

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-96
38359

In the Matter of)
)
Review of the Commission's) MM Docket No. 92-51
Regulations and Policies)
Affecting Investment)
in the Broadcast Industry)

NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: March 12, 1992

Released: April 1, 1992

Comment Date: June 12, 1992

Reply Comment Date: July 13, 1992

By the Commission: Commissioner Quello issuing a statement; Commissioner Barrett concurring and issuing a statement; Commissioner Duggan issuing a separate statement.

I. Introduction

1. We initiate this proceeding to seek comment on possible means for reducing unnecessary regulatory constraints on investment in the broadcast industry. We believe this action is particularly appropriate now, since the availability of capital has recently become a matter of increasing concern to the industry.¹ We also believe that this action is necessary to ameliorate the difficulties that new entrants to this industry, including, in particular, minorities and women, have experienced in obtaining adequate financial backing and in successfully breaking into broadcast ownership.² Furthermore, the capital demands of the broadcast industry for all participants can only be expected to increase in the near future, as new technologies such as Digital

¹ We note that the Board of Governors of the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation recently altered guidelines and reporting requirements concerning highly leveraged transactions, finding that changed circumstances and an unintended and undue effect on the availability of capital justified relaxation of some guidelines. The majority of commenters in the proceeding leading to that action specifically raised concerns about the availability of capital to the media industries.

² In a related vein, we recently established a Small Business Advisory Committee. See Public Notice FCC Establishes Small Business Advisory Committee dated March 12, 1992.

Audio Broadcasting and Advanced Television are implemented. The availability of capital for such enterprises is likely to be a significant determinant of whether U.S. preeminence in the field of broadcasting will be preserved.

2. The broadcasting industry is a cornerstone of American commerce and, therefore, has substantial effects on other parts of the U.S. economy. In addition to the approximately \$35 billion in revenues the industry generates directly each year,³ investment in the commercial broadcasting industry results in production in a host of other industries. To cite one example, the U.S. television broadcasting system has resulted in a vibrant television programming production industry. These related industries are significant not only domestically, but also internationally. For example, in the international economic arena, the U.S. enjoys a significant comparative advantage over foreign competitors with respect to television production exports. In 1989, U.S. television production export totaled \$1.696 billion, or roughly 71% of the world television production export.⁴

3. Given the significance of the domestic broadcasting industry to the economy, it is vitally important that our regulatory programs be as minimally burdensome on investment in the industry as possible, consistent with our statutory mandate. Therefore, in this proceeding we seek comment on several proposals for changes in the Commission's rules and policies which could increase and facilitate the availability of capital for investments in the broadcasting industry. Specifically, we initiate this proceeding to seek comment on requests by two parties⁵ concerning the treatment of widely held limited partnership interests under our ownership attribution rules.⁶ We also seek comment on requests by two other parties that might be relevant to the goals of this proceeding concerning the means by which creditors of broadcast licensees may secure their interests.

4. We also raise, on our own motion, a number of additional issues concerning capital investment in the industry. We seek comment on whether changes in certain of our ownership attribution standards, relating to both shareholder and partnership interests, might foster investment by reducing significant regulatory impediments. We also seek comment on any other

³ See Robert J. Coen, McCann-Erickson, Study prepared for Advertising Age (April 1991).

⁴ Frost and Sullivan, "U.S. and International Program Production Market for Television and New Video Technologies," excerpted in Television Business International, May 1991, at 129.

⁵ In addition to the four requests mentioned here (and further described below), all comments filed in response thereto (set forth in Appendices A and B) are hereby incorporated by reference into this rulemaking proceeding.

⁶ 47 CFR §§ 73.3555 and 76.501. The ownership attribution rules, although contained in the section of our rules prohibiting certain types of multiple-station and cross-media ownership, also govern significant reporting obligations.

actions the Commission might take to foster the availability of capital in the broadcasting industry. We especially seek comment on whether there are financing mechanisms available in other industries which might be used effectively in the broadcasting industry, if appropriate changes in the Commission's regulatory program were implemented.

II. Notice of Proposed Rule Making

A. Attribution of Ownership

5. The Commission's attribution criteria define what interests held in or relationships to media entities will be considered "cognizable" for purposes of applying the multiple ownership rules.⁷ They "in essence constitute the means by which the media multiple ownership rules are implemented."⁸

6. Stock interests. Under existing standards, all non-voting stock interests (including most "preferred" stock classes) are generally not attributable. Any voting stock interest of 5% or more is generally considered attributable. Thus, for example, the current duopoly rule would prohibit an individual or entity from holding a 5% or greater voting interest in each of two television licensees in the same service with overlapping signal contours.⁹ There are several exceptions to the presumption of attribution created by this 5% benchmark. Most notable among these for our present purposes is the "passive" investor exception, under which a defined class of institutional investors may hold up to 10% of a company's voting stock interest without incurring attribution. The Commission considers three types of entities to be "passive" for this purpose: (1) investment companies, (2) insurance companies, and (3) bank trust departments.

7. We believe that relaxation of all or some of these aspects of our attribution rules may substantially benefit the broadcast and cable industries by affording them access to new sources of capital as well as making available increased investment from existing capital providers. Greater access to passive investment should also prove especially beneficial to new entrants, including, in particular, minorities and women, who historically have experienced significant difficulty securing adequate start-up funding.

⁷ The attribution standards are detailed in the notes to the multiple ownership rules. See 47 C.F.R. §§ 73.3555 and 76.501. These provisions were last reviewed comprehensively in 1984. See Report and Order in MM Docket No. 83-46, 97 FCC 2d 997 (1984) (Attribution Order), reconsidered 58 RR 2d 604 (1985) (Attribution Reconsideration Order), further reconsidered 1 FCC Rcd 802 (1986).

⁸ Attribution Reconsideration Order, 58 RR 2d 604, 606 (1985) (footnote omitted).

⁹ The relevant contour for commercial television is the predicted Grade B contour. 47 C.F.R. § 73.3555.

Moreover, enhanced investment opportunities should provide all media companies with more choices in funding sources, decreased capital formation costs and ultimately more resources with which to provide service to the public.

8. In this Notice, we seek comment on three specific proposals. Commenters are expressly invited, however, to submit variations on or alternatives to these proposals.¹⁰ Commenters presenting variant approaches should address the ways in which their proposal will advance our goal of increasing the flexibility of capital sources in media markets while adequately identifying influential ownership and positional interests in the application of our ownership rules.

9. First, we propose to raise the basic attribution benchmark from 5% to 10%, thereby doubling the permissible level of investment which the typical non-institutional investor could provide without fear of conflict with the multiple ownership rules.¹¹ This higher level of nonattributable investment may well attract new sources of capital to the media market and would inevitably create greater flexibility for existing investors to increase their participation in backing media ventures. While we previously considered a 10% basic attribution benchmark and rejected it,¹² that determination was made fully eight years ago in economic and competitive circumstances materially different from those which now prevail. In light of current market conditions, we believe that there is a need to reevaluate our earlier resolution of this matter. Accordingly, we ask commenters to consider how, in today's marketplace, we might preserve investment flexibility while adequately accounting for all influential interests which merit scrutiny under our rules.

¹⁰ We note that the Commission is statutorily prohibited from expending any of its appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer such rules of the Federal Communications Commission as set forth at section 73.3555(c) of title 47 of the Code of Federal Regulations." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 797 (1991). Section 73.3555(c) prohibits ownership of a daily newspaper and a broadcast station in the same market. We therefore will not consider any changes in the attribution rules to the extent such changes fall within the scope of this prohibition. We ask for comment on whether the proposed changes in the attribution rules would fall within the scope of the prohibition and should be limited accordingly.

¹¹ Because we propose no change in our Rules which treat positional interests, e.g., officer and director, as cognizable ownership interests, our proposed changes would not permit evasion of our underlying concerns with diversity and competition. Combining an otherwise non-attributable ownership interest with a positional interest that provides significant opportunities to influence a licensee's affairs will continue to trigger application of our Rules.

¹² See Attribution Order, supra at 1006.

10. Second, we propose to increase the existing attribution benchmark for passive institutional investors from 10% to 20%. This change should be particularly effective in increasing capital availability given the substantial resources which institutional investors, such as insurance companies and mutual funds, can make available to media enterprises. We believe that the inherently passive nature of the investors eligible to use this benchmark will adequately prevent undue influence that might otherwise be associated with the 20% benchmark. We note in this regard that licensees are required to certify that no passive investor "has exerted or attempted to exert any influence or control over any of the affairs of the licensee."¹³ We would retain this requirement. Furthermore, while we previously rejected a proposed passive investor benchmark exceeding 10%, we did so out of a concern that "merely voting or trading large blocks of stock can affect the management of a company . . . and it appears that a block of 10% or more of voting stock approximates the shareholding level . . . that could often result in this effect, even if inadvertent and unintended."¹⁴ This concern may be valid, but it is directed to a type of influence that is considerably more speculative and remote than the direct influence exercisable by non-passive investors. We question whether it continues to represent the kind of risk which warrants a 10% benchmark restriction on passive investment.

11. Finally, we propose to broaden the class of investors eligible for passive institutional status and therefore eligible to use the higher attribution benchmark. Specifically, we seek comment on affording Small Business and Minority Enterprise Small Business Investment Companies (SBICs and MESBICs) such status.¹⁵ We tentatively conclude that new entrants and minority owners could be substantially assisted by relaxing the restrictions which the existing 5% attribution standard places on the investments of SBICs and MESBICs in media companies. In this regard, we note that while there has been growth in the absolute number of minority-owned broadcast entities in the years since our last attribution order, there has been little change in the percentage of all broadcast stations owned by minorities. Moreover, it is the limited availability of capital that has historically laid at the heart of this problem.¹⁶ The four-fold increase in the attribution limit (from 5% to the proposed 20%) which this proposal would provide for investment companies targeted to small and minority enterprises should afford some measurable relief in this area. Further, while we have recognized that SBICs and MESBICs

¹³ Attribution Order, supra at 1014; FCC Form 323 (Ownership Report), Instruction 6.

¹⁴ Attribution Order, 97 FCC 2d at 1013 (footnotes omitted).

¹⁵ The Small Business Administration licenses SBICs and MESBICs 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.

¹⁶ See Strategies for Advancing Minority Ownership Opportunities in Telecommunications, Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (May 1982).

are not entirely passive in nature,¹⁷ the circumstances under which they might enter and direct or definitively influence the affairs of a debtor company are narrow and are subject to regulation by the Small Business Administration.¹⁸ We thus seek comment on whether we should now grant SBICs and MESBICs passive status and the benefits in terms of investment flexibility which such status confers.¹⁹

¹² Partnership Interests. Under the Commission's ownership attribution rules,²⁰ all partners in a general partnership, regardless of equity interests, are attributed with ownership. The rules with regard to limited partnerships establish certain criteria to be applied in determining whether limited partners are sufficiently insulated from "material involvement" in the management or operation of the partnership's media related activities to be exempt from attribution.²¹

¹⁷ See Attribution Order, 97 FCC 2d at 1016.

¹⁸ For example, 13 CFR Section 107.801(a) generally prohibits permanent control by SBICs of the small concerns in which they invest, noting that the "[Small Business Investment] Act does not contemplate that Licensees [SBICs] shall operate business enterprises or function as holding companies exercising control over such enterprises." Section 107.801(c) limits temporary control by SBICs of client debtors only to situations where it is "reasonably necessary for the protection of [the SBIC's] investment." Such control is subject to SBA oversight and would, where a Commission licensee is involved, require our prior consent as well. See 13 CFR Section 107.801(d) and (e), and Section 310(d) of the Communications Act of 1934, as amended. Moreover, the provision by an SBIC of management advice to its client debtors is also regulated, Section 107.501 providing, for example, that any management services rendered "may be advisory only."

¹⁹ In 1984, the Commission suggested that SBICs and MESBICs might obtain the type of investment security they sought when investing in broadcast enterprises through non-attributable equity interests such as non-voting stock or convertible warrants. 97 FCC 2d at 1016. The Commission concluded that the flexibility afforded by a higher, passive-investor attribution benchmark was therefore unnecessary. Given the persistently low percentage levels of minority ownership of broadcast media in the intervening years, however, we believe it is appropriate that this judgment, at odds with the views of SBIC interests filing comments at that time, be revisited.

²⁰ 47 C.F.R. § 73.3555, n.2, and § 76.501, n.2.

²¹ Note 2(g) (2) of the multiple ownership rules cross references the Attribution Order, *supra* and Attribution Reconsideration Order, *supra*, which established the criteria necessary to assure adequate insulation with respect to limited partnerships. The following provisions, among others, are provided as indications that limited partners are sufficiently insulated: (1) The partnership agreement may permit the exempt limited partners to vote on the admission of additional general partners, but the general partner should be empowered to veto any such admissions; and (2) the partnership

13. Currently pending before the Commission are two Petitions seeking Declaratory Rulings regarding application of the attribution rules to limited partnership interests, one by Kagan Media Partners (Kagan) and the other by Equitable Capital Management Corporation (Equitable). Both Petitions request a finding that the provisions of their limited partnership agreements, which admittedly do not comply with the current insulation criteria, nonetheless sufficiently insulate the limited partners from involvement in the management and operation of the partnership's media holdings so that the limited partners' interests in those media investments should be exempt from attribution.²² In response to an August 17, 1990 Public Notice, three parties filed comments and/or reply comments.

14. In essence, these Petitions seek exemptions from the Commission's attribution criteria for "business development companies" organized as limited partnerships. Business development companies are a special class of investment vehicle organized for the purpose of providing transitional and intermediate financing, as well as management assistance, to small- and medium-sized companies. The investments of business development companies are restricted to ensure that such companies provide capital to developing or financially troubled companies. Such companies are typically structured as limited partnerships to take advantage of favorable "pass-through" tax treatment made available to partnerships by the Internal Revenue Service. As "business development companies," the partnerships are regulated under the Investment Company Act of 1940, 15 U.S.C. §§ 80(a) et seq. ("Investment Company Act"), and are also subject to the securities laws of each state in which partnership interests are offered or sold. Under both federal and state securities regulatory systems, limited partners must be afforded the right to vote on the election and removal of general partners. The Commission's insulation criteria, however, require the absence of such voting rights, in conjunction with other insulating provisions, to support a presumption that the limited partners are insulated from the management and operation of the partnership's media activities.

15. The petitioners assert that federal and state securities laws thus prevent them from conforming their partnership agreements to comply with the Commission's current insulation criteria. However, petitioners believe that their partnership agreements provide sufficient insulation to satisfy the Commission's concern that the limited partners be precluded from material involvement in the management or control of the partnership's media

agreement should prohibit the exempt limited partners from voting on the removal of 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 an independent party.

²² Equitable's Petition specifically requests such a ruling so that its limited partners would be entitled to use the "multiplier" provision of the ownership rules in calculating compliance with the alien ownership limits set forth in Section 310(b) of the Communications Act. See Wilner & Scheiner, 103 FCC 2d 511 (1985).

investments. Moreover, because these partnerships are nationwide, publicly-offered, widely-held limited partnerships, with thousands of potential limited partners each owning very small percentages of the total equity, the likelihood that the limited partners will join together and use their collective removal and appointment powers to exert influence over the general partner and thereby control the management or operations of the partnerships' media interests is slight. Any individual partner's ability to influence such an outcome would generally be limited (or could be required to be limited) in proportion to its ownership interest. Petitioners argue that the degree of influence of their limited partners are akin to small minority shareholders in a publicly-held corporation for whom attribution is determined according to a stock ownership threshold. Commenting parties unanimously support the relief requested by Kagan and Equitable.

16. We believe that the strict application of our current attribution criteria to "business development companies" may impede the ability of these limited partnerships to make capital investments in broadcast entities and to attract a large pool of limited partners. Therefore, we propose to modify our insulation criteria as it applies to these widely-held limited partnerships, so as to eliminate as much as possible the current conflict with federal and state securities laws. Alternatively, we could combine an equity ownership standard specific to these partnerships with a more limited relaxation of specific insulation requirements.²³ We seek comment on whether this accommodation of our attribution rules is necessary to facilitate the ability of these types of limited partnerships to invest capital in the broadcast industry.

17. In light of the objectives of this proceeding, we also request comment on whether our attribution criteria for all widely-held limited partnerships should be modified to recognize insulation where limited partners hold an insignificant percentage of the total equity in the partnership. It has been argued that some limited partners are the functional equivalent of small minority shareholders in a publicly-held corporation and therefore are unable to exert influence beyond the amount of their equity share. We seek comment generally on what attributes of a limited partnership should indicate to the Commission that a requisite degree of insulation exists to permit limited partners to be treated similarly to minority stockholders in a corporation. We also seek information on whether there are particular types of partnerships that have consistent characteristics that would permit such an analysis as a matter of course, without case-by-case analysis. Although the Commission previously rejected

²³ Under the main proposal (as well as under current policy), limited partnership interests that meet all of the extant insulation criteria can be of any size without attribution, while those that fail any one of the criteria are presumptively attributed, no matter how small the equity interest, although that presumption could be challenged. The alternative approach would be to not attribute an ownership interest even if certain of the insulation criteria are not satisfied, as long as the equity interest remains below a specified benchmark.

extending the 5% voting stock threshold to limited partnership interests,²⁴ we request comment on whether this or some other percent of equity ownership in a widely-held limited partnership would be appropriate where these identified attributes exist. Commenters should include the level at which they believe limited partners' equity interests do not provide adequate insulation and, thus, should be cognizable. In addition, commenters should address whether such a change would allow limited partners the ability to materially influence or control the partnership's media investments. We further request comment as to whether we should distinguish widely-held partnerships from other types of partnerships and, if so, what criteria should define "widely-held."

B. Security and Reversionary Interests in Broadcast Licenses

18. Background. Pending before the Commission are two Petitions for Declaratory Ruling that raise issues concerning the ability of creditors to take either a limited security interest or a reversionary interest in an FCC broadcast license. The law firm of Hogan & Hartson filed a Petition requesting that the Commission permit third party creditors to obtain security interests in the license of a broadcast station.²⁵ Foreclosure on such interests would be subject to prior FCC approval. In addition, the law firm of Crowell & Moring filed a Petition asking the Commission to clarify Section 73.1150 of its Rules by defining the phrase "right of reversion" so as to allow a seller of a broadcast station to regain control of the license, subject to prior Commission approval. In response to a March 15, 1991 Public Notice soliciting comments on these Petitions,²⁶ 27 parties filed comments and/or reply comments.

19. The petitioners and supporting commenters submit that adoption of their proposals will produce several effects of benefit to the broadcasting

²⁴ Attribution Further Reconsideration Decision, 61 RR 2d 739, 746.

²⁵ Under Section 1-201 of the Uniform Commercial Code, a security interest is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation."

²⁶ There is significant overlap in the issues raised by the Petitions. Indeed, the Crowell & Moring Petition essentially seeks a declaration permitting licensees to retain a security interest in the license of a station when the station is sold -- a variation of Hogan & Hartson's request to allow third parties to hold security interests in a license. The comments to the Petitions, however, primarily address Hogan & Hartson's position on third party creditors, and those comments that did address the Crowell & Moring proposal generally do not discuss reversionary interests as separate from other security interests. To the extent that different policy considerations attach to seller as opposed to third party financing, commenters in this proceeding should provide separate discussion.

industry, and thus will further the public interest.²⁷ The central argument made by these parties is that allowing security interests will increase the availability of capital to the industry. They believe that the Commission's current policies may artificially suppress the availability of funds, and that easing the availability of credit for broadcast lending may foster the entry of new participants. Specifically with regard to seller financing, Crowell & Moring argues that allowing former licensees to retain a reversionary interest in the license will ease entry by minority or other new broadcasters. According to Crowell & Moring, new entrants seldom have sufficient resources to self-finance and generally face obstacles to obtaining third party financing not encountered by more experienced broadcasters.

20. Commenters opposing a change in Commission policy argue that the benefits to be derived from allowing security interests are speculative at best, and that permitting security interests will have negative effects on the industry. According to Capstar Communications, Inc. *et al.* (Capstar),²⁸ possession of a security interest will enable lenders to gain a property right that is independently enforceable outside the bounds of the Commission's statutory control, such as in a state court, creating chaos for the Commission as it attempts to carry out its regulatory function.²⁹ In addition, the Motion Picture Association of America (MPAA) argues that allowing security interests will remove an important incentive for unsecured creditors such as program suppliers to provide goods and services to licensees. According to MPAA, without a policy by which all creditors, on a pro rata basis, share in the value of a station attributable to the license in the event of default, program suppliers would not extend credit to licensees and the public would suffer as a result.

21. The Petitioners' proposals raise serious concerns. Foremost, we must begin by examining the requirements and possible limitations of the Communications Act. We must also assess the costs and other potential disadvantages of changing our rules, and weigh those against the anticipated

²⁷ Several parties have asked the Commission to take a broader approach by overturning FCC policies against security interests in non-broadcast licenses. Sound licensing practice, however, requires that the Commission consider the particular circumstances of each industry before reaching conclusions as to the advisability of permitting security interests in any given service. In this proceeding, our consideration of this issue is specifically limited to the broadcast services.

²⁸ Capstar is joined in its comments by Command Communications, Inc., Jones Eastern Broadcasting, Inc., Legacy Broadcasting, Inc., Liggett Broadcasting, Inc. and Sinclair Broadcast Group, Inc. The joint comments filed by these parties were the only comments filed by broadcast licensees.

²⁹ Capstar cites Section 9-503 of the Uniform Commercial Code which provides: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." U.C.C. §9-503 (1990).

benefits. Furthermore, we note a split of opinion in recent bankruptcy court cases regarding the permissibility of security interests in broadcast licenses.³⁰ Accordingly, we seek additional comment on both the statutory and policy implications of the Petitions before us.

22. Statutory considerations. We historically have taken the view that our rule prohibiting sellers from retaining a reversionary interest³¹ and our policy prohibiting third party security interests³² were based upon statutory provisions prohibiting the grant of ownership interests in the spectrum³³ and the assignment by licensees of their interests in a license without prior Commission approval.³⁴ In a recent case, however, we found that there were no statutory bars in a related context -- the sale of a "bare" construction permit for a cellular authorization. Bill Welch, 3 FCC Rcd 6502, 6503 (1988). Although we limited Welch to the cellular industry, the statutory analysis in that case raises questions as to whether our reverter and security interest policies concerning the broadcast industry are statutorily mandated.³⁵ According to petitioners and supporting commenters, reversionary and security interests could be viewed merely as rights between private parties that can be exercised only upon Commission approval³⁶ and, therefore, would be fully consistent with the provisions of the Communications Act. In light of the analysis in Welch, we seek comment on whether the Communications Act prohibits security or reversionary interests in licenses per se. Commenters are also asked to address what legal implications a conclusion that the Communications Act does not preclude such interests may have under commercial transaction laws such as the Uniform Commercial Code (UCC).

23. Policy considerations. In addition to the statutory issues raised above, we have a number of fundamental policy concerns that must be weighed in deciding whether to permit security or reversionary interests in broadcast licenses. First, we question whether granting such interests would be

³⁰ Compare In re TAK Communications Inc., Case No. MM11-91-00031 (Bankr. W.D. Wis. Sept. 24, 1991) aff'd Case No. 91-C-935-C (W.D. Wis. Mar. 23, 1992) with In re Ridgely Communications Inc., Case No. 89-5-1705-JS (Bankr. D. Md. Nov. 21, 1991).

³¹ 47 C.F.R. § 73.1150.

³² Kirk Merkley, 94 FCC 2d 829 (1983); Radio KDAN, 11 FCC 2d 934, on recon., 13 RR 2d 100, 102 (1968), aff'd on other grounds sub nom. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969).

³³ 47 U.S.C. §§ 301, 304, 309(h) (1).

³⁴ 47 U.S.C. §§ 310(d), 309(h) (2).

³⁵ We do not propose here to change our rule prohibiting the for-profit sale of unbuilt broadcast construction permits. See 47 C.F.R. § 73.3597.

³⁶ See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 F.C.C.2d 1249 (1985).

effective in increasing capital availability, and we seek specific comment assessing the likelihood of such an increase. In this regard, we also ask whether other financing arrangements might be disturbed. For example, it has been argued that other creditors (e.g., program suppliers) would be less likely to extend credit to stations if their positions relative to the senior lender were subordinated. Second, we are concerned that the independence of stations be maintained if security interests are permitted. Thus, we seek comment on the effect that holding a security or reversionary interest in a license may have on the likelihood that creditors will attempt to exercise control or have substantial influence over a borrower station. Is there a greater likelihood of entanglement between the creditor and the licensee where the lender is the former licensee of the subject station? Third, we ask whether safeguards will be necessary to ensure that transfers of control do not take place without the Commission's prior approval, as required by the Communications Act. Fourth, we question whether allowing security interests will discourage lenders from helping stations work past temporary financial difficulties. Finally, we seek comment on the applicability of any action taken in this proceeding to existing contracts. We request comment on each of these areas of concern. In structuring their discussion, commenters should bear in mind the general framework afforded these issues by the comments filed in response to the Public Notice. Using these comments as a backdrop, we ask commenters to provide specific information and detailed analysis of their respective positions.

III. Notice of Inquiry

A. Other Financing Mechanisms

24. In conjunction with our interest in reducing regulatory burdens on investment in broadcasting, we seek comment on whether alteration of other Commission rules or processes might enable enterprises to raise capital more efficiently or at less expense. In this regard, we ask commenters whether it is possible, through regulatory reform, to reduce certain risks associated with debt instruments in the broadcasting industry by enhancing the liquidity and marketability of these securities for potential investors without undermining our public policy or regulatory goals. In particular, we seek comment on whether standardized debt pooling mechanisms could facilitate access to capital by broadcasters, similar to arrangements established in venture capital funds or student loan, insurance and mortgage packages. Commenters should address whether there are fundamental characteristics that would distinguish other debt pooling mechanisms from debt packaging arrangements in broadcasting, thus limiting the viability or marketability of the broadcasting package. In addition, we seek broad-ranging comment regarding any additional steps that the Commission could pursue in order to facilitate access by broadcasters to capital markets.

IV. Conclusion

25. We have launched this proceeding in order to consider ways, in today's competitive marketplace, to strengthen the economic viability of our

domestic broadcast industry and to facilitate entry therein. Specifically, we believe that the availability of investment capital is critical to the future of the industry. The proposals presented herein are designed to ease regulatory burdens on capital formation and therefore increase access to new capital resources for broadcasters in the years to come.

V. Administrative Matters

Ex Parte Rules -- Non-Restricted Proceeding

26. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

27. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 12, 1992**, and reply comments on or before **July 13, 1992**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

28. As required by § 603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981)).

29. **Reason for the Action:** The purpose of this Notice is to consider proposals for changes to the Commission's rules and policies which impact the availability of capital for investment in the broadcasting industry.

30. **Objective of this Action:** This action is intended to determine whether, and if so, in what circumstances, Commission policy might be changed, consistent with statutory mandates, to reduce government regulation on investment in the broadcast industry.

31. **Legal Basis:** Authority for the actions proposed in this Notice may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

32. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:** None.

33. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:** None.

34. **Description, Potential Impact and Number of Small Entities Involved:** Approximately 10,000 existing broadcasters of all sizes and an unknown number of potential broadcasters may be affected by the proposals contained in this Notice. In addition, an unknown number of financial institutions may be affected.

35. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** The purpose of this Notice is to seek comment on issues regarding the concerns raised in the Petitions, including alternatives that would minimize the impact on small entities.

Additional Information

36. For additional information on this proceeding, contact Eugenia R. Hull, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments and Reply Comments filed to date in MMB File No. 910221A and MMB File No. 870921A

Comments

1. American Security Bank
2. Ameritrust Company, National Association; Chemical Bank and New Bank of New England, N.A
3. Bank of America
4. Broadcast Trustee Management, Inc.
5. Burr, Egan, Deleage & Co.
6. Canadian Imperial Bank of Commerce
7. Capstar Communications, Inc.; Command Communications, Inc.; Jones Eastern Broadcasting, Inc.; Legacy Broadcasting, Inc.; Liggett Broadcasting, Inc. and Sinclair Broadcast Group, Inc.
8. Chase Manhattan Bank
9. Den Norske Bank
10. First National Bank of Boston
11. First National Bank of Chicago
12. General Electric Capital Corporation
13. Heller Financial, Inc.
14. J.P. Morgan & Co., Inc.
15. Kansallis-Osake-Pankki
16. Morrison & Foerster
17. Norwest Bank Minnesota
18. O'Melveny & Myers
19. Ropes & Gray
20. Santarelli, Smith & Carroccio
21. Security Pacific Corporation
22. Semmes, Bowen & Semmes
23. Wireless Cable Association, Inc.

Reply Comments

1. Ameritrust Company National Association; Chemical Bank and New Bank of New England, N.A.
2. Capstar Communications, Inc.; Command Communications, Inc.; Jones Eastern Broadcasting, Inc.; Legacy Broadcasting, Inc.; Liggett Broadcasting, Inc. and Sinclair Broadcast Group, Inc.
3. Hogan & Hartson
4. Morrison & Foerster
5. Motion Picture Association of America
6. Motorola, Inc.
7. National Association of Broadcasters
8. Santarelli, Smith & Carroccio

APPENDIX B

Comments and Reply Comments filed to date in MMB File No. 900924A

Comments

1. ML Media Partners, L.P.
2. Sacramento RA Limited Partnership

Reply Comments

1. Equitable Capital Management Corporation

Federal Communications Commission Record

Statement of Commissioner James H. Quello

**Notice of Proposed Rulemaking
and Notice of Inquiry,
Review of the Commission's Regulations and
Policies Affecting Investment in the
Broadcast Industry**

This proceeding is a timely review of Commission policies that affect the ability of broadcast companies to attract capital. Rather than examine each of the policies in isolation, I wholeheartedly endorse the idea to consolidate the various proposals in a comprehensive Notice.

This is not to suggest, however, that I necessarily endorse any of the proposals themselves. In particular, I am skeptical that allowing security interests or reversionary interests in broadcast licenses can be reconciled with the Communications Act. But I am willing to listen to the arguments that will be presented in the comments.

I hope that by making some minor rule adjustments, the Commission can encourage investment in broadcasting. Consequently, commenters should not limit themselves to the options presented in this Notice, but should feel free to make any suggestions that would help attain this goal.

**CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT**

In re: Review of the Commission's Regulations and Policies
Affecting Investment in the Broadcast Industry

I am fully aware of the economic health of the radio industry. I agree that the Commission should take steps to alleviate the genuine burdens facing the industry. However, we should do so in a manner that remains true to the Commission's public interest goals. We should not totally abandon our past policy objectives based on temporary market conditions. I support many of the ideas that have been put forth today under the rubric of regulatory reform. I am more cautious in my approach to this item and the two other items on the agenda dealing with the broadcast industry.¹

While I welcome this opportunity to explore modifications to the Commission's policies and rules in order to encourage investment in the broadcast industry, I have concerns regarding some of the proposals outlined in this item. My concerns relate to the section of this Notice of Inquiry/Notice of Proposed Rulemaking dealing with the grant of security or reversionary interests in a broadcast station license, and the modification of the attribution limit for "active" investors.

I have serious doubts about the Commission's statutory authority to permit reversionary and other security interests in broadcast licenses. The Commission has previously determined that a broadcast license does not confer upon the holder the ability to provide for a reversionary or a security interest in the license.² I understand that in 1988 in the cellular context, the Commission determined that the prohibition was not mandated

¹ See, e.g., Dissenting Statement of Commissioner Andrew C. Barrett in MM Docket No. 91-140, adopted March 12, 1992.

² See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 FCC 2d 1249 (1985); Kirk Merkley, 94 FCC 2d 829 (1983); Radio KDAN, 11 FCC 2d 934, on recon., 13 RR 2d 100. 102 (1968), aff'd on other grounds sub nom. Hansen v. FCC, 413 F.2d 374 (D.C. Cir 1969).

by statute.³ However, this cellular ruling does not persuade me that the prohibition on reversionary and security interests in the "broadcast" context can be modified without violating the Commission's statutory mandate. I plan to closely examine arguments suggesting that the statute may not be a bar to modification or elimination of the prohibition. I expect parties commenting on this issue to set forth specific legal analysis of the statutory provisions, their legislative history and a rationale for their conclusions.

In addition to a statutory concern, I must question the policy implications of granting a security or reversionary interest in a broadcast station license. I would encourage parties commenting on this issue to provide concrete evidence that permitting reversionary or security interests in broadcast station licenses will in fact increase capital availability. I also have concerns about the implications to granting security interests with respect to other financing arrangements.

I must concur to the portion of the item relating to modifying the attribution of ownership criteria. The interplay between modifying the rules relating to voting stock interest and changes in the national and local radio ownership rules have the potential to cause serious damage to the concept of diversity. Raising the basic attribution benchmark from 5% to 10% would create incentives for greater concentration in the radio industry at a time when this Commission has voted to permit the ownership of up to 6 stations in the local market and 60 stations in the national market. As outlined in my statement in the radio ownership docket, I view the modifications to the ownership rules as the initial abandonment of our traditional concerns for diversity, and the fostering of new entrants into the broadcast industry. Similarly, the proposed change in the attribution rule can be viewed as an attack on these principles. Modifying the ownership rules accomplishes only one goal. It permits existing broadcasters or those with ownership interests in broadcast properties to increase their interest. Thus, the removal of the voting stock interests as proposed in this item could, in a real sense, curtail investments from new entrants to the broadcast industry. New entrants, including women and minorities, have the ability, at a lower cost than full ownership of a station, to enter the broadcast industry through stock purchases. These participants can begin to actively participate in the industry through relatively modest costs. The proposals contained in our Notice have the potential to remove this option for new participants. While this item discusses the ability of minorities and women to attain new financing sources through the modification of the attribution limits, I question who really

³ See Bill Welch, 3 FCC Rcd 6502, 6503 (1988).

benefits from the proposed modifications.⁴

I do agree with the suggestions made in the item to explore raising the passive ownership limits and broadening the class of investors for passive status. Perhaps, these proposals can provide a real avenue for providing financing for new entrants, including minorities and women. I look forward to the comments on the benefits and detriments of modifying the passive ownership attribution limits.

Although I do not have a closed mind on the issues raised in this proceeding, the burden on adjusting the active attribution criteria clearly will rest with those proposing modification. I would suggest the comments provide clear examples of other administrative agencies that utilize such high attribution standards. I would recommend that they discuss realistic safeguards that should be adopted with the rules. Finally, I urge commenting parties to demonstrate how relaxation of the rules on ownership and the attribution standards are consistent with the Commission's public interest mandate with regard to programming diversity.

⁴ Interestingly, this item discusses the need to provide incentives for financing to increase minority ownership. I applaud this goal, but find it difficult to understand fully how this can be a goal of the Commission in light of our action with respect to the radio ownership docket. I would urge commenting parties to explain how these actions taken together will encourage the growth of minority ownership.

**STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN**

**In the Matter of Review of the Commission's Regulations and
Policies Affecting Investment in the Broadcast Industry**

Access to capital is the single greatest barrier to entry in the broadcasting field today. Commercial markets for broadcast loans have virtually gone dry in the last 12 months, and I believe it is right for us to consider possible actions by the Commission to ease this credit crunch. I will be particularly interested in comments on the proposals we make for increasing capital for minority investment in broadcasting.

I approach the concept of granting a security interest in a broadcast license with cold skepticism. Those who believe adopting such a policy would spur broadcast lending or provide any other benefits to the broadcasting community bear, in my judgment, a heavy burden in proving their case. I see no harm in expanding the record on this issue, but I believe at the outset that both the security interest idea and the "right of reverter" concept raise serious and perhaps insurmountable concerns.

#