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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of)
)
The Relationship of)
Paxson Communications Corporation)
and National Broadcasting Company, Inc.)

To: The Commission

REQUEST FOR DECLARATORY RULING

PAXSON COMMUNICATIONS CORPORATION

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SUMMARY

Paxson Communications Corporation seeks a declaratory ruling on issues arising from agreements it entered into with the National Broadcasting Company, Inc. in 1999. The agreements, which were designed with the FCC's multiple ownership rules in mind, make NBC a 32 percent non-voting preferred stockholder in Paxson, and provide for common stock conversion privileges, warrants and call options which together give NBC a path to control Paxson when the FCC's rules ultimately permit such a combination. Related agreements between the two companies, entered into over the past two years, name NBC as the agent for the sale of commercial time on Paxson's television stations and its network programming arm, Pax TV.

The agreements themselves contain appropriate insulation devices, to protect the parties from cross-attribution of each other's broadcast interests. However, NBC's conduct under the agreements raises issues as to whether it now has an attributable interest in Paxson or has impinged on Paxson's control of its broadcast stations. Paxson, which to date has resisted NBC's assertions of control over PCC financing and budgeting matters, now needs the Commission's help in determining whether, and to what extent, NBC has overreached from a regulatory standpoint. Paxson also seeks appropriate remedies, up to and including divestiture, should the Commission find that violations of the multiple ownership rules have occurred and, in light of NBC's conduct, are likely to continue unless the current arrangements are restructured or dismantled.

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REQUEST FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Commission's rules, Paxson Communications Corporation ("PCC") hereby requests that the Commission resolve, through a declaratory ruling, whether certain conduct of the National Broadcasting Company, Inc. ("NBC") has caused NBC to have an attributable interest in PCC or threatens PCC's control of its television station. Should these questions be resolved against NBC, the Commission also should prescribe remedies to resolve resulting violations of the local television multiple ownership rule, 47 CFR Sec. 73.3555(b), and the national television multiple ownership rule, 47 CFR Sec. 73.3555(e)(1), as well as the broader control issues raised by NBC's conduct.

I. Background

In September 1999, PCC entered into a strategic partnership with NBC pending regulatory changes which would permit the outright NBC purchase of PCC. The agreements implementing this alliance, described below, were carefully designed to comply with the multiple ownership rules. They created relationships which individually or as a whole would not result in "attribution" of NBC's station ownership to PCC, or visa versa, or result in prohibited delegations of licensee control to NBC. Indeed, counsel for PCC and NBC met with FCC representatives in advance of a public announcement about the deal in order to explain the arrangements and answer questions. Strict compliance with FCC rules and policies was crucial because in four television markets (Hartford, Raleigh-Durham, Birmingham and Providence) the two entities could not, under the local television multiple ownership rule, have attributable interests in two television stations. Also, attribution to NBC of PCC's television stations would have resulted in NBC having attributable interests in stations reaching approximately 45% of US households, in excess of the 35% national multiple ownership rule cap.

NBC appeared to be the ideal partner for PCC. By 1999 PCC owned or had economic interests in 72 television stations, which reached all of the top-20 markets and 43 of the top-50 markets in the United States. This made PCC's station group the largest in the nation. To further expand its stations group as well as PaxTV, its wholly-owned network programming entity, PCC sought a partner which could provide substantial additional financing as well as quality programming and marketing and operational support. NBC, as owner of one of the four largest networks and a subsidiary of General Electric Company, was ideally suited to provide the support PCC needed to streamline and further expand its businesses. A partnership with PCC also was attractive to NBC, which was interested in creating new outlets for NBC network programming and new marketing opportunities. NBC also was seeking to expand its ownership of television stations should the FCC's multiple ownership rules be relaxed, and therefore sought not just a partnership, but a path to control to be exercised when FCC rules permitted.

II. The Agreements

On September 15, 1999, NBC, PCC and Lowell W. "Bud" Paxson, PCC's controlling shareholder (and a single majority shareholder under the FCC's rules), entered into an Investment Agreement (Exhibit 1, or "Ex. 1"), a Stockholder Agreement (Ex. 2), a Call Agreement (Ex.3) under which Bud Paxson's control shares in PCC could be purchased (the "Call"), two warrants entitling NBC to purchase PCC common voting shares (Exs. 4 and 5) (the "Warrants"), an "Initial JSA Side Letter Agreement" (Ex. 6), an "Affiliate JSA Side Letter Agreement" (Ex. 7), an "Additional JSA and Network Sales Side Letter Agreement" (Ex. 8), and Time Brokerage Agreements ("TBAs") between the local NBC and PCC stations in the Raleigh-Durham, Birmingham, Miami, Providence and Hartford markets (*See* Ex. 9, the Raleigh - Durham TBA). The text of the New York joint sales agreement, ("JSA") entered into July 1, 2000, is attached as Exhibit 10. (The other JSAs provided for in the side letters included in Exhibits 6, 7 and 8 contain similar terms.) On July 16, 2001 PCC entered into a National Sales Agreement with NBC (Ex. 11), under which NBC is the exclusive agent for time sales on Pax TV. The contents of these agreements, which form the basis of the NBC-PCC relationship, are summarized as follows:

Investment Agreement. The Investment Agreement includes the following terms: For $415,000,000 NBC purchased, *inter alia,* a 32 percent economic interest in PCC in the form of non-voting 8% Class B preferred shares (the "NBC Preferred Stock") that are convertible into PCC common shares, and was issued Warrants by PCC and the Call by Bud Paxson. Unless the multiple ownership rules were relaxed, NBC could not convert the NBC Preferred Stock, or exercise the Warrants or the Call on Bud Paxson's control shares. The associated Certificate of

Designations of the NBC Preferred Stock (Ex.12) includes a covenant, common to such financings, that limits PCC's ability to incur additional indebtedness. Similarly, the Investment Agreement also included covenants, again standard in such financing agreements, which restricted PCC's ability to amend its corporate documents or increase the size of the board of directors (Ex. A, pp. 41-43).

In connection with these transactions, PCC also agreed in the Investment Agreement to a number of covenants not typically found in financing transactions, but common in acquisitions, including granting NBC the right to approve: (1) with such approval not being unreasonably withheld, PCC's annual budgets, expenditures that would materially exceed budgeted amounts, and amendments to PCC's budgets; (2) programming acquisitions , or the development of new programs, that would constitute five percent (5%) or more of Pax TV's or certain PCC stations' broadcast time in a given season; (3) PCC agreements intended to exploit PCC's DTV spectrum on a regional or national basis; (4) the sale of any PCC station in a top-20 TV market; (5) the issuance of additional stock; and (6) additional compensation (above $400,000 per year) of top PCC executives. Other covenants in the Investment Agreement gave NBC rights to: (7) place on PCC's local stations NBC network programs that are pre-empted by the local NBC affiliate, subject to a 35-hour per year prime time maximum, (8) match any offer to purchase a PCC station, (9) convert PCC stations to NBC affiliates subject to negotiation of NBC affiliation agreements similar to those existing in other comparable DMAs, and (10) have PCC explore the possibility of co-locating local PCC and NBC stations (Ex. 1, pp. 40-42, 50-53).

Article IV, Section 4.1 of the Investment Agreement (Ex. 1, p. 43) provides an important check on NBC's ability to veto PCC corporate actions falling under categories (1) – (6) above.

That provision states that if *any one* of the three NBC-nominated members of PCC's board votes in favor of an action falling within the specified categories, including budget approval, the sale of a station, a stock offering to raise cash or executive compensation increases, NBC will be deemed to have consented to such action. This provision was included to ensure that PCC could continue to act freely with respect to the corporate matters covered in Article IV. That freedom, however, is dependent on the NBC-nominated directors acting independently consistent with their fiduciary obligations as directors. PCC would not have entered into the overall deal with NBC, or granted such unique and broad rights to NBC, without this insulating mechanism or without the understanding that NBC-nominated directors would put PCC's interests first.

Warrants and Call Agreement. In addition to its 32 percent equity interest, NBC purchased two Warrants (Exs. 4 and 5) to acquire additional newly-issued PCC stock, aggregating up to 43 percent of PCC, and the Call, under which NBC could acquire the "super-voting" (10 votes per share) control block owned by Bud Paxson. The Warrants and the Call, under which NBC can obtain control of PCC, are exercisable upon satisfaction of certain conditions, including compliance with the FCC's multiple ownership rules. (As noted above, NBC is not now eligible to exercise those rights.) The warrants and the call option are valid for 10 years, until September 2009. The stock price under Warrant A (Ex. 4) is fixed at $12.60 per share, but the stock price under Warrant B (Ex. 5), which covers a greater number of shares, and for the control block subject to the Call (Ex. 3), is priced higher. The timing and procedures for exercise of conversion rights under the NBC Preferred Stock, and the Warrants and Call, are different. For example, the Warrants must be exercised in full prior to the exercise of the Call.

Stockholder Agreement. In addition to the covenants and agreements in the Investment Agreement, the parties, including Bud Paxson, PCC's controlling stockholder, entered into the Stockholder Agreement, which affords NBC the opportunity to nominate members of PCC's board of directors, but only "If, at any time, in [NBC's] reasonable determination, the Communications Act and the rules and regulations promulgated by the FCC permit [NBC] to have board appointment or similar rights. ... " Until the time such nominations could be made, NBC was entitled to have non-director observers attend directors' meetings (Ex. 2, p. 9). The Stockholder Agreement also contains representations, warranties and covenants, similar to those included in the Investment Agreement, which provide for financial disclosures, define events of default and restrict the sale of PCC, or equity interests in PCC.

Joint Sales Agreements, TBAs and National Sales Agreement. Under the terms of the letter agreements included in Exhibits 6, 7 and 8, PCC has entered into JSAs under which substantially all local and national (*i.e.*, non-network) advertising time on local PCC stations is sold by local NBC-owned or affiliated stations operating in PCC markets. The JSAs also afford NBC-owned or affiliated stations the right to place certain NBC programs on co-located PCC stations (*see, e.g.*, Ex. 10, the New York JSA). Under the TBAs, PCC's stations were to broadcast NBC-provided programs during the hours 6:00-8:00 a.m., 10:00 a.m.-1:00 p.m. Monday through Friday and for one additional hour on Saturdays. The National Sales Agreement appoints NBC as exclusive agent for the sale of advertising on Pax TV. Together these sales and marketing agreements account for two-thirds (2/3) of PCC's annual revenues. The LMAs and JSAs include standard terms permitting the licensee to pre-empt brokered programs or commercials and substitute PCC material when the public interest requires.

III. PCC's Perspective on the Agreements

There is nothing on the face of these agreements which delegates control of PCC's stations to NBC. Article IV of the Investment Agreement includes the director consent mechanism described above, which was intended to limit NBC's participation in certain corporate matters by delegating NBC's consent rights to directors who were to be nominated by NBC, but who would be bound by the fiduciary obligations to PCC and its shareholders imposed on corporate directors. The understanding was that NBC itself would not be represented on PCC's board of directors and could not unreasonably interfere with operation of the company.

With this insulating director-consent mechanism in place, the covenants present no delegation-of-control or attribution issues. Further, while the Investment Agreement provides for NBC's consent to PCC budgets, such consent cannot be unreasonably withheld. The restrictions in the Certificate of Designation on taking on new indebtedness are common to financing agreements and, it was believed, would not be used unreasonably to block important financings. The approval process for new program acquisitions, while applicable to certain PCC stations in markets where NBC could own an additional station, primarily affects PaxNet, a non-licensee entity. The right to veto the sale of major-market stations was seen as a reasonable accommodation to PCC's new partner, which was acquiring not only a 32 percent equity interest in PCC, but also, through the Warrants, Call and conversion rights under the NBC Preferred Stock, a path to controlling PCC. The right to control executive compensation increases is often seen in financings and does not raise FCC issues, particularly given the director consent provision and the parties' understanding as to how it would function. The right to convert PCC stations to NBC affiliates does not encroach on PCC's control either; station management will remain in PCC's hands regardless of network affiliations. Moreover, the affiliation of PCC stations with the NBC network is subject to negotiation of definitive affiliation agreements (*See* Ex. 1, pp. 50-51). Similarly, PCC's agreement to accept pre-empted NBC network programming, which is intended to provide PCC with a stronger line-up of programs, will cause minimal disruption given the 35-hour per annum limitation on such program placements (Ex. 1, pp. 52-53). The provision in the Investment Agreement which contemplates co-location of PCC and NBC local station facilities is intended to facilitate cost savings in light of the JSA and TBA arrangements between PCC and NBC. PCC still will have local managers and staff to supervise its facilities. In sum, the arrangements in the Investment Agreement, tempered as they are by the director consent mechanism, are consistent with the FCC's policies requiring that its licensees not delegate to others control over finances, programming or personnel. *See, Stereo Broadcasters, Inc.*, 55 FCC 2d 87 (1981), *recon. denied,* 50 RR 2d 1346 (1982).

The provision in the Stockholder Agreement allowing NBC to nominate members of PCC's board of directors was not deemed problematic under the attribution rule because it was understood that NBC would not nominate NBC-loyal directors until (in NBC's "reasonable determination") the FCC's rules permitted such nominations (Ex. 2, Sec. 2.1(b)). In the meantime, PCC rightfully assumed that any person nominated by NBC would act in the company's best interest consistent with the state-law fiduciary responsibilities of corporate directors. Indeed, as noted above, PCC relied upon this independence as a means to insulate its corporate decision making from the direct and broad NBC influence otherwise granted to NBC under Article IV of the Investment Agreement. PCC's assumption in this regard was consistent with, and indeed dictated by, the Commission's rule attributing the interests of non-independent directors.

The TBAs and JSAs raise no delegation-of-control or attribution issues. They are standard industry agreements which include licensee pre-emption and substitution prerogatives to insure control over content. With these safeguards and the other limitations included in the agreements in place, NBC is free under FCC policies and rules to provide commercial matter and programming on PCC's stations.

These agreements, while restrictive, were viewed by PCC in 1999 as including reasonable concessions as part of a transaction both parties believed would culminate in the contemplated NBC takeover of PCC. In the interim, the agreements were to provide operations, programming and financial help to PCC through such things as the co-location of station facilities, and the pooling of marketing and programming efforts. For the reasons explained above, none of the agreements was seen as implicating FCC delegation-of-control policies or running afoul of the local or national television multiple ownership rules.

IV. NBC's Conduct

From a regulatory standpoint, what is important is not simply the contractual arrangements between PCC and NBC, but how those arrangements have been implemented. The Commission is fully aware of this distinction and that it is necessary to not only evaluate arrangements on a predictive basis, but to review the parties' actual conduct to determine whether the Commission's rules are being violated. *See, Roy M. Speer*, 11 FCC Rcd 18393, 18413 (1996). As in *Speer*, the conduct of one of the parties in the present case (NBC) may not be consistent with the agreements or the FCC's rules.

The conduct of NBC under the agreements raises concerns which may have multiple-ownership rule implications for both companies, and is being brought to the Commission's attention in the interest of full disclosure.. As indicated above, should it be found that NBC, through abuse of its contractual arrangements with PCC, has or has had an attributable interest in PCC, NBC would be in violation of Sections 73.3555(b) and 73.3555(e)(1) of the rules. If the FCC finds that NBC's conduct under the agreements has impinged on PCC's control of its television stations, compliance with Section 310(d) of the Communications Act also may be at issue.

NBC Director Participation. In 2000 NBC nominated three of its senior employees to serve as PCC directors. These three persons, which, Bud Paxson, PCC's controlling shareholder, and the other shareholders, elected as board members at the annual shareholders' meeting in 2000, were R. Brandon Burgess, Vice President and Chief Financial Officer of NBC Business Development and New Media; Keith G. Turner, President of NBC Television Network Sales; and Harold N. Brook, Executive Vice President of NBC Entertainment and NBC Studios Business Affairs. Mr. Brook was later replaced by R. Edward Wilson, President of NBC Enterprises and Syndication.

In October 2000, PCC requested NBC to extend further financing. Mr. Burgess, who had a fiduciary obligation to PCC as a member of its board of directors, said in a letter to PCC (Ex. 13) that NBC would provide the requested financing, but only if PCC would agree to changes in the Investment Agreement. Mr. Burgess, writing on NBC letterhead, asked PCC for changes in (i) the "creative process" as it related to programming so as to better align PCC's and NBC's programming and marketing efforts on the West Coast; (ii) the structure, timing and the reduction in the exercise price payable by NBC under the Warrants and the Call (NBC wanted the power to "call" Bud Paxson's control stock before it exercised the Warrants); and (iii) the terms of the JSAs, which Mr. Burgess described as too restrictive in terms of limiting the amount of programming that could be placed on PCC stations by local NBC stations. PCC rejected PCC director Burgess's requests, on behalf of his employer, for changes in the NBC agreements and obtained financing elsewhere.

On July 30, 2001, Mark W. Begor, NBC's Executive Vice President and Chief Financial Officer, sent a letter to PCC (Ex. 14) in which he complained about the manner in which the PCC board meeting of June 21 and June 24, 2001 had been noticed and conducted, and further alleged that PCC's alternate plan for refinancing violated the debt incurrence covenant associated with the NBC Preferred Stock (*see* Ex. 12). A subject of the board meetings was a $200 million senior note offering by PCC, which NBC had previously informed PCC management was unacceptable because it created long-term debt which would be costly to refinance when NBC pursued its path to control. Mr. Begor stated in his letter that the "NBC board members" had not received sufficient or legal notice of the meeting and demanded that NBC be provided with "a detailed plan specifying how the additional funds...will be used, and that any change in the plan be approved by NBC and the board." In response, Jeff Sagansky, PCC's president, pointed out that the NBC directors were fully informed of the planned meetings and the subject matter. Mr. Sagansky denied that the increase in indebtedness violated the terms of PCC's Certificate of Designations relating to the NBC Preferred Stock. (*See* Ex. 15).

At the next PCC board meeting, on September 7, 2001 in New York, the NBC directors (Brandon Burgess, Keith Turner and Edward Wilson) abstained from voting on items dealing with the sale and lease-back of PCC's towers and the refinancing of certain preferred stock. Mr. Burgess, apparently on behalf of all three NBC directors, cited the need to resolve the issues raised in Mr. Begor's July 30, 2001 letter (Ex. 14), and subsequent correspondence, before he could vote on any PCC financing matters (*See* Ex. 16, extracts from minutes of the Sept. 7, 2001 board meeting). The minutes of the September 7 meeting also reflect Bud Paxson's admonitions to the three NBC directors that they were acting contrary their fiduciary duties to PCC and placing themselves at personal financial risk (Ex. 16, p. 14).

Prior to the September 7, 2001 board of directors meeting, NBC announced to PCC that it would use the NBC directors to advance NBCs position on the disputed financing transaction, and to that end asked PCC to add to the board's meeting agenda a discussion of the transaction. In e-mail messages to PCC from Lawrence P. Tu, NBC's Executive Vice President and General Counsel, dated August 27 and September 5, 2001, NBC made its position clear:

> [C]ould you get us a detailed agenda for the Sept. 7 board meeting as soon as you can, including any relevant background materials relating to the agenda items, so that the NBC representatives can be informed and prepared well in advance of the meetings.

Ex. 17; and,

> Please add to the board agenda a discussion of the recently completed financing transaction. In particular, NBC would like to focus the discussion on the company's future plans for incurring additional debt to fund capital expenditure and related purposes, and the controls applicable to such debt incurrence. This will obviously involve a discussion of the existing covenant restrictions on additional debt.

Ex. 18. After the meeting, on September 24, 2001, Mr. Tu sent a fax to Anthony L. Morrison, PCC's General Counsel, in which he asked for amendments to the official minutes of the

September 7 meeting. This fax, attached as Ex. 19, asks for the substitution of *new NBC versions of the record reflecting the NBC directors' responses, in the board meeting, to Bud Paxson's admonitions to the NBC directors for violating their fiduciary obligations to PCC by abstaining from voting on important financing resolutions*. Dissatisfied with his first draft of this suggested rewrite of PCC's board minutes, Mr. Tu sent a second version on the same day Ex. 19, pp. 8-9). The suggested changes to the minutes were rejected.

Budget Veto Power. Section 4.1(a) of the Investment Agreement provides that NBC must consent to PCC 's annual budgets, but that such consent will not be unreasonably withheld. On September 24, 2001 Lawrence Tu sent a letter to PCC (Ex. 20) which was a follow-up to the Begor letter and Jeff Sagansky's response referenced above. The letter again asserted NBC's right to approve PCC's incurring additional indebtedness to fund capital expenditures. The letter asserts NBC's "rights to approve [PCC's] budget and material deviations from that budget." Based on this "existing right," the letter continues, NBC proposed that: (i) PCC periodically report to NBC the dollar amounts of purchase money indebtedness and lease obligations; (ii) as part of its annual budget process, PCC submit to NBC, in addition to the budget itself, a detailed capital expenditure plan for the succeeding 12-month period, which plan would include categories of items of planned capital expenditures or leases and a projected timetable for such undertakings; (iii) PCC ratify its obligation under the Investment Agreement to seek NBC approval for any material deviation from an approved budget; and (iv) PCC renounce its negative interpretation of the covenant relied upon by NBC in its effort to disapprove the refinancing at the center of the dispute. Mr. Tu's letter was served on five NBC employees, including the three NBC-nominated directors named above.

In spite of the positions taken by NBC, PCC has not agreed to any of the terms set forth in Mr. Tu's September 24 letter and has proceeded with the refinancing that was the subject of the dispute. Additionally, PCC's Washington communications counsel provided a letter to PCC (Ex. 21), which was forwarded to NBC, indicating PCC's concern, from an FCC rule violation standpoint, about NBC's nomination of its own employees as PCC board members, and its use of them to influence corporate decision making. FCC counsel's letter also rejects as unacceptable NBC's assertion of control over PCC's budget processes. Mr. Tu responded in letters of October 23 and 31, 2001 to Anthony Morrison, PCC's general counsel (Ex. 22 and Ex. 23). Therein, he offered to remove the NBC directors from PCC's board. In his October 23 letter (Ex. 22) Mr. Tu denies that either he or NBC had influenced the NBC employees' voting as PCC board members. Of course, removal of the NBC–nominated directors potentially would be worse for PCC from a control standpoint than leaving them in place. Article IV of the Investment Agreement, as noted above, provides that NBC's consent to certain PCC corporate actions, including budgeting, program acquisitions, station sales, equity offerings and executive compensation, will be deemed given if even one of the three NBC-nominated board members votes in favor of it. Without this carefully crafted provision, which PCC believed would provide insulation from NBC's direct influence, PCC would not have entered into its partnership with NBC. Removal of NBC-nominated directors, similar to the current situation where NBC employees, controlled by NBC management, occupy the seats, will subject PCC to direct intervention by NBC of the sort evidenced by the correspondence referenced above.

V. Request for Relief

PCC views the Investment Agreement, the Stockholder Agreement, the Call Agreement, the JSAs, TBAs and related agreements and instruments entered into with NBC to be in full compliance with the FCC's multiple ownership rules as well as the agency's policies governing delegation of licensee control. However, the conduct of NBC exposes PCC to a potential finding that it has participated in violations of the multiple ownership rules. Indeed, NBC's (i) nomination of its own employees as PCC directors, (ii) their conduct as board members , and (iii) the NBC general counsel's efforts to not only have the employee-directors represent NBC's exclusive interests, but also to control the agenda and the minutes of a PCC board meeting, is strong evidence that NBC is an "attributable" owner of PCC under 73.3555, Note 2, subsection (h) ("Officers and directors of a broadcast licensee...are considered to have a cognizable interest in the entity with which they are so associated").

In approving the insulation provisions of a short-term trust in the context of the 1993 Viacom, Inc./Paramount Communications, Inc. merger, the Commission required that, while the trust was in effect, Viacom could not nominate persons to serve on Paramount's board of directors, or influence the selection of Paramount directors. Nor, for attribution purposes, were Paramount directors permitted to have business relationships with Viacom. *Viacom, Inc.*, 8 FCC Rcd 8439, 8442 (1993). The issue here is the same, *i.e.*, whether the NBC employees' presence on the PCC board equates to the presence of NBC itself on PCC's board. *See also, BBC License Subsidiary, LP,* 10 FCC Rcd 7928 (1995) (severence of a director's ties with previous licensee deemed necessary to avoid attribution of previous licensee's broadcast interests).

NBC's conduct raises attribution concerns on a broader front. The use of NBC-nominated directors to enforce rather than buffer the covenants included in Article IV of the Investment Agreement has sufficiently eroded NBC's insulation from direct involvement to make NBC a non-passive PCC investor, causing attribution of PCC's broadcast interests on a separate basis. In the case of limited partnerships, which are covered by Note 2, subsections (g)(1) and (2) of Section 73.3555 of the rules, a limited partner or member of an LLC is considered to have a non-attributable interest only if "that partner is not materially involved, directly or indirectly, in the management or operation of the [stations]. . .." While the rules governing the permissible roles of non-voting stockholders do not contain the same specific prohibition, by analogy the same underlying standard of insulation applies, raising the question of whether NBC's non-passive conduct, described above, brings it within the reach of the policies underlying the attribution rules. Indeed, the Commission has made it clear that it must review the multiple relationships, not each agreement in isolation, and the empirical evidence, not just the contractual arrangements. The purpose of its attribution rules is, the Commission has stated, to identify those interests or relationships which "confer on its holders a degree of 'influence' such that the holders have a 'realistic potential to affect the programming decisions of licensees.'" *BBC License Subsidiary, LP*, *supra,* 10 FCC Rcd at 7932 (1995), *citing Attribution of Ownership Interests,* 97 FCC 2d 997, 999, 1005 (1984), *recon. granted in part,* 58 RR 2d 604 (1985), *further recon. granted in part,* 1 FCC Rcd 802 (1986). The "cumulative effect of all relevant factors" determines whether a party's interest will be considered attributable. *Roy M. Speer, supra,* 11 FCC Rcd at 18413–14.

NBC's conduct raises issues above and beyond mere attribution concerns. NBC's assertion of the right to review and approve each PCC budget and material amendments thereto, and its attempts, unsuccessful so far, to use NBC-nominated directors to block PCC's efforts to obtain financing from independent sources, show disregard for PCC's prerogatives as an FCC license. This verges on an assertion of control of PCC. NBC's efforts to control the agenda for the September 7, 2001 PCC board meetings, and to rewrite the minutes to suit its interests may best illustrate NBC's desire to control PCC before the FCC's rules permit.

The opportunities for abuse are great given the economic power NBC can exercise under its programming and marketing arrangements with PCC, arrangements which by themselves do not raise regulatory issues, but which make PCC vulnerable to NBC's aggressive tactics. Should NBC continue to use the same tactics, based on its apparent assumption that it can interfere with, if not control, important aspects of PCC's decision-making, PCC will be hard pressed to resist. NBC controls the generation of two-thirds of PCC's revenues, and is responsible for the sale of all commercial time on PCC's stations and network. This, combined with NBC's asserted power over budgeting, borrowing and the issuance of equity financings, puts PCC in a tenuous position. If the aggression continues, NBC could manipulate PCC's revenues but refuse to let the company raise money to pay its debts. This would leave PCC with no room to maneuver. The situation will be exacerbated if the three NBC-nominated directors continue to serve NBC's instead of PCC's interests, or if NBC were to have them resign as Mr. Tu has offered in his letters of October 23 and October 31, 2001.

PCC appeals to the Commission to resolve whether NBC's conduct raises regulatory issues, from both an attribution and a licensee control standpoint. Specifically, PCC asks the

FCC, if it finds that NBC has an attributable interest in PCC, or has engaged in conduct which threatens PCC's control of its stations, to consider the following remedies:

(1) Require reformation of the Stockholder Agreement to make it provide that any NBC-nominated directors must be independent, such that they have no employment or other relationships with NBC; or

(2) Should the FCC find that NBC cannot, under the attribution rule, nominate members of PCC's board of directors, require that the covenants contained in Article IV of the Investment Agreement be stricken; or

(3) If, in light of NBC's conduct, the Commission finds that the combination of rights granted to NBC under its agreements with PCC cannot reliably be reconciled with the requirement that NBC be a non-attributable owner of PCC, or reliably prevent further encroachments on PCC's licensee prerogatives, then the Commission should require a divestiture of NBC's equity and contractual interests in PCC.

WHEREFORE, It is respectfully requested that the Commission issue a declaratory ruling as to whether the conduct of the NBC under its agreements with PCC cause attribution of PCC's television stations to NBC contrary to the multiple ownership rules, or whether NBC's conduct impinges on PCC's licensee control prerogatives. Based on any finding of such violation, the remedies suggested above should be imposed.

Respectfully submitted,

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<u>EXHIBIT 1</u>

<u>INVESTMENT AGREEMENT</u>