providing financing to a broadcast group, because another fund in which CALPERS is also an investor has an interest in another broadcast group.

2. *How Limited Partners Should Be Attributed*

In light of the weakened rationale of the attribution rules in the mid-1990s, and the importance of stimulating the inflow of capital into the broadcast industry, the Commission should reform the attribution rules for limited partners.[38]

a. *The Preferred Standard: Control.* The proper rule should be that any limited partner that qualifies as a limited partner with limited liability under the Revised Uniform Limited Partnership Act ("RULPA")[39], as in effect under the laws of the state of the partnership's formation, should be deemed nonattributable. Under RULPA, the limited partners do not control the business. Therefore, so long as the limited partners are truly limited under RULPA, they cannot be in control, and, as explained above, in the absence of control, no interest should be attributed. There should be no need for "insulation."

RULPA provides that limited partners may engage in certain actions without losing their limited liability.[40] Even if a limited partner engages in such actions, he or she does not control the partnership. Under RULPA, if a limited partner exceeds the permitted

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[38] The pernicious effect of this rule is compounded by the fact that the same analysis applies in computations for purposes of compliance with the alien ownership prohibitions of Section 310(b) of the Act. Therefore, if a limited partnership does not "insulate" its limited partners, even a tiny investment by a single alien limited partner will result in the entire partnership being treated as if it were composed exclusively of aliens. Indeed, it is arguable, although nonsensical, that under the Commission's current analysis, two noninsulated alien limited partners would make the partnership be deemed to be 200% owned by aliens.

[39] Revised Uniform Limited Partnership Act § 303 (1985).

[40] Such actions include consulting with or advising the general partner, attending a meeting of partners, and voting with respect to major financial decisions of the limited partnership. Id. at § 303(b).

level of activity, which he would do by taking control of the partnership, he loses his insulation from liability. At that point, the Commission could attribute the holding, but it should not do so at any point at which state law considers the partner to be a limited partner.

Nor should the Commission confuse the fact that a given individual or firm may have dual roles: a person may be a limited partner and also serve as a general partner, an officer, employee, or otherwise become involved in the business of a partnership or a partnership's operating affiliates. Under current rules, the limited partner immediately becomes attributable by virtue of these other activities. That attribution is wrong, and should be corrected. If a limited partner is also a general partner, it is the general partnership interest that should make the person attributable; if he serves in a management capacity that gives him *de facto* control of a broadcast station, then that activity in and of itself -- not the limited partnership holding -- should be the basis for attribution.

b. *If The Standard is Less Than Control: Equity Benchmark.* We have urged that interests that are less than controlling should no longer be attributed, which would mean that no limited partnership interests would be attributable. Even if the Commission adopts a lower threshold for attribution in general, it should recognize that the current rules subject limited partners to a far higher burden than holders of other kinds of interests, without a legitimate justification. Therefore, at the very least, the Commission should adopt an equity benchmark for noninsulated limited partnership interests.

A "noninsulated" limited partner has fewer rights than a voting stockholder, and in some cases fewer rights than the holder of nonvoting stock.[41] Limited partners,

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[41] Many corporate charters that create a class of nonvoting stock nevertheless provide the nonvoting stockholders with the ability to vote on certain corporate actions, such as merger, dissolution, and incurrence of indebtedness.

unlike voting stockholders, typically are not entitled to vote for management, nor even to take part in management. They frequently have the right to vote on certain fundamental partnership decisions, such as sale of substantially all of the partnership's assets, refinancing of its indebtedness, termination of the partnership, change in the nature of the partnership's business, and removal of the general partner.[42] Yet the Commission currently deems such interests attributable. If the business entity were a corporation rather than a partnership, minor voting stock interests would not be attributable, even though the voting stockholder would be entitled to vote on the election of directors, launch proxy fights, provide services to the company, communicate vigorously with management, and the like. At most, therefore, limited partnership interests should be considered no more attributable than voting stock interests.

The Commission has proposed to institute an "equity benchmark" for noninsulated limited partnership interests, that is, to consider limited partnership interests (whether insulated or not) attributable only if they exceed a certain percentage of the partnership's equity. Such an approach would constitute a step toward rectifying the bias against limited partnership interests. Whatever threshold the Commission adopts for attribution of voting stock -- whether 10% as proposed, or some higher percentage, as we recommend -- the threshold for attribution of noninsulated limited partnership interests should be no lower. Given the absence of any legitimate policy or legal basis to treat limited

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[42] These rights are frequently encouraged by state law, particularly in cases in which the partnership has solicited investments by limited partners in a public or private offering, in which case state securities administrators might insist on such rights as a protection to limited partners.

partnership interests more harshly than voting stock, the Commission should not continue to disfavor the use of limited partnerships by either licensees or investors.

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

We have argued that insulation should be discarded as a concept, because limited partners can never be in control of an entity. If the Commission continues to insist on attribution at some level less than control, we have supported the notion that even noninsulated limited partners be subject to some equity threshold before their interests are attributed. Beyond that, insulated limited partners should never be attributed.

The Commission's current statements on attribution, however, are overly restrictive and leave many questions unanswered. This is the appropriate time to provide clarification on the issue, so that investors are not dissuaded from investing in broadcast because of uncertainty about their regulatory status or because of unnecessary limitations on investment.

First, the current attribution policy speaks to the relationship between a limited partner on the one hand and the general partner and the partnership on the other hand. For example, the limited partner may not serve "as an employee of the limited partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company."[43] In many cases, however, particularly involving investment funds, the limited partnership does not itself have "media enterprises" except perhaps to the extent that it invests in a media company. What is the scope of the prohibition? Is a limited partner barred from working as an employee of the partnership to monitor its investments, including its investments in broadcast? The Commission's concern here stemmed from the prospect that a limited partner

[43] Insulation Criteria Order at ¶ 48.

might work at a broadcast station, as a station manager for example[44], but that has no bearing on the situation in which an employee of a fund manager is given a limited partnership interest in a fund as an element of compensation. Yet such a incentive is barred if the limited partner is to be insulated.

Perhaps the Commission intends that the test apply not at the partnership level but at the level of the media company in which the limited partnership has invested. That may make some sense if the partnership controls the media company. It makes no sense if the partnership is not in a position to exercise control. The degree of "influence" over diversity issues that such a partner would be able to exercise is remote. Applying insulation restrictions in that context would do nothing to further diversity but would merely impede broadcast investment.

Another element of insulation restricts the limited partner from performing services (other than acting as lender or surety) to the partnership. If the limited partner is a bank or insurance company, is it precluded from providing conventional financial services or insurance products? This problem becomes even more perplexing if the partnership is not the licensee but merely holds an interest in the media company. In a recent transaction, a large insurance company, organized as a limited partnership, was justly concerned about whether its affiliate might -- even inadvertently -- provide insurance to one of the stations licensed to a corporation ultimately controlled (through several layers) by a limited partnership in which the insurance company held a limited partnership interest. To suggest that the insurance company, by providing insurance to the broadcast station, might be influencing viewpoint simply blinks reality. Yet, the attribution policy clearly appears to

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[44] Id.

cover neutral services wholly unrelated to concerns about preserving diversity, and is vague enough to leave a cloud on the permissibility of performing those services at the media company level (as opposed to the partnership level).

Moreover, most of the policy concerns are phrased in terms of limited partners that are natural persons. For example, insulated partners are precluded from acting as employees or independent contractors. But many limited partners are entities, not natural persons. The Commission acknowledges in a footnote that limited partners may not be natural persons, and states cavalierly that "these restrictions apply to the constituent parts of the limited partner, e.g., its directors, officers, partners, etc. [and that] [w]here applicable, in vertical chain situations, our multiplier will be used."[45] Does this truly mean that every officer of Chemical Bank must be specifically precluded from providing services to, acting as an employee or contractor for, or communicating with a broadcast station in which a Chemical Bank affiliate has taken a passive limited partnership interest in order to be excluded from attribution? Does this extend to all affiliates? What does the multiplier have to do with the functional restrictions (as opposed to equity ownership) on limited partners? It is hard to believe that there were any legitimate policy goals in 1983 that would have been served by a reading that required banks to ensure that their officers refrained from certain activity, but there clearly are no good reasons in the competitive environment of 1995. The continued existence of this ambiguity merely dissuades large institutions from investing, or permitting their affiliates to invest, in broadcast.

Finally, the current policy permits insulated limited partners to vote on the removal of a general partner only for cause, which it defines as "a finding by an independent

[45] Insulation Criteria Order at ¶ 48 n.61.

party that the general partner has engaged in malfeasance, criminal conduct or wanton or willful neglect."[46] There are two problems with this formulation. First, malfeasance is a vague term. The Commission should clarify that a general partner may be removed for failure to comply with the terms of the partnership agreement, whatever that may be. If the partnership agreement, for example, requires the general partner to achieve certain financial goals by a certain date, failure to meet the goals should constitute sufficient "cause". Breach of any of the terms of the partnership agreement should also be sufficient cause. Second, the Commission speaks of the need for an independent party to determine whether cause exists. This statement is often viewed as a requirement that the partnership agreement provide for binding arbitration, but the Commission has never espoused arbitration as a communications policy goal, nor does it make much sense here. If the limited partners believe that cause exists, they will inform the general partner and vote on the matter. If the general partner disagrees whether there exists just cause, he can resort to the courts, which are surely as independent as arbitrators. Does the Commission really mean to insist that the parties seek arbitration, not judicial resolution, of the question whether cause exists?

In summation, if the Commission is determined to retain insulation as a concept, it should clarify the following:

> 1. When the limited partnership is itself the licensee, or holds a controlling interest in the licensee, an insulated limited partner may not act as an employee or independent contractor of the licensee, nor perform services for the licensee related to the content of the broadcast transmission. General services that might be provided to any business, such as banking, insurance, legal and accounting services, real estate management, and the like, are not precluded.

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[46] 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, 1 FCC Rcd 802 at ¶ 6 (1986).

2. If the limited partnership holds a noncontrolling interest in the licensee, no restrictions apply on a limited partner's involvement with the licensee in determining insulation.

3. If a limited partner is an entity rather than a natural person, the limitations do not apply to officers or directors of the entity, nor to affiliates of the entity, unless those persons are acting on behalf of the entity. That is, no special prohibition is needed on officers and directors. The limited partner may not act, and the only way an entity can act is through natural persons acting on its behalf.

4. An insulated limited partner may vote to remove a general partner for "cause," however that term is defined in the partnership agreement or by applicable law. In the event of a dispute over the existence of cause, the dispute may be resolved by any means other than arm-wrestling: litigation, arbitration, or alternative dispute resolution.

D. Limited Liability Companies

Limited liability companies ("LLCs") are almost identical to partnerships in their organizational documents and structure. The FCC should recognize this and regard investors in the two entities similarly. As in the limited partnership context, all members of an LLC should be able to render their interests nonattributable by including insulation criteria in the governing documents of the LLC. For noninsulated LLC interests, the Commission should adopt an equity benchmark focused on "control" of the licensee; namely, an equity benchmark should be applied in the LLC context just as it applies in the voting stock context. LLC interests below this threshold -- whether 50% as proposed by the Commenting Parties or some lower percentage -- should relieve the holders of being considered "owners" for purposes of the multiple ownership rules.

E. Cross-Interest Policy

As the Commission recognizes, the current attribution rules serve most of the purposes for which the cross-interest policy was enacted. In addition, antitrust rules cover possible anticompetitive combinations of more than one licensee. If an investor uses its attributable "controlling" interest in one licensee to protect its nonattributable stake in another licensee, the antitrust rules may be implicated. The vague proscription on certain cross-interests now serves only as an impediment to investment. The delays to investment resulting from the FCC's processing of waivers of the cross-interest rule are themselves a barrier to investment.

If the Commission is concerned about control over the decisionmaking of a licensee, it should focus only on situations where it deems an investor's position as attributable. The multiple ownership restrictions are sufficient to combat one investor having control over too many licensees. The FCC should refrain from monitoring situations of nonattributable investment; the cross-interest policy is an ambiguous extension of the multiple ownership rules to cover situations where an investor has complied with the multiple ownership caps yet still holds other interests.

The cross-interest policy serves as an added deterrent to investment by sophisticated investors, such as the Commenting Parties, who work diligently to comply with regulatory rules in structuring their investments, but are typically perplexed when told that mere compliance with attribution rules is insufficient, that there is a vague policy that may or may not preclude a given investment, or that may or may not preclude a company in which they have invested from making another acquisition based on a nonattributable interest in their portfolio.

If an investor receives its funds from large institutional investors, such as described above, the investment funds may be structured to render its institutional investors nonattributable, yet other holdings of those institutions may or may not implicate the cross-interest policy. The process of soliciting information from scores of large institutions that invest in many ways is daunting at best. Commission staff, faced with a vague and shifting policy of dubious value, attempt to be consistent but frequently have different standards for the information that must be solicited for cross-interest policy compliance, from different levels in the chain. Once the investment is made, there is great uncertainty and unpredictability about what efforts must be done to ensure continued compliance, and what future investments (or foreclosures on investments) will be permitted under the policy.

All in all, the cross-interest policy, the reports of whose death have unfortunately not been exaggerated, is a significant deterrent to capital formation, not only because of the administrative burdens but also because of the ongoing uncertainty about what will or will not be allowed. The Commission should end it completely and finally.

Respectfully submitted,

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