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JUN 12 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

To: The Commission

**JOINT COMMENTS**

A.H. BELO CORPORATION
BROAD STREET TELEVISION
COMMUNICATIONS EQUITY ASSOCIATES
COSMOS BROADCASTING CORPORATION
FALCON CABLE SYSTEMS COMPANY
JONES INTERCABLE, INC.
MULTIMEDIA, INC.
RIVER CITY BROADCASTING

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June 12, 1992

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**SUMMARY OF COMMENTS**

The Joint Parties support the Commission's proposals to increase the attribution benchmark for individual shareholders to 10 percent and the attribution benchmark for passive institutional investors to 20 percent. The proposed benchmarks are appropriate measures of the ownership interests which confer material influence over a media entity's management and operations and thus will permit the Commission to adequately identify such interests. An individual stockholder holding less than 10 percent of a company's voting stock who is neither an officer nor a director will not be able to influence either a company's general operations or its day-to-day management. Similarly, an institutional passive investor holding less than 20 percent of voting stock also will not materially influence company operations or management because these institutional entities, by their very nature, are principally interested in a return on investment, not participation in corporate policy decisions or day-to-day activities. Finally, the

proposed benchmarks will serve the Commission's goals of enhancing programming diversity and increasing investment and economic competition in the communications marketplace.

The Joint Parties also urge the Commission to modify its attribution rules as they apply to widely-held limited partnerships. Widely-held limited partnerships offer partnership interests for sale to the general public. In consequence, the limited partners of such partnerships generally number in the thousands; however, each limited partner usually holds less than a 1 percent interest in the partnership. These limited partners also generally invest in such a partnership for investment purposes only. They have no interest in participating in the partnership's day-to-day operations and generally are restricted from doing so by the limited partnership agreement. Widely-held limited partnerships therefore differ significantly from privately-held limited partnerships, and because of their unique characteristics, the current "no material involvement" standard currently used to determine whether a limited partnership interest is cognizable is not workable and is unwarranted.

The Commission should completely exempt from attribution limited partner interests in widely-held limited partnerships. In the alternative, the Commission should use the 20 percent benchmark for passive institutional investors or the 10 percent benchmark for individual stockholders.

For purposes of applying these proposals, widely-held limited partnerships should be defined as a limited partnership whose limited partnership shares are offered for sale to the general public and are subject to informational reporting requirements under the Securities Exchange Act of 1934.

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To: The Commission

**JOINT COMMENTS**

A.H. Belo Corporation, Broad Street Television, Communications Equity Associates, Cosmos Broadcasting Corporation, Falcon Cable Systems Company, Jones Intercable, Inc., Multimedia, Inc., and River City Broadcasting ["Joint Parties"], by their attorneys, submit herewith their Joint Comments in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry[1/] in the above-captioned proceeding:

INTRODUCTION

By its Notice, the Commission proposes significant changes in the attribution rules, which determine what ownership interests are considered "attributable" for purposes of its multiple- and cross-ownership rules. The

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1/ Notice of Proposed Rulemaking and Notice of Inquiry, MM Docket No. 92-51, FCC 92-96 (April 1, 1992) ["Notice"].

Commission has not revisited these regulations since 1984,[2/] yet in that time, the economic and competitive environment of the communications industry has undergone radical change.[3/] As the Commission recognizes in its Notice, these developments mandate substantial revision of its attribution rules.

The Commission's rules now attribute an ownership interest to individual shareholders holding 5 percent or more of a corporation's voting stock. The benchmark for institutional "passive" investors is 10 percent.[4/] The Notice proposes to increase the attribution benchmark for individual shareholders to 10 percent of voting stock, and the benchmark for passive institutional investors to 20 percent.

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2/ See Report and Order, MM Dockets Nos. 83-46, et. al, 97 FCC 2d 997 (1984) ["Attribution Report"], reconsideration, Memorandum Opinion and Order, 55 FCC 2d 604 (1985), further reconsideration, Memorandum Opinion and Order, 1 FCC Rcd 902 (1986) [collectively, "Attribution Proceedings"].

3/ See Notice of Proposed Rulemaking, MM Docket No. 91-140, 6 FCC Rcd 3275, 3275-76 (1991); Report and Order, MM Docket No. 91-140, FCC No. 92-92 (Apr. 10, 1992) (Revision of Radio Ownership Rules); News Release (Action in MM Docket No. 91-221) (May 14, 1992) (Revision of Television Ownership Rules).

4/ Such interests are considered to be "passive" because of these institutions' inherent lack of interest in controlling or managing the affairs of a media entity. Attribution Report, 97 FCC 2d at 1001.

The Joint Parties fully support the Commission's proposal. The increased benchmarks will continue to adequately identify those ownership interests which are likely to have significant influence over media companies' operations, but will enhance the attractiveness of media industry investments by limiting attribution of interests which have no realistic influence over business activities and thus exempting holders of such interests from the regulatory burdens attendant on attribution.

The Notice also seeks comment on the standards now used to determine the attributability of limited partnership interests. At present, the Commission uses specific criteria to determine whether a limited partner is "materially involved" in a limited partnership's media-related activities. If a limited partner can show that it is not materially involved in those activities, then its interests will not be considered attributable.

The Joint Parties submit that the current "no material involvement" standard is unworkable and unrealistic as applied to widely-held limited partnerships, which offer their partnership interests for sale to the public, are organized primarily for investment purposes, and typically have thousands of limited partners, each owning less than 1 percent of the partnership equity. These characteristics clearly set widely-held limited partnerships apart from closely-held limited partnerships. As a result, the Commission's concerns as to limited partners' ability to influence or control a partnership's media-related activities simply do not apply to widely-held limited partnerships. Limited partners of these partnerships are the functional equivalent of minority corporate stockholders and should at a minimum be subject to the same attribution benchmarks.

Moreover, since these limited partners possess many of the same characteristics as passive institutional investors, particularly with respect to their investment motives and ability and desire to become involved in day-to-day operations, application of the passive investor benchmark to limited partners of widely-held limited partnerships is even more appropriate.

The Commission thus should exempt limited partnership interests in widely-held limited partnerships from attribution. Alternatively, it should use the 20 percent attribution benchmark proposed for passive institutional investors or the 10 percent benchmark for corporate stockholders in determining the attributability of such interests. For purposes of these rules, a widely-held limited partnership would be defined as a limited partnership whose limited partnership shares are offered for sale to the general public and are subject to informational reporting requirements under the Securities Exchange Act of 1934.[5/]

In summary, the Joint Parties encourage the Commission to consider the following changes in its attribution rules:

(1) The Commission should increase the benchmark for individual corporate shareholders to 10 percent of voting stock;

(2) The Commission should increase the benchmark for institutional investors to 20 percent of voting stock; and

(3) The Commission should completely exempt from the attribution rules the limited partnership interests held in widely-held, public limited partnerships, or in the alternative:

(a) apply the benchmark for individual corporate shareholders to these limited partnership interests; or

(b) apply the benchmark for passive investors to these limited partnership interests.

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5/ These reporting requirements include the filing of an Annual Report on Form 10-K, a Quarterly Report on Form 10-Q, and the report of certain important events on Form 8-K. Registered entities are required to file these reports as long as they have 500 record holders of equity securities and assets in excess of $5,000,000.00.

"COGNIZABLE STOCK INTERESTS"

1. Current Attribution Benchmarks.

The Commission's attribution criteria determine "what interests held in or relationships to media entities will be considered 'cognizable' for purposes of applying the multiple ownership rules." Notice at ¶ 5. The Commission's ownership rules provide that any partnership or direct ownership interest and any voting stock interest of 5 percent or more of the outstanding stock of a corporate broadcast licensee or cable television system shall be deemed cognizable in applying the multiple- and cross-ownership rules. 47 C.F.R. §§ 73.3555, Note 2(a); 76.501, Note 2(a) (1991). Non-voting stock is non-attributable, as are limited partnership interests where the limited partner is not materially involved in the management or operation of the partnership's media-related activities. 47 C.F.R. §§ 73.3555, Notes (f), (g)(1); 76.501, Notes (f), (g)(1). Investment companies, insurance companies and banks holding stock through their trust departments in trust accounts are considered "passive investors" and are deemed to hold attributable interests only if they hold 10% or more of a company's outstanding voting stock. Id. §§ 73.3555, Note 2(c); 76.501, Note 2(c).

2. The Proposed Increase in the Attribution Benchmarks Will Continue to Identify Those Ownership Interests with Significant Influence Over Media Operations While Facilitating Additional Investment.

The Notice proposes to raise the attribution benchmark for corporate shareholders from 5 percent to 10 percent, and the "passive investor" benchmark from the current level of 10 percent to 20 percent. Notice at ¶¶ 9, 10. The Joint Parties strongly support this proposal.[6/] This increase in the benchmarks will clearly "advance the [Commission's] goal of increasing the flexibility of capital sources in media markets while adequately defining influential ownership and positional interests in the application of our ownership rules."[7/]

The Joint Parties submit that the proposed 10 percent attribution benchmark for individual stockholders and the 20 percent benchmark for passive investors are appropriate measures of the ownership interests which have relevant influence over media entities' management and day-to-day operations. Unless a stockholder has a substantial ownership interest, it will not be able to influence general

6/ Indeed, the Joint Parties submit that the benchmark for individual corporate stockholders could be raised to 15 percent without adversely affecting the public interest. Similarly, the benchmark for passive investors could be raised to 25 percent.

7/ Notice at ¶ 8.

corporate policies, much less the details of day-to-day operations with which the attribution rules are ultimately concerned. An 8 percent stockholder, for example, is not in a position to materially influence corporate policy, particularly if that ownership interest is not coupled with a position as an officer or director.[8/] Prior Commission decisions have recognized that corporate control rests with officers and directors or with the shareholders as a group.[9/] Given such recognition, the proposed benchmark increase will ensure that the Commission can still identify those entities which in practice can impact companies' day-to-day operations.

An increase in the benchmark for passive institutional investors is likewise appropriate. Such investors are simply not interested in or are precluded by regulation from controlling or otherwise influencing corporate policy. Their involvement is passive in nature, designed to create a return on investment rather than to exercise control. The Commission's prior action raising the passive investor attribution benchmark to 10 percent recognized the

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8/ If the shareholder held such a position, under both the current and proposed rules, he would be considered to hold an attributable interest, regardless of the extent of his stock ownership.

9/ *See*, *e.g.*, *Turner Broadcasting System*, 101 FCC 2d 843 (1985); *Committee for Full Value of Storer Communications, Inc.*, 101 FCC 2d 434, *aff'd sub nom.*, *Storer Communications, Inc. v. FCC*, 764 F.2d 436 (D.C. Cir. 1985).

"... appropriateness of the passive status we have traditionally accorded to investment companies, bank trust departments and insurance companies." Attribution Report at ¶ 33. That recognition should be extended in this proceeding to support the proposed benchmark increase to 20 percent.

If the underlying purpose of the Commission's ownership rules is to foster programming diversity and economic competition by limiting common operational control or influence, there is no need for restrictions when the control on which they focus is expressly disavowed or is prohibited by statute or regulation. Attributing ownership in the absence of the ability or desire to control elevates mechanical application of a rule above logic and practicality. The ownership rules' assumptions do not apply in the case of institutional investors which expressly disclaim any intent to control corporate policy or which are precluded by statutory or other restrictions from doing so. The benchmark thus can be increased to 20 percent without undermining the rules' policy underpinnings.

As an alternative to an across-the-board increase, the Commission could adopt a specific set of criteria which institutional investors must satisfy in order to qualify for the higher benchmark. These criteria, based upon those already set forth in Commission decisions,[10/] would be as follows:

(1) such investments are intended solely to result in dividends or capital gains for those on whose behalf they are made;

(2) the investor is passive and does not intend to control the companies in which it holds stock;

(3) the investments are made on behalf of others, to whom a fiduciary duty is owed; and

(4) the investor is subject to governmental regulation.

These criteria could also be adopted as a supplement to the current exemption of bank trust departments and insurance and investments companies to permit any investors who meet these criteria, either individually or as a group, to use the higher benchmark applicable to passive investors.

It should be noted that several other federal agencies use ownership benchmarks above 10 percent to define the controlling interests of entities under their jurisdiction.[11/] For instance, the Department of

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10/ See, e.g., College Retirement Equities Fund, 35 FCC 2d 885 (1972); New York Teachers' Retirement System, 52 RR 2d 1695 (1983); Stoner Broadcasting System, Inc., 74 FCC 2d 547 (1979); Report and Order, Docket No. 20520, 59 FCC 2d 970 (1976).

11/ In the past, the Commission has looked to the practices of other federal agencies for guidance on the adoption of benchmarks to measure ownership interests in regulated entities. See Attribution Report, 97 FCC 2d at 1006.

Transportation ["DOT"] defines a "person controlling an air carrier," for reporting purposes, as

> [a]ny person . . . whom the Department [of Transportation] has found in any proceeding, to control an air carrier, or who holds, directly or indirectly, <u>the legal or beneficial ownership of more than 50 percent of the outstanding voting capital stock or capital of an air carrier</u>.[12/]

The Interstate Commerce Commission ["ICC"] has established a similar "control" benchmark to analyze the investments of railroad companies subject to the Interstate Commerce Act. The ICC's financial accounting instructions to railroad companies mandate that "principles of equity accounting" are to be used to analyze any investments by the railroad company in the voting stock of an affiliated company which gives the carrier the ability to significantly influence the operating and financial policies of the investee. 49 C.F.R. Part 1201, § 5-1(b)(1) (1991). The ICC states that for these purposes

> an investment of <u>20 percent or more</u> of the outstanding voting stock of an investee will indicate <u>the ability to exercise significant influence over an investee</u> in the absence of evidence to the contrary.

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<u>12/</u> 14 C.F.R. Part 241, § 03 (1992) [emphasis added]. DOT also will permit a person owning more than 50 percent of an air carrier's stock to submit evidence that the person does not control the carrier despite the stock ownership. <u>Id.</u> If the person cannot provide such evidence, then he is deemed to be a person controlling the air carrier. DOT defines "controlling" as "[t]he possession, directly or indirectly, of the power to positively direct, or cause the direction of or negate the direction of, the management and policies of a company." <u>Id.</u>

Id. (emphasis added).

While the regulatory responsibilities of the FCC and these other agencies differ, use of control benchmarks greater than 10 percent supports this Commission's adoption of at least 10 percent/20 percent benchmarks - much lower attribution benchmarks than those adopted by the ICC and DOT.

Neither a 10 percent benchmark, in the case of individual shareholders, nor a 20 percent benchmark, in the case of passive investors, will adversely affect the Commission's diversity goals. To the contrary, raising the attribution benchmarks could attract many new investors, particularly minorities and women, thus adding to ownership diversity. The holder of an attributable interest in a broadcast station is subject to a number of burdensome regulatory requirements. Not only does such a holding subject it to the restrictions of the Commission's ownership limitations, it also subjects it to the requirement that certain litigation be reported[13/] and can require the preparation and submission of ownership reports.[14/] Such obligations can discourage investments: given a choice between investing in a highly regulated industry and an

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13/ See Report and Order, Gen. Docket No. 90-312, FCC 91-397 (Dec. 27, 1991); Memorandum Opinion and Order, 6 FCC Rcd 3448 (1991).

14/ See 47 C.F.R. § 73.3615(a)(3)(iv)(B).

equivalent non-regulated industry, the choice is easy. Increasing the benchmark which subjects investors to such requirements will obviously increase the attractiveness of media investments.

Additionally, the highly competitive nature of today's communications marketplace precludes the exercise of influence or control by a minority stockholder holding less than a 10 percent interest or by a "passive investor" holding less than a 20 percent interest in the stock of a media entity. As the Notice[15/] confirms, the communications industry has become extraordinarily competitive over the last eight years -- there has been a tremendous increase in the number of radio and television stations and in the number of new technologies entering the industry and, as a result, there is an enhanced level of competition among the many different media outlets.[16/] The degree of competition exacerbates the difficulties of exercising material control by minority owners.[17/]

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15/ See Notice at ¶ 1.

16/ See Notice of Proposed Rulemaking, MM Docket No. 91-140, 6 FCC Rcd at 3275-76.

17/ As the Commission will continue to attribute "positional interests," and since substantial stockholders generally hold such positions, any person who holds less than 10 percent of a media company but who can nonetheless exercise significant influence will be attributed with an ownership interest.

ATTRIBUTION BENCHMARKS FOR LIMITED PARTNERSHIPS

1. Current Attribution Standard.

The Commission's ownership attribution rules now provide that any interest held by a general partner, regardless of size, is cognizable for purposes of applying its ownership rules. Notice at ¶ 12. Limited partners' interests, on the other hand, are not attributable if the limited partners are "sufficiently insulated from 'material involvement' in the management or operation of the partnership's media related activities." Id.

The Commission has established a set of criteria to determine whether a limited partner is sufficiently insulated from such "material involvement."[18/] See generally Attribution Proceedings.

The Joint Parties respectfully ask that the Commission further clarify the types of activities which will be considered to constitute material involvement in a partnership's media activities, particularly insofar as the ability to vote on sales or disposition of assets which may be less than substantially all of a partnership's assets (such as a single station or cable system) but which may nonetheless be extraordinary and not confer influence or control over day-to-day operations. The Commission should also look to the substance of limited partners' involvement

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18/ These criteria are as follows: the limited partnership agreement must specify that the limited partner cannot act as an employee of the limited partnership if his or her job, either directly or indirectly, relates to the media activities of the partnership; the limited partner may not act, in any material capacity, as an independent contractor or agent with respect to the company's media business; the partnership agreement must restrict the limited partner from communicating with either the licensee or the general partner on the daily operations of the partnership; although limited partners may vote on the admission of general partners, the limited partnership agreement must specify that the general partner may veto any such admission; the limited partner may only remove the general partner for cause as long as the partnership agreement specifies that a neutral arbiter makes the decision regarding the general partner's liability; except for ability to make loans to the partnership, the limited partnership agreement must prohibit the limited partner from performing any services for the limited partnership which relate substantially to the media activities of the company; and the limited partnership agreement must state specifically that the limited partner may not be actively involved in the management or operation of the partnership's media business. See generally Attribution Proceedings.

in partnership activities, rather than adopting a narrow focus on the presence or absence of "magic words" in the partnership agreement.

2. Widely-held Limited Partnerships Should Be Exempt From Attribution or Should be Subject to an Attribution Benchmark Rather than the "No Material Involvement" Standard.

The Joint Parties believe that the Commission's current standard for determining cognizable limited partnership interests should not be indiscriminately applied to all types of limited partnership interests. Specifically, the "no material involvement" standard should not be applied to "widely-held limited partnerships."[19] The standard completely fails to accurately reflect the ownership realities of widely-held limited partnerships. The very nature of this type of limited partnership mandates that limited partner interests in such entities should be completely exempt from attribution or, in the alternative,

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19/ Widely-held, public limited partnerships, consisting of a general partner and individual limited partners, generally are large, nationwide partnerships which typically offer the limited partnership interests (or "units") for sale to the general public. As a result, the limited partners of a widely-held, public limited partnership may often number in the thousands, with individual limited partners typically owning less than 1 percent of the partnership. For purposes of the FCC's rules, a widely-held limited partnership should be defined as a limited partnership whose limited partnership shares are offered for sale to the general public and are subject to informational requirements under the Securities Exchange Act of 1934. See supra note 5.

subject to: (1) the attribution benchmark to which individual shareholders are subject; or (2) the attribution benchmark to which passive investors are subject.

In adopting its partnership attribution criteria, the Commission never addressed the specific issue of widely-held, public limited partnerships. Rather, the Commission focused on limited partnership interests solely in terms of small, privately-held limited partnerships with few, easily identifiable limited partners. Although the Commission recognized the minimal influence which limited partners can exercise,[20/] it nonetheless did not exempt them from attribution, but instead established specific criteria to evaluate limited partners' involvement in the partnership's management and operations.

Widely-held, public limited partnerships are clearly distinct from other types of limited partnerships. Limited partnership interests in such limited partnerships are sold to individual investors through public offerings which are conducted on a nationwide basis. A typical widely-held

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20/ "[a] typical limited partner is in a position similar to that of the holder of a debt or non-voting stock as far as involvement in the management of the company is concerned. Such an interest, conferring no influence or control over the licensee, is thus within the purview of the multiple ownership rules. Furthermore, the involvement of limited partners in certain enterprises provides another important source of capital for the industry, without inherently affecting the distribution of concentration or control within the industry." Attribution Report, 97 FCC 2d at 1022 [emphasis added].

limited partnership thus has literally thousands of individual limited partners, virtually all of whom hold less than a 1 percent interest in the partnership. As publicly-held entities, widely-held limited partnerships must register the partnership interests offered for sale to the public with the Securities and Exchange Commission ["SEC"]. Widely-held limited partnerships are also required to register their partnership interests with state securities commissions.

By contrast, a privately-held limited partnership typically does not sell limited partnership shares to the general public but rather to a select group of investors. Consequently, privately-held limited partnerships are not required to register with the SEC or state securities commissions.

Limited partners who invest in privately-held limited partnerships may do so for investment purposes but may also do so in order to participate, at least on a minimal level, in the operations of the limited partnership. Limited partners of a widely-held limited partnership, however, typically purchase a partnership interest for investment purposes only, and generally have no interest in becoming involved in the partnership's day-to-day affairs. In fact, a common provision in most widely-held public limited partnership agreements prohibits limited partners from influencing or controlling the partnership's management and operations.[21/] Limited partnership interests in a widely-held limited partnership are thus clearly "passive" in nature.

Widely-held and privately-held limited partnerships possess very different characteristics with respect to the extent to which limited partners may exercise influence and control. Such distinctions are central to the concerns reflected in the FCC's attribution standards.

Widely-held public limited partnerships are closely analogous to large publicly-traded corporations. Such limited partnerships offer partnership interests for sale to the public just as a public company offers its stock for sale to the public. See KMP Petition at 2. Just as a large publicly-held corporation has literally thousands of shareholders owning very small amounts of stock, widely-held limited partnerships also typically have thousands of limited partners, which generally own less than 1 percent of the total limited partnership interest.[22/] Like minority corporate shareholders, the limited partners of most widely-

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21/ See e.g., Kagan Media Partners, L.P. Petition for Declaratory Ruling ["KMP Petition"], Exhibit 1 at A-22 (Limited Partnership Agreement of Kagan Media Partners, L.P.) (July 7, 1989).

22/ In the case of certain widely-held limited partnerships, a potential limited partner may purchase an interest in the partnership for as little as $1,000.00.

held limited partnerships generally purchase an interest in the partnership for purely investment purposes and have no interest in and do not seek active involvement in the partnership's operations.[23/]

As with individual minority corporate shareholders, the nature and size (less than 1 percent) of a limited partner's ownership interest in widely-held limited partnerships, coupled with the large number of limited partners, ensure that no single limited partner can significantly impact the partnership's operations and management.[24/] Indeed, such a limited partner's interest gives it even less control and influence over the partnership's management and operations than a minority stockholder's control over a corporation.

For example, for corporate minority stockholders, the annual meeting is the primary forum for exercising voting power over the corporation's management and policies. Widely-held limited partnerships generally offer no comparable forum.

There is likewise a marked difference between a corporate stockholder's power to vote out the Board of

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23/ See e.g., KMP Petition at 15.

24/ The KMP Petition therefore correctly states that the limited partners of a widely-held limited partnership are at the very least the "functional equivalent" of minority stockholders of a large publicly-traded corporation, see KMP Petition at 15, and therefore at the very least should be subject to the same attribution benchmark as individual stockholders.