of course, would not have structural ownership regulation, and thus do not see the need for attribution rules. But if there are going to be structural rules, their purpose should be clearly defined so that meaningful attribution rules can be crafted.

I also disagree with the very premise of the *Attribution Further Notice* issued in this proceeding: namely, that the relaxation of ownership limits in the Telecommunications Act of 1996 required reexamination of broadcast attribution standards. *See* 11 FCC Rcd 19895 (1996). Nothing in the text of the statutory mandates revising ownership limits suggests that the changes should have any impact whatsoever upon the attribution rules. Presumably Congress was aware of the existing attribution regulations when it passed the ownership changes and knew that the new limits would work in conjunction with those regulations. This is not to say that the Commission cannot change the attribution rules if necessary , it can, but that the deregulation of ownership has no necessary connection to changing the attribution standards -- unless, of course, one is looking for ways to counter, limit, or mitigate the effects of Congress' decision to deregulate ownership.

Although the items disclaims any intent to tighten the attribution rules in the wake of the 1996 Act, *see supra* at para. 35, these rules are not simply more precise than the old ones. They work to capture more interests than the old rules, thus making more properties attributable for ownership purposes. If it were precision that the Commission sought to achieve, we would just have simplified the structure of the existing rules. But, unfortunately, we did not do so. Instead, this Commission has once again tightened underlying or related rules in order to avoid as much deregulation as Congress intended.

In this regard, the Commission is much like Penelope in Homer's *Odyssey*. Waiting for Odysseus to return from war, but pressed by the chiefs of her land to marry again, she invents stratagems to put them off. She says she cannot remarry until she finishes needlepointing a pall for the hero Laertes. All day long, she works on her web, but at night she unpicks each and every stitch by torchlight. Looking outwardly somewhat deregulatory in the broadcast local ownership proceeding, the Commission undoes here much of the relief it provided there.

On the merits of the attribution decision, I do not think that we should extend attribution rules into the area of pure debt instruments, as does this Report & Order. I would not count debt for attribution purposes. When one ventures into the area of pure debt, one encounters an administrative hornets' nest. Almost all companies have some debt and, given the variety of instruments and agreements, this debt fluctuates in terms of value and sometimes, if transferrable, even in terms of possession. As a *practical* matter, debt is a concept that is nigh impossible to measure with reliable precision, even if there is support for the *theory* in academic literature. For these reasons, I disagree with the decision to extend attribution rules into the area of pure debt.

I also believe that the EDP test itself is misguided. Instead of clarifying or perhaps even simplifying current broadcast attribution standards, this Report & Order heaps yet another regulatory board on top of the existing gangplank of attribution rules. Now, in addition to wading through existing attribution rules, regulatees and their lawyers must *also* apply the EDP test to determine whether the interests that they have just ascertained are not attributable under the old rules are nonetheless attributable under the EDP rule.

Yet, in order to know whether the EDP rule even applies, the entity, if a potential "major program supplier," must assess the percentage of program supplied to a particular station at some particular point in time. Like debt, this is in all likelihood an ever-changing number, difficult to pin down and costly to ascertain. And if a potential "same market media entity," the company must ask whether any other of its interests are attributable such that it might be a "media entity," bringing it full circle to the original attribution rules; the daisy chain effect of these regulations regarding attribution is, apparently, limitless. Then, after figuring out whether one falls under the subject headers of the EDP rule, major program supplier and same market media entity, one must then apply the operative sections of the rule, no mean task.

Finally, absent a drastic simplification of existing attribution rules, I would have retained the single majority shareholder attribution exemption in full. The certainty this rule gives against the backdrop of the existing rules affords at least some relief and clarity to certain entities, in terms of understanding and assessing the attributable nature of their interests, and should be preserved.

* * *

Stepping back to survey the newly-designed landscape of attribution rules, I am reminded of Justice Frankfurter's description of a gerry-mandered voting district as "an uncouth twenty-eight-sided figure." *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960). These attribution rules are as many, if not more-sided. I regret that, instead of taking this opportunity to simplify the attribution rules, the Commission has only further complicated them by extending the existing rules to encompass pure debt interests; by adoption of the EDP test; and by limitation of the single majority shareholder exemption.

August 5, 1999

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL K. POWELL

Re: *Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221); and Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8)*

Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150); Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; (MM Docket No. 92-51); and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

Today I vote in favor of these orders revising the Commission's rules governing local broadcast ownership. I write separately to give greater context to my vote.

I believe that the actions we take today are both constitutional and consistent with the explicit intent of Congress to promote diversity and competition in the media marketplace. Section 257(b) of the 1996 Act explicitly instructs the Commission to "promote the policies and purposes of this Act favoring diversity of media voices." 47 U.S.C. Section 257(b). Thus, as we review our ownership rules, it is clearly the intent of Congress that we consider the implications of our rules on diversity.

I agree that diversity is very hard to define, and is at some level a visceral concept. Accordingly, we should be cautious in over-invoking it as a justification for imposing or intruding on constitutionally protected activities. Yet, not all worthy policy goals, not all important government interests, and indeed, not all compelling government interests, can be quantified or measured with precision. I do not believe the Constitution boxes out all subjective judgment in government actions. Yes, diversity is hard to define, but not more so than obscenity, privacy, or interstate commerce, areas in which the law allows government activity. What is important, is that such rules be balanced and well-reasoned. Moreover, where rules involve some degree of subjective balancing, they should be reviewed frequently to ensure they remain on keel, given changing conditions in the market. This is what I feel the Commission has failed to do over the years. But the Commission takes an important step forward today, and it should continue to review these rules at periodic intervals, as Congress instructed. 47 U.S.C. Section 202(h).

In all of the discussion about diversity and localism, I believe we lose sight of something that is unique about broadcasting, something that I believe is a substantial public benefit and something that is not so easily entangled in the web of concern about content infringement. It is the fact that broadcasting is free.

There are substantial public benefits that flow from the free broadcasting business model. It provides access by all of our citizens to news, entertainment, and information, regardless of their socio-economic class. It provides valuable information to citizens in natural disasters who cannot access their phones or cable systems because of downed lines or loss of power. It lets people in a mobile society stay connected to the outside world, as well as individuals in remote areas.

But, this free business model is quite unique and, thus, some special consideration of the challenges to it is warranted. For example, as a medium it competes against other media that have access to subscription revenue in addition to advertising dollars. Broadcasters cannot as easily repackage programming or recoup costs of purchasing high quality programming. And they have significantly less distribution capacity than most of their competitors. Therefore, it is important to ensure our rules do not unduly constrain broadcast business competitiveness and viability.

Additionally, the public value of having a diverse free medium also warrants some government attention to undue concentration. If a single media group were to monopolize a market, advertising rates would likely increase as would the desire for advertisers to place advertisements with the concentrated media group. Because advertising dollars are not infinite, it would mean other stations would suffer the effects of less advertising revenue, which is the lifeblood of a station's viability. Should such a station be crippled or fail, the public would have lost a source of programming. This could happen irrespective of how highly the public might value the station, since they cannot express their preference by paying higher rates to sustain the station. For this reason, we are justified in giving some consideration to the structure of the market for free broadcasting.

Finally, I would be remiss if I did not briefly express a few of my concerns. In the items adopted today the Commission does not grandfather LMAs that were entered into after November 1996, the date of the Further Notice of Proposed Rulemaking in these proceedings. I would have preferred to grandfather LMAs entered into after November 1996. The Commission's delay in bringing these proceedings to a close since 1996 has forced broadcasters to make business decisions regarding LMAs for over three years without knowing what the rules would be. As a result, I believe the equities lie in favor of grandfathering these arrangements.

I also would have preferred to count additional media in the voice counts. For example, where cable is subject to effective competition as a result of a cable overbuild, I would argue that there are two voices for cable in that market. I would not have required *involuntary* bankruptcy to access the failed station waiver. I do not believe that there is any real threat of a broadcaster's entering into bankruptcy voluntarily to gain the benefits of this waiver provision.

Rules, however, are by their very nature both under- and over-inclusive. The rules we adopt today are not all right, and not all wrong. But they reflect what good public policy often must be, a balanced compromise of conflicting values and judgments. And I believe that with the Orders adopted today, the Commission takes an extremely important step toward aligning our rules with the current realities of the electronic media market programming market.

August 5, 1999

STATEMENT OF COMMISSIONER GLORIA TRISTANI
ON BROADCAST OWNERSHIP

In the Matters of: Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221), Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Broadcast Television National Ownership Rules (MM Docket No. 96-222), Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150), Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry (MM Docket No. 92-51), and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

I had two goals for these proceedings: (1) to eliminate the fictions and subterfuges that have plagued our broadcast ownership rules; and (2) to strike the appropriate balance between the potential public interest benefits and the potential harms of increased consolidation. For the most part, as discussed below, I believe we have hit the mark.

Eliminating Fictions

One of the disturbing characteristics of our broadcast ownership rules was the gap between the rules as they were written and the rules as they were enforced. For instance, duopolies were strictly prohibited under the rules, but station owners were able to use the LMA artifice to control the programming decisions of a second station in the market without that station being attributable. Similarly, our one-to-a-market rule was effectively eviscerated by a Commission waiver process that became, in practice, a rubber stamp.

Today's decisions largely put an end to these and other fictions. LMAs are now attributable. The one-to-a-market waiver process will be tightened. Debt is now recognized as a factor that can bestow influence. Eliminating these fictions often has meant relaxing the underlying substantive rule involved. But I would much rather relax the underlying rule to reflect reality than to keep a rule on the books that is meaningless. Today's decisions should not only promote respect for the Commission's rules and processes, but should also help level the playing field between Washington insiders and those outside the beltway who still believe that our rules mean what they say.

As for LMAs in particular, although the subterfuge is over and they are now attributable, this Order does not outlaw them. Nevertheless, I hope and expect that there will be few, if any, new LMAs, since their regulatory *raison d'etre* has been eliminated and the duopoly rule has been relaxed. I do not believe it is appropriate for control of a station's programming to be divorced from control of a station's license. The licensee is the one responsible for programming its station to serve the local community; that responsibility should not be delegated to a third party. The sharp drop in new radio LMAs after the Commission found them attributable gives me every reason to expect that television LMAs will suffer the same fate. If this proves incorrect, I would revisit the LMA issue.

One rule change that is expessly intended to bring our rules in line with reality is the narrowing of the duopoly rule to permit common ownership of television stations in different DMAs, regardless of contour overlap. According to the Order, DMAs "are a better measure of actual television viewing patterns" than a signal contour test, "and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products." I could not agree more. Indeed, I have made this very point on several occasions in the context of our local radio ownership rules, which still rely exclusively on signal contours to define the relevant "market." I look forward to changing our radio ownership rules to reflect reality as we have done for our television rules.

Unfortunately, there is one fiction that the Commission chose to retain: the single majority shareholder rule. Under this rule, as long as a single shareholder owns more than 50% of a licensee's voting stock, no other interests are attributable. That means, for example, that someone could own 49.9% of the voting stock, own the studio and transmission facilities, and provide all of the station's debt, and still be deemed unable to exert significant influence over that station's decision-making. I realize that the scope of the single majority shareholder rule has been narrowed somewhat by the adoption of the equity/debt plus rule, but the EDP rule only applies to programming suppliers and same-market media entities. The attribution rules, however, should identify *any* relationship that permits an entity to exert significant influence over another. If, for policy reasons, we wish to permit certain entities to obtain ownership interests notwithstanding their ability to influence the licensee, we should do so directly and not through the fiction of claiming that such influence does not exist. I therefore dissent from that part of the Attribution Report and Order.

Finding the Public Interest

This has been a difficult decision to reach. Making decisions about diversity is never easy. In the end, I did not agree to relax our broadcast ownership rules because I believe we have "enough" diversity or because the growth in new media outlets means that diversity is no longer a concern, but because I believe that the diversity benefits of the relaxed ownership rules we adopt today outweigh the potential harms. Let me explain this apparent paradox.

For those of us who care about diversity, the easy answer would have been to insist on a maximum number of independent owners -- the Commission's traditional proxy for maximizing the number of different "voices" in a community. And generally, I still believe that this proxy is a good one. Those television licensees who can stand alone and provide a real local voice should be required to do so. As the Order notes, it is at the local level that our diversity concerns are most acute. But I became convinced through the course of this proceeding that separate ownership -- at least in the full-power television context -- does not necessarily translate into a meaningful local "voice." That is, if a licensee's low market share does not give it the resources to originate any local programming, such as news or public affairs, the community may have an additional owner but no meaningful additional voice.

In those cases in which a licensee is unlikely to contribute to local diversity, I believe the public interest may be better served by permitting that station to combine with a stronger station in the market. With the efficiencies of consolidation, for instance, the weaker station may be able to change from running only infomercials and reruns, or simply passing through a satellite-delivered signal, to a station that is able to provide local news. Or maybe the stronger station will use the weaker station as some broadcast networks use their cable channels -- as a forum for more in-depth news pieces or to stay with breaking stories rather than returning to the network feed. Either way, it is not clear to me that the public is better off with a separate owner with no local content than with a duopoly that permits one owner to provide more and better local content.

But make no mistake: this is not an exact science. We could have drawn the line in a different place, and there may be situations in which a viable local voice is removed from the marketplace under the new rules. Overall, however, I believe that we have struck the appropriate balance and that the new rules will do more good than ill for meaningful local diversity and for serving the public interest.