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

In the Matter of	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	CC Docket No. 94-324 MM Docket No. 94-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	CC Docket No. 94-324 MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	CC Docket No. 94-324 MM Docket No. 87-154

COMMENTS OF M/C PARTNERS, THE BLACKSTONE GROUP, AND VESTAR CAPITAL PARTNERS

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. THE ATTRIBUTION RULES MUST BE AMENDED TO MEET THE NEEDS OF THE 1990s 4

A. The Original Purposes Behind the Attribution Regulations 4

B. The Original Goals in Today's Marketplace 7

III. THE ATTRIBUTION REGULATIONS SHOULD LIMIT THEIR SCOPE TO "CONTROL" 12

IV. SPECIFIC ATTRIBUTION PROPOSALS 16

A. Voting Stock Benchmarks Should Be Raised to Fifty Percent 16

1. Single Majority Shareholder Exception 18
2. Nonattribution by Certification 19
3. Investment Companies 19

B. Nonvoting Stock Interests and Debt Holdings 21

C. Limited Partnership Interests 22

1. The Current Rule and Its Effect 22
2. How Limited Partners Should Be Attributed 24

a. The Preferred Standard: Control 24
b. If The Standard is Less Than Control: Equity Benchmark 25

3. If Retained As a Concept, Insulation Should be Clarified 27

D. Limited Liability Companies 31

E. Cross-Interest Policy 31

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I. INTRODUCTION AND SUMMARY

The Federal Communications Commission (the "FCC" or the "Commission") has launched a reexamination of its broadcast attribution rules, the regulations designed to implement the Commission's multiple ownership rules.[1/] The parties represented by this pleading[2/] are investors whose investments include, among other things, investments in broadcast properties. As a result, the manner in which the Commenting Parties carry on their business -- indeed, the extent to which they can do so -- is directly and immediately

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1/ See In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rule Making, CC Docket No. 94-324 (released January 12, 1995) ("Attribution Notice").

2/ M/C Partners, The Blackstone Group, and Vestar Capital Partners (the "Commenting Parties").

affected by the attribution rules. The Commenting Parties applaud the proposed liberalization of the attribution rules as a step in the right direction, but the proposals do not go nearly far enough, given the sweeping and dynamic changes in the communications environment of 1995 as compared to even a decade ago.

In 1953, when the attribution rules were first adopted,[3/] radio, and its nascent sibling, television, were the only media to present audio and video programming to the public; together with the print media, they comprised the universe of significant avenues for public expression of viewpoints. In that environment, it may have made sense for the Commission to strive for viewpoint diversity and economic competition within the radio and television industries. Today, however, broadcasting represents only a small portion of the multitude of choices available for receiving news, information, and entertainment. Technologies brand new or even undreamed of in 1953 are standard fare today: cable, wireless cable, direct broadcast satellite ("DBS"), videocassette recorders, the Internet and other on-line services, broadcast fax, modems and wireless modems -- all of which compete with broadcasting for the eye and ear of the American public. Moreover, other avenues of viewpoint expression are poised to enter this vibrant and competitive marketplace of ideas: digital radio services, Interactive Video and Data Service, telephone entry into broadband services to the home (and directly through the acquisition of wireless cable companies), to name only a few on the immediate horizon.

3/ See In the Matter of the Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 18 FCC 288 (1953) (the "1953 Order").

As a result of these sweeping changes, any concern about diversity of viewpoint *within* the broadcast industry is fundamentally misplaced. Instead, the Commission's concern should be ensuring the continued vitality of broadcasting as one of the many voices and competitors available to the American public. This logic leads to the conclusion that the Commission should eliminate (or at least relax) its multiple ownership rules and jettison the quirky and unpredictable cross-interest policy, a proposition the Commenting Parties wholeheartedly endorse (and which has found support in the Congress).[4/]

At any rate, whether or not the multiple ownership rules and cross-interest policy are eliminated, the attribution rules should be completely overhauled. The attribution rules are designed to prevent certain investments in broadcast properties; that is, their very purpose is to restrict capital flow into the broadcast industry. If broadcasters still represented the principal source of viewpoint expression to most Americans, using the harsh tool of limiting capital inflows might be a reasonable method to ensure healthy diversity and competition. But in today's environment, the marketplace truly exhibits diversity and competition. The Commission should ensure that wherever possible its rules *facilitate,* rather than impede, capital inflows to the broadcast industry, so that broadcasting remains a vibrant speaker and competitor and may fulfill its special mission as a public trustee of the airwaves.

Thus, the Commission should tailor the attribution rules as narrowly as possible to achieve what limited goals it has without unduly impeding investment in broadcast. First, it should deem attributable only those holdings that *control* a broadcast

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4/ H.R. 1556, 104th Cong., 1st Sess. (1995); S. Rep. No. 23, 104th Cong., 1st Sess. 41-42, Report of the Committee on Commerce, Science, and Transportation (1995).

licensee; the Commission should not concentrate on the ephemeral notion of targeting those who may be able to *influence* a licensee. Second, the Commission should clearly and swiftly reject any proposals that would deem attributable any of the interests (such as nonvoting stock and debt) that have historically been considered nonattributable and that have formed the bedrock of capital formation in the broadcast industry. Third, the Commission should refine its treatment of limited partnership interests. Such interests should not be attributable; at the very least, an equity benchmark should be instituted so that holders of minor partnership interests will not be deemed "owners" for purposes of the multiple ownership rules. Moreover, the "insulation" criteria should also be refined to reflect more closely the types of influence which actually impede the goals underlying the multiple ownership rules. Finally, as it proposes in its rule-making notice,[5] the Commission should treat limited liability companies as partnerships in applying the attribution rules.

II. THE ATTRIBUTION RULES MUST BE AMENDED TO MEET THE NEEDS OF THE 1990s

A. The Original Purposes Behind the Attribution Regulations

The first attribution rules were adopted in 1953, devised to accomplish the twin goals of "diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[6] In 1953, the media consisted of print media, radio, and a young television industry. For a Commission focused on encouraging profitable, privately-run broadcast entities but intent on fostering

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[5] Attribution Notice at ¶ 69.

[6] 1953 Order at ¶ 10.

diversity of programming, multiple ownership and attribution rules were necessary. The Commission believed that limitations on broadcast ownership would serve the public interest by creating opportunities for "the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service."[7] The Commission's mention of only "radio service", and not television, in referring to the broadcast industry, also illustrates the vastly different nature of the industry in 1953; indeed, the first televised presidential debate was still seven years away and any FCC regulation of cable systems was a full decade away.[8] Broadcasting, especially television, depended on federal regulation to ensure its growth and diversity.

Of the two nominal goals of the multiple ownership and attribution rules, the first -- diversification of program and service viewpoints -- is plainly the overriding goal. When the rules were conceived, attaining the ability to encourage the diversity of programs presented to the American public through indirect constraints on multiple ownership rather than through direct intervention into the operations of broadcast licensees was considered a triumph.[9] Pursuit of the diversity goal reflected the Commission's recognition of the First Amendment concerns implicated by media of mass communications and the notion that the marketplace of ideas should be as dispersed as possible in order to encourage healthy, robust, and wide-open debate. Indeed, in a 1975 Report and Order regarding its broadcast multiple ownership rules, the Commission cited a Supreme Court decision in explaining the rationale

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[7] Id. at ¶ 10.

[8] Broadcasting & Cable Yearbook 1995, Vol. 1, at p. xvi, xvii.

[9] 1953 Order at ¶ 10 ("[W]e wish to emphasize that by such rules diversification of program services is furthered without any governmental encroachment on what we recognize to be the prime responsibility of the broadcast licensee.").

behind the multiple ownership rules: "[i]t is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[10/]

The second goal -- prevention of economic concentration -- is an afterthought to which the Commission has never given serious independent consideration apart from the diversity goal. Although both the 1953 Order and the Commission's 1984 Report and Order[11/] regarding a reexamination of the attribution rules pay lip service to the economic concentration goal, neither one ever discusses whether pursuit of this goal furthers any objectives different from those sought by the diversity goal.

If the economic concentration goal merely restates the general aims of antitrust policy, to avoid the possibilities of monopolization, collusion, price-fixing, and the like, then the antitrust laws already exist to serve this purpose. The current attribution rules, which (as discussed in more detail below) in some circumstances prohibit a person from acquiring six-percent voting stock interests or even tiny "noninsulated" limited partnership interests, strike far below the threshold at which the antitrust laws would find any anticompetitive effects and are a harsh tool to serve antitrust objectives. The Commission has never attempted to justify

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10/ See In the Matter of Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046, 1048-49 (1975) (the "1975 Order"), citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

11/ See In the Matter of Reexamination of the Commission's Rules Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Report and Order, 97 FCC 2d 997 (1984).

the attribution rules as being tailored to achieve antitrust aims, and they cannot be so justified.[12] At most, antitrust is viewed as a haphazard by-product of the attribution rules.

If instead of, or in addition to, antitrust concerns, the prevention of economic concentration is desirable because diversification of ownership leads to diversification of viewpoint, then the economic concentration goal merely restates the viewpoint diversity goal. In fact, the 1975 Order mentions antitrust policy as a "correlative source" of the diversification policy rather than as a goal in itself.[13] Perhaps it is for this reason that the Commission itself has consistently addressed only the viewpoint diversity goal.

B. The Original Goals in Today's Marketplace

The communications landscape today is entirely different -- more diverse, more robust, more fluid -- from the one facing the Commission in 1953 or even when it last reviewed the attribution rules in 1984-86. Broadcasters now present only a segment of the news, information, and entertainment options available to the American public. If the Commission wants to fulfill its goal of viewpoint diversity, it must recognize the multiplicity of voices extant today and should seek to maximize the diversity among all those voices, not just among one subset. Simply stated, "diversification of program and service viewpoints" among broadcast licensees is too narrow a goal for 1995, when the goal should be diversity of all media voices and preservation of broadcasting as one of those voices.

In 1953, radio and the nascent television industry were the only media to present audio and video programming, and the print media were the only other significant

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[12] The very First Amendment concerns that are a part of the viewpoint diversity goal also demand that if the Commission seeks to achieve antitrust aims, it do so in as narrowly tailored a fashion as possible.

[13] 1975 Order at 1049.

avenues for viewpoint diversity. Today, the narrow focus on broadcast becomes less meaningful as viewers and listeners can choose from an increasing array of programming options. In the video arena, for instance, wireless cable, after years of struggle, is now a booming provider of video programming.[14] Cable television programming alone already reaches more than three-fifths of the nation's households[15]; such households thereby receive from a dozen to over a hundred additional viewing options, none of which are constrained by attribution and multiple ownership rules, in addition to their broadcasting choices.[16] And capacity expansion within the cable industry is constant. The incipient success of DBS also renders concern over broadcasting diversity increasingly misplaced, as DBS subscribers are beginning to enjoy the prospect of numerous programming options.[17] In addition, the viability and penetration of multichannel alternatives to broadcast television will probably only increase over the next decade.[18] Viewers have increasingly been

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[14] There are 700,000 subscribers to wireless cable services in the U.S., and the industry has recently captured significant investments from Pacific Telesis and Bell Atlantic as the local phone companies target wireless cable as their initial inroad into the video marketplace. See "PacTel joins wireless migration," Broadcasting & Cable, April 24, 1995, at 35.

[15] As of the beginning of 1995, operating cable systems reached about 58 million subscribers, representing nearly 152 million people and 62.4% of the nation's TV households. Broadcasting & Cable Yearbook 1995, Vol. 1, p. xxi.

[16] "Most [cable] systems offer 30 or more channels. Systems constructed after March 1972 must have a minimum 20-channel capacity." Id. at xxi; in 1990, 89.3% of cable subscribers were served by systems with 30 or more channels. FCC Office of Plans and Policy Working Paper No. 26 Broadcasting Television in a Multichannel Marketplace, 6 FCC Rcd 3996, 4054 (1991) (citing Warren Publishing, Inc., Television Factbook, 1990 ed., Cable and Services Volume, p. C-385).

[17] The recent success of DBS providers has been well-documented; see "DBS Business Flying High," Broadcasting & Cable, January 9, 1995, at 55, ("DIRECTV President Eddy Hartenstein expects daily activations to jump to the 4,500-5,000 range during 1995. He says the company is on track to reach its projected 'breakeven' point of 3 million subscribers during the second half of 1996.").

[18] See "Station sales encore in '94," Broadcasting & Cable, February 27, 1995, at 34 ("'My short-term competition for the lion's share of the dollars today is the guy across the street,' [Ellis Communications President/CEO Bert] Ellis says, 'But somewhere in the next 10 years, no doubt about it, my

attracted to videocassettes.[19] The viewing trend away from the three major networks reflects all of these increased alternatives.[20] Furthermore, as the cable industry develops, the amount of attractive programming and popular channels will inevitably rise, siphoning off more broadcast viewers. Partly as a result of this competition, diversification of the marketplace even among broadcast stations has been very successful.[21]

In the radio industry as well, the goal of diversification among broadcast licensees diminishes in importance as the number of broadcast stations increases and as new competitors arrive within the radio industry, such as digital audio broadcasting.[22] Certain audio programs are now even distributed by emerging technologies, such as the Internet, which are poised to gain in popularity in the latter part of this decade. Moreover, the proliferation of broadcast radio stations since the inception of the attribution rules in 1953 reduces the importance of maintaining strict limits on the influence by one party over numerous licensees. The growth of stations within the broadcast arena, from 3,081 on-air

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competition is going to be the cable operator or the telephone operator or both; or they may be one and the same . . .'").

19/ In 1990, 69 percent of television households owned videocassette recorders. FCC Office of Plans and Policy Working Paper No. 26 at 3999.

20/ The big three networks' share of the prime-time viewing audience hit an all-time record low in the 1994-95 regular season of 57%. This figure was down four percentage points from the 1993-94 ratings. See "Big Three post record share slide," Broadcasting & Cable, April 10, 1995, at 8.

21/ See, "Special Report: Hispanic Broadcasting & Cable," Broadcasting & Cable, January 9, 1995, at 40 ("Spanish-language TV networks and the Hispanic television marketplace in general are booming. Advertising figures prove it: $800 million went into TV ads targeting the U.S. Hispanic population . . . The two Spanish language networks, Univision and Telemundo, each reported an ad revenue increase of $30 million.").

22/ Digital audio broadcasting may provide a medium for the delivery of new programming stations or formats via satellite or terrestrial means to listeners. If authorized by the Commission, this technology may be a formidable competitor for broadcast stations; it may allow for the reception of a single channel nationwide and in areas such as auto tunnels and mountainous regions.

stations nationwide in 1953 to over 11,701 today,[23] underscores the reduced importance of strict limits on ownership. In most locations, diverse radio programming options are already a reality,[24] and the Commission's fears of one viewpoint gaining too much control should subside.

In 1953, the American public confronted only broadcast and print media; the programs and viewpoints transmitted or expressed by these entities thus represented the universe to which consumers were exposed. In 1995, however, the vastly different nature of the video and audio marketplace, as detailed above, diminishes the importance of maintaining *broadcast* diversity as a goal in itself. The Commission's focus today should be on ensuring the continued vitality of broadcasting in a multimedia world to ensure that broadcast will add to the existing multiplicity of voices.

Furthermore, the continued vitality of existing broadcasters amidst this larger, more competitive universe demands more relaxed, rather than tighter, attribution rules. Broadcast licensees have always held unique public interest obligations that other media entities have not;[25] because of this status, they must remain viable in today's competitive media arena. Strict attribution standards, which inhibit the capital flow to broadcast entities, only hinder the ability of broadcast entities to compete with their nonbroadcast (and thus not

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[23] These figures represent the numbers of combined AM & FM on-air stations as of January 1, 1954 and January 1, 1995. Broadcasting & Cable Yearbook 1995, Vol. 1, p. B-655.

[24] "Special Report: Hispanic Broadcasting & Cable," supra note 21 at 40 ("[I]n radio, every major Hispanic market now supports two or more Spanish stations on the FM band. During the past five years, the number of Spanish-language and other ethnic stations has grown by 33%.").

[25] Broadcast television stations are required, for instance, to provide programming responsive to local issues and to provide equal opportunities to political candidates. See 47 U.S.C. § 315 (Communications Act of 1934).

similarly restricted) competitors. Yet, the capital needs of broadcasters are on the rise, not diminishing.

The emergence of competing cable channels and an increasing array of over-the-air channels have yielded increased bidding for programming; the resulting higher costs of programming have only added to television broadcasters' capital requirements.[26] In addition, the radio industry is becoming increasingly capital-intensive. Technological changes, including availability of programming from satellite feeds, the ability to coordinate broadcast segments for several stations from one location and the ability to computerize shifts from one program to another, have enabled even small and medium-sized market stations to produce a first-rate broadcast previously available only to large-market stations. The availability of funds has been instrumental in enabling some small-market stations to achieve the efficiencies and production quality that technology has introduced. Tightening the attribution rules would restrict the access to capital of these smaller-market stations. Furthermore, in this decade, the capital requirements of a broadcast station often require at least two or three investors to provide the necessary capital for a broadcasting licensee; no single investor wishes to take such a large financial risk on one entity.

Relaxation of the attribution rules, by allowing more capital to flow to broadcast entities, would enhance the ability of new entrants to secure a successful place within the broadcast industry, the very result that the attribution rules strive to achieve. The media arena has changed not only within the past four decades since the attribution rules were first introduced but most dramatically in the last decade since the present rules were implemented. The goal of diversity of viewpoints is no longer a broadcast-industry-wide

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[26] FCC Office of Plans and Policy Working Paper No. 26 at 4030.

goal; diversity among the entire media marketplace is now the issue in question. In today's environment, the Commission must take steps to maximize, not inhibit, broadcasters' access to capital.

III. THE ATTRIBUTION REGULATIONS SHOULD LIMIT THEIR SCOPE TO "CONTROL"

The magnitude of the changes in the marketplace demands that the multiple ownership rules themselves be either eliminated or significantly relaxed.[27] Even -- or especially -- if there is no change to the multiple ownership rules, the attribution rules, which are the guidelines that breathe life into the multiple ownership rules, should reflect the diminished importance of the broadcast-only diversification goal. Ownership of broadcast licensees is commonly splintered among many parties: control parties, management, and investors of different stripes. Therefore, although the multiple ownership rules set the limits on the number of stations which may be owned by one party, the attribution rules have great power over investors' options, for these regulations determine which types and sizes of broadcast holdings will be treated as "ownership" interests and which will not. The Commission has correctly recognized that the current attribution rules are in need of reconsideration but the proposed changes have not gone far enough to liberalize the regulations.

The dramatic changes in the media marketplace demand substantially more relaxed attribution. At the same time as increased media competition diminishes the

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[27] Some changes to the television rules are proposed in a simultaneous rulemaking proceeding; see In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, CC Docket No. 94-322, Further Notice of Proposed Rule Making (released January 17, 1995).

broadcast diversity goal, it underscores the need to allow broadcast entities to have greater access to capital so as to enable them to compete more effectively with new competitors.

In adopting regulations that will guide the development of the broadcasting industry into the next century, the Commission should focus on *control* rather than influence. The FCC should attribute ownership only to a party who has definitive control over the ultimate message being disseminated rather than monitor the nebulous concept of *influence*. Mere *influence* over a station's programming should not be the focal point of the attribution rules, nor should control over the business and financial aspects of a licensee.

Labelling someone an attributable "owner" for purposes of the multiple ownership rules simply because of a five or ten percent voting interest does not significantly further the diversity goal but does restrict the flow of capital investment into broadcasting. Those who seek to guide the viewpoint of a broadcast station acquire a controlling interest in the station, not a lesser interest. In today's environment, most broadcast investors, and particularly those who take less than a controlling position, invest in order to seek a return on capital, not in order to guide a licensee's programming or viewpoint decisions. The Commenting Parties, which represent a broad range of broadcast investment expertise, make their investments with a view toward maximizing return, and look to the expertise of management to determine programming and viewpoint issues.

Thus, logic and experience point to the conclusion that interests should be attributed only if they give the holder control over the station, and in particular control over programming and viewpoint decisions. Yet the Commission has hinged its entire attribution scheme on the vague concept of "influence." Influence is a slippery and dangerous concept, one that knows no bounds. Investors of all kinds have influence, to be sure: the holder of a

single share of stock of even a large company can be a corporate gadfly, introducing resolutions at the corporation's annual meeting, and haranguing the chief executive officer to change a company policy. Lenders influence broadcasters, by their decisions whether or not to lend, and on what terms. But shareholder and lender influences tend to be focused on financial performance, not the First Amendment features of broadcasting.

Other constituencies exert influence more directly related to content. Advertisers, deciding on which stations to buy time, exert great influence on broadcasters. Listeners and viewers influence broadcasters, and services exist to quantify and focus that influence. Competitors, both broadcast and non-broadcast, influence broadcasters, by their own choice of format and programming, and by what they say on- and off-air about their competitors. Media coverage of a station will be far more influential in changing the viewpoint of a station than an investor's scrutiny of the station's overhead expense.

Other players who influence broadcast content include employees, program and equipment suppliers, accountants, lawyers, lawmakers, and even the Commission. For the Commission to select only holders of equity from this broad spectrum of influence wielders, and to include minority equityholders at that, is both insupportable and unwise. It is insupportable because the record simply lacks the evidence to buttress the Commission's hypothesis that noncontrolling equity holdings provide the basis for influence that leads to viewpoint convergence rather than diversity.[28] It is unwise because the Commission, now more than ever, needs to tailor its attribution rules with surgical precision, recognizing that

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[28] Indeed, the Commission has entirely reversed the burden of proof. It has asked the public to provide evidence that holders of certain degrees of influence do not guide licensee's programming decisions. But the public should not be forced to shoulder the burden of proving a negative, establishing the nonexistence of a fact, where the hypothesis itself rests solely on the Commission's conjecture rather than record evidence. To do so is bad administrative policy in any case, but is particularly damaging here where the consequences are to chill investment in broadcasting.

the rules' method of promoting diversity is to impede investment, at a time when broadcasting is competing for investment in order to survive as a vigorous First Amendment speaker.

As currently fashioned, and even if the equity threshold is raised from five to ten or even to twenty percent, the attribution rules do not act with surgical precision to curb the influence of investors who seek to guide the message expressed; rather, they act as a blunderbuss that curtails the flow of capital into this industry from those who view investments in broadcast operators as financial opportunities. The Commission should recognize that the overwhelming majority of the capital flow into broadcasting has resulted from sound investment decisions, not from a desire to alter viewpoint.

Over the last ten to fifteen years, investors have found the broadcasting industry to be an attractive financial opportunity, but they are often hamstrung with restrictions that are unrelated to their legitimate concerns as investors, simply because the rules single out investment as a pernicious form of influence that may restrict (rather than expand) breadth of viewpoint. Investors will seek to exert influence over financial decisions, to be sure: they typically seek the right to protect their investment from excessive borrowings or dividends, from untimely or unwise sales of the company's assets or significant acquisitions, from liquidation and declaration of bankruptcy, and other financial matters.

But the Commission will be hard-pressed to find investors who seek to meddle in core Commission concerns: programming, format, viewpoint. If a noncontrolling party does seek to alter station viewpoint, the company will go along only if the control parties wish to do so or if it is in the best economic interest of the company. But the ability to persuade the company to make wise economic decisions scarcely rises to the level of

pernicious, viewpoint-narrowing influence; the company would be just as susceptible to good advice from any quarter, whether it comes from an investor or a Wall Street analyst, media broker, newspaper column, or the station's accountant.

Thus, the touchstone for all of the Commission's attribution concerns should be actual control. Parties holding less than controlling interests should not be treated as owners for purposes of the multiple ownership rules; such interests should not be attributed. The focus on control, rather than influence, should permeate all aspects of the Commission's revised attribution rules borne from this proceeding.

IV. SPECIFIC ATTRIBUTION PROPOSALS

A. Voting Stock Benchmarks Should Be Raised to Fifty Percent

As explained above, only controlling interests should be considered attributable. In the corporate context, shareholders who hold less than a fifty percent voting stock interest in a licensee should not be regarded as owners (in the absence of *de facto* control). The Commission's proposals to raise the voting share benchmark for ordinary investors from five to ten percent and to raise the voting share benchmark for passive investors (bank trust departments, insurance companies, and mutual funds) from ten to twenty percent do not go far enough.

For example, a 15-percent interest in a broadcasting entity, even together with one board seat out of seven, is a small ownership share; it does not constitute the amount of influence that the Commission should be monitoring closely. It defies experience and logic to suggest that such an investor would be both motivated to alter the station's viewpoint and capable of achieving such a change. To hold such interests in multiple

stations, whether in a single market or in multiple markets, likewise should not raise any diversity issues.

When an investor makes a noncontrolling equity investment in a corporation, the rights that accompany a noncontrolling voting stock interest (let alone a nonvoting stock interest) are insufficient or provide any significant control over the entity, including the financial protections needed to safeguard the investment. For that reason, an investor will typically obtain certain investment protections by contract, whether through a stockholders' agreement or through a stock purchase or subscription agreement. If the Commission were to examine such agreements, it would find that the rights for which investors contract are those related to financial protection rather than any rights relating to viewpoint. These rights typically include majority shareholder approval of significant debt financing, major acquisitions, or large disbursements. Even these protections do not afford minority investors any "control"; such provisions only afford them a voice in major financial decisions. These kinds of protections are the same ones found in an investment in a shoe manufacturing company, for example, and do not relate to viewpoint. That minority investors must resort to such separate agreements to guard against even major acquisitions without their notification and vote leads to a conclusion that such interests by themselves carry little control over the entity; thus, the Commission's focus on the power of a minor voting stock interest is misplaced.

By raising the attribution benchmark to fifty percent for voting stock interests, the Commission does not lose jurisdiction over holders of influential minority interests. The Commission still retains its power to determine that a minority interest in a widely-held

company constitutes a *de facto* controlling interest and thus to attribute ownership[29]. The Commission should therefore raise the attribution threshold for all voting stock interests to fifty percent.

1. *Single Majority Shareholder Exception*

The Commission has questioned the vitality of the single majority shareholder exception, which provides that where one single shareholder holds greater than a fifty-percent voting stock interest, all other interests will be nonattributable. This result is precisely in harmony with what we have argued as the standard: only controlling interests should be attributed. Even large interests, well over the historical 5% standard, have been deemed nonattributable. The single majority shareholder rule is both Commission endorsement and empirical test of the correctness of the control standard. It has been in use for years and has served broadcast investment well, with no diminution in broadcast diversity.

If the control standard is adopted, there is no further need for this exception. Even if the Commission does not agree that control should in all cases be the sole basis for attribution, however, the single majority shareholder rule should surely remain. It strains logic to think that someone interested in affecting a station's viewpoint would choose to make an investment, no matter how large an investment it might be, in a broadcast station that is controlled by a single person. Such an investment would surely be an exercise in futility.

Many investments have been structured over the years in reliance on the single majority shareholder rule. The Commission should certainly preserve these settled expectations, and not render existing nonattributable interests attributable. Moreover, the Commission should carefully consider that the single majority shareholder exception is in fact

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[29] 47 U.S.C. § 73.3555 Note 1.

based on the soundest premises, and should form the basis for the rule, not merely serve as the exception.

2. *Nonattribution by Certification*

If the Commission does not adopt the principle that only controlling interests are attributable, it should consider allowing a minority holder the ability to render its interest nonattributable through a certification process. A licensee could file a certification that a given investor or class of investors does not possess "control" over those aspects of the licensee's operations that affect diversity. Such certification could be open to challenge and would also afford the Commission an opportunity to monitor interests of under fifty percent while still allowing the holders of such interests the opportunity to render their interests nonattributable. Such a certification could be based on insulation like that in the partnership context, whereby a voting stockholder could be insulated by terms of a shareholder agreement, agreeing not to become materially involved in the media-related activities of the company (other than by voting for the election of directors). For closely-held companies, this would provide a feasible means for minority investors to render their interests nonattributable.

3. *Investment Companies*

Whether or not the Commission adopts the *control* principle, it should take into account the financial, rather than the viewpoint-oriented, nature of investments by investment companies. These entities simply do not invest in broadcast entities to attain influence over viewpoint; they invest for financial reasons.[30] Voting stock interests of such

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[30] Indeed, the Commission's inclusion of investment companies within its "passive" investor category of the broadcast attribution rules reflects this aspect of investment companies. See 47 U.S.C. § 73.3555 Note 2(c).

investment companies should not be subject to an attribution threshold of ten percent, as now exists,[31] or even twenty percent, as proposed in the Attribution Notice. Such interests should never be attributable unless, of course, the investment company possesses actual control over an entity.

Furthermore, the Commission should borrow from its earlier decisions regarding equity requirements for the "entrepreneurs' block" licenses in the broadband Personal Communications Service ("PCS").[32] Namely, the Commission should include not only investment companies as defined in 15 U.S.C. § 80a-3 but also those entities which would otherwise meet the definition of investment company but are excluded by the statutory exceptions of 15 U.S.C. § 80a-3(b) and (c).[33] In the PCS analysis, the Commission recognized, after careful consideration, that entities which otherwise met the statutory definition of investment company but fell under the exceptions simply for securities law reasons should be treated the same as investment companies. Likewise, the Commission should borrow from this reasoning in revising its broadcast attribution rules. At the very least, if the Commission does not adopt a greater attribution threshold for investment companies and those entities which fall under the exceptions to the statutory definition, it should still include the latter within the "passive investor" category[34] of the broadcast attribution rules along with investment companies.

31/ Id.

32/ See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 at ¶ 65 n.162 (1994) and Erratum, PP Docket No. 93-253 (released January 10, 1995) at ¶ 3.

33/ See Erratum at ¶ 3 n. 162, supra note 32.

34/ Supra note 30.

B. Nonvoting Stock Interests and Debt Holdings

The Commission's emphasis on "control" should also govern its treatment of nonvoting stock and debt holdings, for these interests do not grant their owners control over a licensee's operations. Such control by law rests in the hands of voting stockholders. Even if the Commission were to retain its low levels of equity attribution, however, nonvoting stock interests and debt holdings should continue to be nonattributable in all situations, regardless of the size of such interests and regardless of the other holdings of such interest holders. Such investors have invested without gaining any accompanying voting power; their interests afford them no direct voting control over the licensee at all and should not be considered attributable. Nonvoting stock is a common investment vehicle for parties wishing to invest in an entity without inducing attribution. Restricting its availability would curtail the flow of capital to broadcast entities for no good reason.

Debt is the lifeblood of all business entities, including those engaged in broadcasting. Equity investors will not realize as large a return on their investment if the equity cannot be leveraged by the incurrence of debt. Therefore, broadcasters need access to debt financing at least as much as to equity capital. Deeming debt holdings attributable (aside from being an administrative nightmare in determining what the appropriate capitalization percentages are to apply a benchmark) would dry up broadcast lending and be absolutely crippling to the broadcast industry.

A relatively modest number of banks takes a lead role in most broadcast financing. A somewhat larger number of banks take a role in the syndication of larger loans, though the same banks tend to participate in most of the syndicates. To limit lenders to a certain number of broadcast borrowers to which they can lend, or even serve as lead bank, is

foolish. It would mean that broadcasters would have less, rather than more, access to capital, and less ability to compete against other media that would not face such bizarre restrictions.

Capital flow in the form of nonattributable nonvoting stock interests and debt has been a driving force behind the increase in diversity of broadcast programs. Such investments have been instrumental in enabling the success of numerous broadcast entrepreneurs. By labelling nonvoting stock or debt interests as possibly attributable investments, the Commission may stymie the entrance of new voices and thereby help defeat the very goals that such a change aims to pursue.

C. Limited Partnership Interests

1. *The Current Rule and Its Effect*

The current attribution rules will attribute to a limited partner all of the partnership's broadcast holdings if the limited partner is not "insulated" according to the standards set out in a 1985 Memorandum Opinion and Order[35], even if the interest qualifies under applicable state law as a limited partnership interest, one that does not subject the holder to liability as a general partner. Indeed, not only will the interest be attributed, but the holding will not be entitled to use of the "multiplier," so that the limited partner will be attributed with 100% of the holding of the limited partnership, just as if the limited

[35] See Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Memorandum Opinion and Order, 58 RR 2d 604 at ¶¶ 48-50 (1985) (the "Insulation Criteria Order").

partner had actual control of the partnership.[36] This rule does not comport with reality, with the law of limited partnerships, nor with common sense.

In broadcast investment, the effects of this rule are particularly harmful: the source of a great deal of private capital that has historically been available for many industries and is now becoming available for broadcast investment is contained in funds that are organized, for business and tax reasons, as limited partnerships.[37] For example, all of the Commenting Parties are organized as limited partnerships. The general partner is often the fund manager or an affiliate, and the limited partners are mere investors in the fund. Although the investor profile varies, investors may include pension funds, financial institutions, and wealthy individuals, who entrust the arrangement of a portion of their portfolio to the fund manager. When CALPERS (the California Public Employees Retirement System), Chemical Bank or Yale University invests in a fund, it has neither the ability nor the desire to get involved with the affairs of a company in which the fund might invest; indeed, the investors are typically precluded from getting involved in the affairs of the fund itself, for it is the fund manager's expertise on which they are relying. Yet, many funds do not, for example, prohibit their investors from voting to expel the general partner nor from communicating with the general partner on any particular matter. Thus, those limited partners are not insulated and are currently deemed owners. And the effect of this result may be that a fund in which CALPERS has an investment will be barred from

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[36] For example, if *X* is the holder of a 1% noninsulated limited partnership interest in *Y* partnership, which owns 20% of the voting stock of *Z* corporation, licensee of radio station WWWW, the current rules will say that *X* is deemed to own 20% of *Z*, even if the partnership agreement provides that *X* may take no part in the management of the partnership's business (but does not explicitly "insulate" *X*).

[37] The attribution rules apply not only to licensees that are limited partnerships but also to investors that are limited partnerships.