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

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

COMMENTS OF CBS INC.

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May 17, 1995

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SUMMARY

The current attribution rules have served the Commission, the public and the broadcast industry well by striking an appropriate balance between promoting investment and providing for attribution of ownership interests where there is sufficient influence to merit it. In light of the rules' success, there is neither justification for significantly tightening them nor need for their substantial liberalization. While CBS is not opposed to some of the proposed changes contemplated in the Notice, we urge that any potential change be closely scrutinized to determine whether it conforms to several general principles supporting clarity and fair dealing that have previously guided the Commission in this area.

The Commission's goal of fostering investment in the broadcast industry requires clear rules whose application to prospective transactions can be confidently predicted. Even rule changes intended to broaden nonattributable interests will not promote investment if they leave potential investors uncertain whether the interests they propose to acquire will be deemed attributable. Tightening the rules by making attribution turn on the uncertain outcome of balancing tests would similarly depress investment in the industry, including investment in minority controlled enterprises, at a time when broadcasters are faced with increasingly intense competition in the video marketplace.

Fairness dictates that members of the industry who have acted in good faith reliance on the existing rules be protected in the event the Commission overrides its previous judgments and increases the reach of its attribution rules. In their pursuit of long-term strategic goals, many companies have made significant investments to acquire what they understood to be nonattributable interests. If the Commission were now to change the Rules so as to make attributable interests

previously understood to be nonattributable, such changes must be made only prospectively to protect these investments. Holders of such interests should be shielded both from forced divestiture (should their holdings then exceed the multiple ownership limits), and from attribution of interests they understood to be nonattributable in good faith reliance on existing law.

CBS believes there is some utility in raising the voting stock and passive voting stock benchmarks to 10 and 20 percent, respectively. But the value of such changes would be negated if the decision to raise these limits were coupled with the introduction of multi-factor analyses that would make the determination of attributability less predictable.

CBS believes there is no basis for reversing current policy by attributing ownership to some nonvoting interests or minority interests in corporations with a single majority shareholder. The proposals for attributing such interests would unnecessarily depress investment, both by introducing unpredictability in the Commission's analysis and by attributing ownership in numerous circumstances in which no undue influence or control exists. The Commission retains the discretion to address exceptional cases involving these types of interests without needlessly disturbing the generally applicable rules that have benefitted the industry. If the Commission nevertheless broadens its rules to make some of these interests attributable, it must do so only prospectively.

The Commission's cross-interest policy is inconsistent with the general clarity of its attribution rules. This policy merely adds uncertainty and administrative burden to media transactions. It has outlived any usefulness it may have had and should be eliminated.

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rule Making ("Notice" or "NPRM")[1] in the above proceedings, in which the Commission has undertaken review of its current ownership attribution rules, its cross-interest policy, and its related policies affecting investment in the broadcast industry.

I. Introduction and Overview

In 1984, after "comprehensively reviewing and revising the standards for attributing interests,"[2] the Commission adopted the ownership attribution rules which, with relatively minor

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[1] FCC 94-324, adopted December 15, 1994; released January 12, 1995.

[2] Report and Order in MM Docket No. 83-46, 97 FCC 2d 997, 998 (1984) ("Attribution Order"), recon. granted in part, Memorandum Opinion and Order in MM Docket No. 83-46, 58 RR 2d 604 (1985) ("Attribution Reconsideration"), further recon. granted in part, Memorandum

amendments, remain in effect today. Those rules struck a careful and generally appropriate balance between the Commission's dual goals of promoting investment in the broadcast industry and attributing ownership where there is a sufficient degree of influence or control to warrant it. For the most part, they have served the industry and the Commission well, generally facilitating adequate levels of investment in the broadcast industry over the past decade.[3] A central premise of the instant Notice is that review of the existing attribution rules is warranted to ensure that they "remain effective" in light of changes occurring in the broadcast industry, including previous and proposed changes in the Commission's multiple ownership rules. (Notice at ¶2)[4] While CBS agrees that such review is appropriate, we believe that the present state of the industry neither warrants tightening nor necessitates significant loosening of the current attribution rules.

Critical to the success of the rules adopted in 1984 is that they established clear guidelines that have enabled participants in the industry to predict the attributability of interests before

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Opinion and Order in MM Docket No. 83-46, 1 FCC Rcd 802 (1986) ("Attribution Further Reconsideration").

[3] During the last two years, for example, the volume of television station sales has been particularly high. See, e.g., Broadcasting and Cable, February 27, 1995 at 32.

[4] The Notice's statement that the Commission's review of its attribution rules is prompted in large part by proposed changes in the multiple ownership rules, Notice at ¶2, raises the concern that the attribution rules might be tightened (e.g., the single majority shareholder exemption narrowed or eliminated) merely to compensate for or balance the proposed relaxation of the multiple ownership rules. Though not unrelated, the attribution and ownership rules are separate and serve different purposes. Issues related to the appropriate cap on a licensee's station holdings or the audience reach consistent with the Commission's policies against undue concentration are analytically distinct from the question of what level and type of interest is sufficient to warrant attribution of ownership. CBS urges that proposals to increase the reach of the attribution rules be considered on their own merits or demerits.

entering into transactions to acquire them.[5] The investigation, planning, negotiation and documentation of complex transactions involving the investment of large sums of money entail substantial commitments of human and financial resources, and are not infrequently accompanied or motivated by significant reassessment of a firm's strategic objectives. Transactions whose regulatory consequences are uncertain are inherently less efficient, and hence less attractive, than those whose implications for the investor can be evaluated with confidence at the time the transaction is proposed. Unpredictability of regulatory outcomes is, in short, a profound disincentive to investment. The current attribution rules have avoided this hazard by affording to potential investors in the broadcasting industry clear indications as to whether they will or will not be attributed with ownership status. Brightline benchmarks for voting stock ownership, for example, by providing certain guidance for investors, have assisted capital formation in the industry. Particularly in light of the general success of the current rules, and the absence of any compelling need for significant amendments to them, CBS believes that any proposed changes should be approached with caution and their potential consequences analyzed carefully. As part of this analysis, we urge in particular that the following overarching considerations be taken into account.

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[5] One exception to the general clarity of the rules has been the cross-interest policy, which has no precise application and has been administered in an ad hoc fashion. As set forth below, we believe that policy should be abolished.

A. Clear Rules Are Necessary to Foster Investment, and Rule Changes Should Not Be Made at the Expense of Clarity

CBS believes that a principal goal in this proceeding should be certainty and predictability in the application of the Commission's attribution rules. We urge the adoption (and retention where they exist) of clear rules rather than multi-factor analyses and balancing tests, so that existing and potential investors in the industry can accurately anticipate the consequences of contemplated transactions. We acknowledge that because brightline rules dispense with a process of regulatory scrutiny narrowly tailored to the facts and circumstances of particular transactions, they may produce the results which are debatable, from the standpoint of regulatory policy, in certain marginal cases. We submit, however, that the price of achieving regulatory perfection in classifying transactions at extreme ends of the spectrum should not be the regulatory unpredictability which impedes all transactions and discourages efficient capital formation in the industry as a whole.

The Notice sets forth proposals both to relax and to tighten the rules by means that would introduce uncertainty into the determination of attributability. Whether the purpose is to extend or reduce the reach of the rules, it would be counterproductive to make attributability ride on the outcome of a multi-factor balancing test. Even though CBS believes that some liberalization could be beneficial, therefore, we would not support relaxation of the attribution rules were it to come at the expense of clarity. In our view, for example, it would be counterproductive for the Commission to raise the voting share limitation to 10 percent if doing so were accompanied by introduction into the Commission's analysis of new factors, such as individualized assessments of the size or management composition of companies, or of the rights of minority shareholders. (Notice at ¶22) And given our view, set out below, that the reach of the rules should not be broadened, we believe it

would be doubly destructive to expand the rules by means of balancing tests. We therefore oppose, for example, the suggestion to make some nonvoting stock holdings attributable depending on whether the stock is "held in combination with other rights." (Notice at ¶54)

B. Nonattributable Interests Taken Under The Current Rules Must Remain Nonattributable Regardless of Rules Changes Now Made

An important corollary of the predictability principle set forth above is that if the Commission chooses now to change its rules, previously nonattributable interests that are the subject of pending agreements and that would be attributable under new rules must be grandfathered as nonattributable. Relying on the firm rules established in 1984, firms throughout the industry have entered into complex transactions critical to the achievement of their long-term strategic goals. Media companies, including both CBS and its major competitors, have made commitments to invest many millions of dollars in broadcasting to position themselves for the future, based on the good faith understanding that, for example, their nonvoting interests or minority holdings in corporations with single majority shareholders are nonattributable. These companies would be placed in an unfair and untenable position if the nonattributable interests they have acquired were retroactively deemed attributable. Should the rules on which they relied be changed, affected companies must be protected from the conclusion that their previously nonattributable interests now count as attributable, whether or not attribution would result in their exceeding then-applicable multiple ownership limits. The Notice rightly expresses the concern that actions taken in this proceeding not "disrupt existing financial arrangements" (Notice at ¶15); we submit that both industry stability and fundamental fairness require protection of financial interests taken in reliance on the rules.

C. Some Relaxation of The Attribution Rules Would Benefit The Industry; Further Restrictions Would Inhibit Investment

While the current attribution rules have not unduly impinged on capital formation,[6] some relaxation of the rules is likely to promote additional investment in the broadcast industry. Historically, there has been a strong positive correlation between Commission actions to liberalize its ownership rules and investment in the industry. The Commission's issuance in 1984 of the Attribution Order loosening the attribution rules and of the Report and Order raising the AM, FM and television station ownership limits from seven to 12[7] was followed by a surge of investment.[8] Generally, when the Commission has used its regulatory powers to create investment opportunities, it has succeeded. It is thus reasonable to predict that if the Commission were to adopt some of the changes proposed in the Notice -- for example, raising the voting stock benchmarks -- investment would increase. As set forth below, we believe some relaxation of the rules is supportable, as long as it is accomplished by the adoption of clear rules.

Conversely, while the current rules have not unduly inhibited capital formation, we believe that additional attribution restrictions over and above those currently in place would constrict the capital available to the industry and would be ill-advised. During the period the current attribution

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[6] See p.2 & fn. 3.

[7] Report and Order in Gen. Docket 83-1009, 100 FCC 2d 17 (1984).

[8] Industry capital raising increased from $614.6 million in 1983 to more than $6 billion in 1985. The capital raised in 1985 represents the highest annual amount raised by the industry over the past 15 years. (These figures are derived from the database of the Security Data Company, Inc.) While it may not be possible to calculate what portion of this increase was due to attribution rule changes as opposed to multiple ownership rule changes, it is beyond question that the combined impact of these actions was to promote investment in the industry.

rules have been in effect, including the relatively recent past, the industry has certainly experienced periods when adequate financing was difficult to find.[9] And as has been widely noted,[10] the broadcast industry has faced a dramatic rise in competition from alternative sources of video programming over the past number of years. This competition will only intensify as, for example, direct broadcast satellite (DBS) services and telephone companies join existing distributors of video programming, such as cable, in the marketplace. Finding sufficient financing will be critical to the broadcasting industry's continued viability as it seeks to compete in this emerging environment. It is therefore a highly inopportune time to introduce new obstacles to investment in the industry. For these reasons, CBS opposes the various suggestions floated in the Notice to expand the types of interests considered attributable, including nonvoting stock interests, debt interests or minority equity interests in corporations with a single majority shareholder. We submit that adding new impediments to investment would undermine the Commission's goal of ensuring the availability of adequate capital, and could result in a significant decline in station values.

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[9] As recently as 1992, in comments filed in response to the Commission's Capital Formation Notice, the National Association of Broadcasters observed that:

> Without financing, the market for existing stations will diminish and the value of stations will decline precipitously. A recent survey of industry values conducted by *Broadcasting* magazine indicates that this has already occurred; it found that the asset value of the broadcasting industry was down by almost one third, largely due to the absence of financing for acquisitions.

Reply Comments of the National Association of Broadcasters at 3 & n.5, dated July 13, 1992 (MM Docket No. 92-51), citing "Valuing the Big Three: Telcos Get Bigger," Broadcasting, August 19, 1991, at 19.

[10] See, e.g., Office of Plans and Policy Working Paper No. 26, Broadcast Television in a Multichannel Marketplace, DA 91-817, 6 FCC Rcd 3996 (1991).

Against the backdrop of the foregoing general principles, which we regard as the fundamental policy issues in this proceeding, we turn below to certain specific issues raised in the Notice.

II. Stockholding Benchmarks

A. Voting Stock: Active Investors

Although the current rule is not unduly restricting investment, CBS believes there is some room to relax the five percent limitation on voting stock ownership. While we have not seen any detailed study of corporate governance which would quantify precisely how far the limit could be extended without creating undue influence, CBS believes the change from five to 10 percent will not increase influence to any significant degree. There appears to be no evidence that a holder of 10 percent or less of a company's stock is in a position to wield influence "likely to induce" a licensee or permittee to take actions to protect that stockholder's investment. (See Notice at ¶4) Increasing the benchmark from five to 10 percent is, however, likely to make additional capital available for investment in the industry. In 1985, the year after the Commission increased the basic attribution benchmark from one to five percent, the industry raised approximately ten times the capital it had in 1983, the year preceding this and related changes to the attribution rules.[11]

In connection with the proposal to raise the voting stock limitation to 10 percent, however, the Notice inquires whether "such factors as the size, composition of management, and minority shareholder rights of individual corporations might not be increasingly relevant where larger nonattributable stockholdings are permitted." (Notice at ¶22) CBS submits that if nonattribution of

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[11] See n.8, supra.

a 10 percent stock holding is to turn on unpredictable assessments by the Commission regarding, for example, the significance of the minority shareholders' rights in individual corporations, it is decidedly preferable to retain the smaller but certain five percent limitation.

B. Voting Stock: Passive Investors

While the current benchmark for passive investors is not unduly inhibiting adequate investment, we believe that the 10 percent limit for passive investment can also be increased without significantly increasing influence. As suggested in the Capital Formation Notice, the inherently passive nature of the investors eligible to use this benchmark, together with the required certification of noninvolvement in the affairs of the licensee, adequately prevents any undue influence that might otherwise be associated with the suggested 20 percent passive investor limit.[12]

In the Notice, the Commission asks whether there are "common factors, intrinsic to all passive investors," sufficient to provide assurance that passive investors holding 20 percent interests will not exert influence or control over broadcast licensees. (Notice at ¶48) This question again implies that the Commission might consider a multi-factor balancing test for passive investments over 10 percent. Once again, we submit that leaving the limit at 10 percent would be preferable to introducing a range of unpredictable variables into the determination whether any particular passive interest should be found nonattributable.

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[12] 7 FCC Rcd 2654, 2655 (1992).

C. Minority Stockholdings in Corporations with a Single Majority Shareholder

The Notice inquires whether the Commission should restrict the availability of the single majority shareholder exemption. (Notice at ¶51) In 1984, after thorough consideration, the Commission determined that where a corporate licensee has a single majority shareholder, it is "neither necessary nor appropriate to attribute an interest to any other stockholder" because "the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings."[13] We believe this was and remains an accurate assessment, and submit that the exemption should not be disturbed.

The single majority shareholder exemption has provided considerable benefits to the industry. When it adopted the exemption in 1984, the Commission understood and intended that one of its beneficiaries would be small licensees. By its own calculation, the Commission found that "one third of small licensees have a single majority interest holder, where attribution to the minority stockholders, regardless of the size of their shareholdings, is inappropriate."[14] The exemption clearly is of great value to small licensees in seeking investment funds, and the impact of any restriction on the availability of the exemption would surely be felt by this group.

Minority-owned media companies also benefit significantly from the exemption, and its existence has aided in achievement of the Commission's expressed goal of promoting minority ownership of broadcasting facilities.[15] An example of the benefit that the exemption can bring to

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[13] Attribution Order, 97 FCC 2d at 1008-09.

[14] Attribution Order, 97 FCC 2d at 1008, ¶19.

[15] See generally, e.g., Notice of Proposed Rule Making in MM Docket Nos. 94-149 and 91-140, FCC 94-323 (adopted December 15, 1994; released January 12, 1995).

minority broadcasting is the recent investment by Tribune Broadcasting in Qwest Broadcasting L.L.C. ("Qwest").[16]

Although smaller licensees and minority broadcasters are two specific intended beneficiaries, the single majority shareholder exemption was clearly designed to facilitate capital formation by all licensees having single majority shareholders. The intended broad application of the exemption is reflected in the Commission's observation that there should be no attribution of ownership to minority shareholders "where a corporate licensee, whether closely or widely-held, has a single majority shareholder." Attribution Order, 97 FCC 2d at 1008-09, ¶21 (emphasis added).[17] The result of the exemption has been to permit a wide variety of licensees to attract non-controlling equity partners, thereby giving them greater flexibility and increasing their capabilities.

Given this background, there is no reason to restrict the availability of the exemption. Moreover, the method implicitly suggested in the Notice for doing so would convert a clear rule for establishing attribution into an unpredictable balancing test. While it is always possible to "conceive of circumstances," see Notice at ¶51, in which the applicability of a generally valid rule

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[16] According to documents filed with the Commission in connection with an application to assign the license for Station WATL(TV), Atlanta, Georgia, from Fox Television Stations Inc. to Qwest, Qwest was "formed to promote minority ownership of broadcast stations in significant television markets, with the ultimate goal of assuring greater minority participation in the actual management of TV properties." Application for Consent to Assignment of Broadcast License (File No. BALCT-941214KH), Assignee's Exhibit 2, p. 1. Documents filed state that Qwest is 45% owned by Tribune Broadcasting. That interest is nonattributable, Qwest submits, because Qwest has a single majority shareholder, QwestCom L.P., an entity controlled by minority individuals, which holds a 55% equity and voting interest in Qwest. Id., pp. 11-14. According to the application, "[t]he single largest benefit from Tribune's non-attributable equity investment in Qwest is that it will enable Qwest's African-American and Hispanic owners to own and control stations in large metropolitan markets." Assignee's Exhibit 6, p. 1.

[17] Attribution Order, 97 FCC 2d at 1008-09, ¶21 (emphasis added). Indeed, there could be little justification for discriminating among licensees in the availability of the exemption.

may be questioned, we submit it would be counterproductive to abandon the benefits of a clear, generally applicable rule for the unpredictability of "case-by-case" analysis. (Id.) Even the Notice's conception of circumstances in which the reasoning behind the exception might not be valid[18] illustrates the difficulties the Commission would face in attempting to reduce the arguably relevant factors to a clear test. The problems inherent in formulating a clear restriction on the reach of the exemption weigh heavily in favor of retaining the current rule.[19]

Should the Commission chose to override its own considered judgment and narrow the single majority shareholder exception, it is essential that minority interests acquired in single majority shareholders companies in reliance on the 1984 rule be permanently protected as nonattributable. Relying in good faith on the rule, CBS and other companies have entered into major, complex transactions in pursuit of long-range strategic goals, as a result of which they have acquired minority interests in such companies. Such transactions might not have been undertaken,

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[18] The Notice states, "we can conceive of circumstances in which the minority voting stockholder has contributed a significant proportion of equity, holds 49 percent of the voting stock, and combines that holding with a large proportion of the nonvoting shares or debt financing." (Notice at ¶51) The Notice gives no indication of what would constitute a "significant proportion" of equity or a "large proportion" of nonvoting shares, nor how these different factors would interact. Similarly, the Commission would be hard pressed to articulate a coherent basis for differentiating between situations where the voting interest is, for example, 40% or 25%, rather than 49%.

[19] Of course, there may be exceptional circumstances in which attribution of a minority interest may be appropriate notwithstanding the existence of a single majority shareholder -- such as where a minority holder of a corporations's voting stock nonetheless owns the overwhelming majority of the company's equity or can be factually shown to exert control over the day-to-day management of the station in question. While the Commission may wish expressly to reserve its right to find a minority interest attributable in such circumstances, we respectfully suggest that it make clear that such a finding would be made in only the clearest of cases, so as to avoid the creation of general uncertainty as to whether such investments may be made on a nonattributable basis.

or might have been structured differently, had the parties anticipated that the station interests acquired would be treated as attributable.[20] To label these interests attributable retroactively would arbitrarily cause great hardship to CBS and others, based merely on their good faith reliance on existing government rules.

Consequently, if the single majority shareholder exception is narrowed, companies whose attributable holdings under the new rules exceed the multiple ownership limits must not be required to divest. Just as significantly, any interest in a single majority shareholder company that was nonattributable under the rules now in effect must remain nonattributable for purposes of future multiple ownership calculations, not only with respect to their current station holdings, but also with respect to pending station acquisition agreements which have been entered by such companies.

The Notice appears to recognize the necessity of this approach where it expresses the concern that actions contemplated in this proceeding, including restricting the availability of the exemption, not "disrupt existing financial arrangements." (Notice at ¶15) Grandfathering existing financial relationships is absolutely necessary to ensure stability and protect existing relationships established in reliance on the rules. The alternative suggested in the Notice of a transition period

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[20] Thus, for example, CBS has entered a strategic partnership with Westinghouse Broadcasting Company ("Group W") to own major market television stations pursuant to an arrangement structured in accordance with the single majority shareholder rule. See CBS Inc. Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) (SEC File No. 1-2931). While CBS will have a 50 percent equity interest in these stations, they will be controlled and managed by Group W -- a management arrangement which CBS might not have been willing to accept but for the strategic advantages to the company inherent in the anticipated attribution of the stations to Group W.

during which licensees would be required to "come into compliance"[21] is a hollow offer, providing no real relief from what would be a punitive and highly unfair rule change.

D. Nonvoting Stock

CBS believes that the Commission should retain its current rule holding nonvoting stock interests nonattributable, both because the rule reflects a reasonable judgment regarding most nonvoting interests and because it provides a clear guideline to the industry. As the Commission succinctly stated in 1984, "non-voting stock by its specific nature precludes the means to influence or control the activities of the issuing corporation."[22] This premise remains valid in the vast majority of cases.

The nonattributability of nonvoting stock has facilitated significant investment in the industry, including investment in minority-owned media companies. For example, the current rule has allowed minority-owned Blackstar Communications to obtain an investment of up to $20 million from Fox for a new company, Blackstar Acquisition, which reportedly plans to buy 11 VHF stations in markets 51 to 100. Fox will hold a 20% nonvoting interest in Blackstar Acquisition, whose voting stock, according to news accounts, is to be "100% minority-controlled."[23] Given Fox's station holdings, it is apparent that but for the nonattribution of nonvoting stock, Blackstar would not have been able to obtain this sizable investment.

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[21] Id.

[22] Attribution Order, 97 FCC 2d at 1020.

[23] See Communications Daily, October 11, 1994, p. 2; Broadcasting and Cable, October 17, 1994, p. 28.

As the Notice suggests, it is possible that a variety of interests or circumstances in combination with nonvoting stock interests could result in some degree of influence over licensees.[24] But if consideration of a variety of factors such as voting stock holdings, contractual relationships or debt interests is included in the determination of the attributability of nonvoting stock, the result would be precisely the kind of case-by-case approach that the Commission seeks to avoid. See Notice at ¶54. Except perhaps in the most extreme of cases,[25] the introduction of various factors into the determination of whether nonvoting stock interests are attributable will merely deny the industry a clear guideline on which to base its actions and result in less investment, without identifying a significant number of interests capable of influencing licensees.

Should the Commission decide, notwithstanding the positive effects of its 1984 ruling, that significant nonvoting stock interests merit attribution, CBS believes the preferable course would be to adopt a benchmark rather than a multi-factor analysis. If a benchmark is adopted, it should be as high as or higher than that for passive investors, since nonvoting interests are clearly less likely to influence licensees than are voting interests.

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[24] Notice at ¶53. We do not believe, however, there is reason to believe that such additional interests will result in influence "likely to induce a licensee or permittee to take action to protect the [shareholder's] investment," Notice at ¶4, rather than to further the licensee's own goals.

[25] See discussion at note 19.

III. The Cross-Interest Policy

For reasons that CBS has previously addressed in detail,[26] CBS believes remaining applications of the cross-interest policy should be eliminated. The retention of the policy is unjustifiable in light of the growth of media outlets, the historical development of the Commission's attribution and ownership rules, the existence of other regulatory restrictions and legal remedies, and the unnecessary burdens and uncertainty on media transactions which the policy imposes.

The Commission itself has acknowledged that "the ad hoc development of the policy has had the unintended effect of surrounding certain media transactions with a cloud of uncertainty."[27] As the Commission also recognizes, the case-by-case nature of cross-interest review imposes administrative burdens on both applicants and the Commission. (Notice at ¶90)

The detrimental effects of the policy are not balanced by any countervailing benefits. The cross-interest policy began as a supplement to the ownership rules to address concerns that have now been addressed by the attribution and the ownership rules.[28] As we have previously pointed out, the 1984 "attribution rules represent the Commission's 'informed policy judgment' regarding

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[26] See Comments of CBS Inc. in MM Docket No. 87-154, dated April 20, 1989 ("CBS Cross-Interest Comments"). CBS will not repeat here all the arguments made in these earlier Comments, but believes they remain valid and applicable in this proceeding.

[27] Policy Statement in MM Docket No. 87-154, 4 FCC Rcd 2208, 2217 at ¶27 ("Policy Statement").

[28] See CBS Cross-Interest Comments at 7-9. As we have noted, antitrust laws and private contractual arrangements also render the remaining elements of the policy unnecessary. Id. at 9-10.

which interests hold sufficient potential to influence or control a media property's operation to warrant regulatory restrictions."[29] Having made these determinations and having adopted attribution rules setting out clear guidelines to the industry, there is no justification for retaining a separate, ambiguous policy to regulate the same kinds of interests.

While acknowledging that the ownership and attribution rules have supplanted aspects of the cross-interest policy, the Notice alludes to the interplay between the cross-interest policy and these rules (Notice at ¶86), and asks whether adoption of proposed changes to the rules now under consideration would provide new reason to retain the policy. (Notice at ¶88) For example, the Notice inquires whether an increase in the attribution benchmark for voting stock from five to 10 percent provides reason to retain the cross-interest policy that might otherwise not exist. (Id.) CBS submits that if the Commission determines that stockholdings of up to 10 percent do not carry a sufficient degree of influence to warrant attribution, that policy judgment should prevail, and the holding of otherwise nonattributable cross-interests should not trigger attribution. But if the Commission nevertheless were to conclude that the raising of the benchmark to 10% creates a need to retain the cross interest policy, then the benchmark should not be raised. Given the relative clarity of the attribution rules and ambiguity of the cross-interest policy, CBS believes it would be far preferable to retain the current benchmark and eliminate the cross-interest policy, than to raise the benchmark and retain the policy.

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[29] CBS Cross-Interest Comments at 15, quoting Policy Statement at ¶33.

Conclusion

The attribution rules adopted in 1984 have served the industry well, by providing clear guidelines that have facilitated investment. While some minor relaxation of some of the rules may be appropriate, there is no urgent need for significant liberalization of the rules. Conversely, there is no justification for tightening the rules, a course of action that would be detrimental to the industry and for which protection would have to be granted for existing financial relationships.

Respectfully submitted,

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