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May 18, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WRITER'S DIRECT DIAL NUMBER

202-508-9530

OUR FILE NO.

**VIA MESSENGER**
William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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92-51

Re: Comments of The California Public Employees' Retirement System, MM Docket No. 94-150; In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast Interests

Dear Mr. Caton:

Submitted herewith on behalf of The California Public Employees' Retirement System ("CalPERS"), pursuant to Section 1.419 of the Commission's Rules, is an original and required copies of Comments to a Notice of Proposed Rulemaking which was released on January 12, 1995, in MM Docket No. 94-150, and a Motion for Leave to File One Day Out of Time.

Please direct any communications concerning this matter to the undersigned, or to Bruce D. Ryan at (202) 508-9560.

Respectfully submitted,

Michelle W. Cohen

Michelle W. Cohen
for PAUL, HASTINGS, JANOFSKY & WALKER

Counsel for The California Public Employees' Retirement System ("CalPERS")

Enclosures

No. of Copies rec'd 0+2
List A B C D E

cc: Office of the Secretary
Mass Media Bureau
Information Office
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Hon. James H. Quello
Hon. Andrew C. Barrett
Hon. Rachelle B. Chong
Hon. Susan Ness
Hon. William Kennard
Roy J. Stewart, Chief, Mass Media Bureau
Mania K. Baghdadi, Esq., Mass Media Bureau

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

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| In the Matter of | ) | |
| | ) | |
| Review of the Commission'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 |

To: Chief, Mass Media Bureau

## MOTION FOR LEAVE TO FILE COMMENTS ONE DAY OUT OF TIME

The California Public Employees' Retirement System ("CalPERS"), by its attorneys and pursuant to Section 1.46 and 1.415 of the Commission's Rules, 47 C.F.R. §§ 1.46, 1.415, hereby requests leave of the Commission to file its comments in response to the Commission's Notice of Proposed Rulemaking released in the above-captioned proceeding on January 12, 1995, one day out of time, for the reasons set forth below. The comments were due to be filed yesterday, May 17, 1995. In support of this Motion, CalPERS demonstrates as follows:

1. CalPERS was diligently preparing its comments for filing with the Commission yesterday afternoon, but experienced certain logistical difficulties in coordinating the final review and preparation of the comments with responsible officials at CalPERS located in Sacramento, California, which resulted in a delay in dispatching the filing to the Commission by messenger until after 5:00 p.m. yesterday. In addition, the messenger employed by CalPERS was then further delayed in transit due to unanticipated complications, and arrived at the Commission for the filing after the Secretary's Office had closed at 5:30 p.m.

2. CalPERS respectfully submits that its comments, which set forth the views of the nation's largest public pension trust fund, would facilitate the development of a full and complete record on the issues raised in this proceeding, and would thereby assist the Commission in reaching its policy determinations on the broadcast media attribution rules.

3. CalPERS will endeavor to obtain a list of all parties filing initial comments and serve each such party with a copy of CalPERS comments today in order to ensure that no party is prejudiced by this late filing. In addition, pursuant to 47 C.F.R. § 1.46(c), CalPERS will orally notify Commission staff personnel responsible for acting on the motion that this motion is being filed with the accompanying comments.

Accordingly, good cause having been shown, CalPERS respectfully requests the Commission to grant this motion and receive CalPERS' comments for filing in this proceeding.

Respectfully submitted,

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

By: _____

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Its Attorneys

May 18, 1995

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

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| In the Matter of | ) | |
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| Review of the Commission's Regulations Governing Attribution of Broadcast Interests | ) | MM Docket No. 94-150 |
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| | ) | |
| Reexamination of the Commission's Cross-Interest Policy | ) | MM Docket No. 87-154 |

**COMMENTS OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**


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May 17, 1995

## SUMMARY

The California Public Employees' Retirement System ("CalPERS") is a pension trust fund currently serving over one million active, inactive, and retired public employees and their beneficiaries. CalPERS is pleased to take this opportunity to participate in the Commission's review of its broadcast media attribution rules. CalPERS' comments focus primarily on proposed revisions in certain aspects of the rules governing attribution of limited partnership interests, particularly those held by large institutional investors. CalPERS' comments also address a need to modify the Commission's cross-interest policy.

CalPERS' suggested alterations or clarifications to the Commission's broadcast media attribution rules include: (1) clarification or relaxation of the limited partner insulation criteria in several respects, including with respect to limited partners' rights to vote to remove a general partner "for cause"; (2) adoption of an equity ownership benchmark for non-insulated limited partnership interests that is the same as the voting stock threshold; (3) application of the higher attribution threshold to a larger class of institutional investors, including pension funds; and (4) elimination of the cross-interest policy as applied to non-attributable equity interests.

CalPERS believes that these changes would promote greater investment in the broadcast and cable industries without compromising the diversity and competition purposes of the Commission's multiple ownership rules.

## TABLE OF CONTENTS


Page

I. STATEMENT OF INTEREST . . . . . 2

II. THE COMMISSION SHOULD CLARIFY OR RELAX ITS LIMITED PARTNER INSULATION CRITERIA IN SEVERAL RESPECTS . . . . . 4

A. Limited Partners' Rights to Vote to Remove a General Partner "For Cause." . . . . . 4

B. Other Reasonable Actions Directed Solely to the Protection of the Limited Partner's Investment . . . . . 10

C. Additional Insulation Criteria Are Not Necessary. . . . . 12

III. THE COMMISSION SHOULD ADOPT AN EQUITY OWNERSHIP BENCHMARK FOR NON-INSULATED LIMITED PARTNERSHIP INTERESTS, REGARDLESS OF THE SIZE OF THE PARTNERSHIP . . . . . 13

A. The Same Equity Threshold Applied to Voting Stock Interests Should Apply to Non-Insulated Limited Partnership Interests . . . . . 14

B. The Commission Should Apply The Same "Multiplier" Approach to Both Limited Partnership Interests and Voting Stock Interests . . . . . 15

C. The Emergence of Limited Liability Companies and Other Hybrid New Business Forms Further Supports a Uniform Equity Benchmark . . . . . 17

IV. THE COMMISSION SHOULD APPLY ITS HIGHER EQUITY THRESHOLD TO A BROADER CLASS OF INSTITUTIONAL INVESTORS, INCLUDING PENSION FUNDS, IN APPROPRIATE CIRCUMSTANCES . . . . . 18

V. THE COMMISSION SHOULD ELIMINATE THE CROSS-INTEREST POLICY AS APPLIED TO NON-ATTRIBUTABLE EQUITY INTERESTS . . . . . 22

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

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| In the Matter of | ) | |
| | ) | |
| Review of the Commission's Regulations Governing Attribution of Broadcast Interests | ) | MM Docket No. 94-150 |
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| 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 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

The California Public Employees' Retirement System ("CalPERS"), by its attorneys, submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") released in the above-captioned proceeding on January 12, 1995. CalPERS supports the Commission's effort to review its broadcast media attribution rules, set out in Notes to 47 C.F.R. § 73.3555, to identify and include only those positional and ownership interests that "convey a degree of influence or control to their holder sufficient to warrant limitation under the multiple ownership rules." Notice, ¶ 4. CalPERS' comments primarily address certain aspects of the rules governing attribution of limited partnership interests, particularly those held by large institutional investors.

In its Notice, the Commission recognizes that its judgment as to what level of "influence" should be subject to restriction by the multiple ownership rules

has been, and should be, focused on "what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions." Id. The Commission further recognized that it "must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry." Id., ¶ 5. Additional stated goals include achieving "reasonable certainty and predictability to allow transactions to be planned" and "ease of processing." Id. CalPERS urges the Commission to adopt attribution rule revisions that further these appropriate objectives.

Specifically, CalPERS respectfully submits that the Commission in this proceeding should:

- Clarify or relax its limited partner insulation criteria in several respects, including the right of limited partners to vote to remove a general partner "for cause."
- Adopt an equity ownership benchmark for non-insulated limited partnership interests, regardless of the size of the partnership, that is the same as the voting stock threshold.
- Apply its higher attribution threshold to a larger class of institutional investors, specifically public pension funds, to encourage greater mass media investment, and to allow greater flexibility in supporting the venture capital needs of minority- and women-owned enterprises.
- Eliminate the cross-interest policy as applied to non-attributable equity interests.

Each of these proposed changes is consistent with the Commission's stated objectives.

## I. STATEMENT OF INTEREST

CalPERS is a pension trust fund currently serving over one million active, inactive and retired public employees and their beneficiaries. CalPERS is administered by a 13-member Board of Administration, whose members are trustees

of the Public Employees' Retirement Fund. As fiduciaries of this fund, Board Members owe a duty of loyalty to discharge their responsibilities with respect to the System "solely in the interest of the participants and beneficiaries."[1/]

Consistent with its objectives, CalPERS generally follows long-term investment strategies. Its investment policy is designed to generate the best possible total return on a long-term basis at an acceptable level of risk. It has a broad, well-diversified portfolio, including domestic and international fixed-income investments, domestic and international equity investments, real estate, private equity and alternative investments. The market value of CalPERS' current portfolio is approximately $80 billion.

CalPERS' media investments are made primarily through its "Alternative Investment" program, comprising no more than two percent of the total pension fund. The "core" Alternative Investments are structured as limited partnerships which, in turn, invest in venture capital, corporate restructuring, and special situations. Also included in this area are Alternative Emerging Investment Opportunity transactions, which involve new or non-traditional markets (e.g., minority- and women-owned businesses). These also are structured as limited partnerships.[2/]

CalPERS' interest in this proceeding primarily involves the extent to which limited partners should be considered "cognizable" for purposes of applying the Commission's multiple ownership rules. As set forth more fully below, CalPERS

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1/ Cal. Const. Art. XVI, § 17; Cal. Gov. Code § 20205.8.

2/ As a public fund, CalPERS has neither the staff resources nor the inclination to assume an active role in managing these investments.

strongly supports adjustments to the mass media attribution rules that now unduly restrict its ability to invest in the broadcast and cable industries. Specifically, CalPERS advocates that the Commission permit ownership interests and arrangements, primarily in the form of limited partnership investment funds, that involve no realistic potential to influence the core operational decisions of a licensee or system. CalPERS also has an interest in reducing the burden and uncertainty of complying with the Commission's regulatory policies applicable to broadcast investments, which may arise both at the time of an initial investment decision and throughout the course of the investment.

## II. THE COMMISSION SHOULD CLARIFY OR RELAX ITS LIMITED PARTNER INSULATION CRITERIA IN SEVERAL RESPECTS.

The Commission has requested comment on whether the limited partner insulation criteria should be "relaxed to any degree," without implicating the purposes of the multiple ownership rules to encourage diversity and competition.[3/] Notice, ¶ 55. CalPERS suggests several aspects in which the present criteria might be clarified or relaxed in this manner.

### A. Limited Partners' Rights to Vote to Remove a General Partner "For Cause"

In order for a limited partner to be "insulated" from attribution under the current rules, the limited partnership agreement (or the limited partnership

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3/ Under the Commission's rules, limited partners' interests in broadcast licensees can be exempt from attribution if limited partners are not "materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership," and the licensee so certifies in accordance with specified insulation criteria. See 47 C.F.R. § 73.3555, Note 2(g).

certificate) must provide, among other things, that exempt limited partners may only possess the power to vote to remove the general partner in three circumstances: (1) the general partner is subject to bankruptcy proceedings specified in the Revised Limited Partnership Act ("RULPA"); (2) the general partner is adjudicated incompetent; or (3) a neutral arbiter has determined that the general partner can be removed "for cause." See Corporate Ownership Reporting and Disclosure of Broadcast Licensees, 1 FCC 2d 802 (1986). CalPERS' suggested clarification concerns the third removal condition. The Commission has not specified all the particular circumstances which may constitute "cause" for voting on removal, but has stated that "cause" at least includes "malfeasance, criminal conduct, or wanton and willful neglect," and conduct "so removed from the ordinary so as to require recourse by prudent investors to an express right of removal." Id. at 803, 807, n.17.

In its media and other Alternative Investments, CalPERS' role is always that of a limited partner investor. CalPERS looks to the general partner for its expertise and experience in managing the particular investments. CalPERS does not seek to "micromanage" or otherwise influence the general partner. Its investment strategy is to "hire" the knowledge and skills of the general partner in a given industry area such as broadcasting. None of CalPERS' activities are aimed at broadcast licensee programming decisions or other day-to-day decisions of the licensee. Indeed, CalPERS' role in its media investments is at least a couple of levels removed from this kind of "influence" activity.[4/] Even the general partners of the

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4/ See Notice, ¶¶ 4-5 (Commission has viewed "influence" as an interest through which the holder is "likely to induce a licensee or permittee to take actions to protect the investment," which "influence" becomes of concern only at a level that conveys a (continued...)

investment funds normally do not involve themselves in day-to-day licensee decisionmaking.

Like any reasonable investor, however, CalPERS recognizes that there are risks inherent in any venture where it delegates investment authority. As a pension fund, CalPERS has an additional obligation as a fiduciary to its members and beneficiaries. Thus, CalPERS generally requires that the limited partnership agreement provide it with a right to vote, along with other limited partners, on removal of the general partner in certain "for cause" situations. In addition, some states, such as California, require that limited partners have the right to remove the general partner, which removal is effective upon the vote or written consent of a majority in interest of all partners. See Cal. Rev. Ltd. Ptner. Act. § 15636(f)(2) (Supp. 1995).

In CalPERS' experiences as a limited partner, questions of a general partner's ability adequately to serve the partnership have been raised in a number of instances, some of which arguably might not be covered by a narrow interpretation of the Commission's "for cause" events. For example, CalPERS was a limited partner in a partnership in which the principals of the general partner, a corporation, had been the subject of a large monetary judgment in a legal action relating to a predecessor partnership. The judgment basically "paralyzed" the general partner and its principals, and the general partner could not adequately perform its duties to the later-in-time CalPERS partnership. If this had been a partnership with media

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4/(...continued)
"realistic potential to affect [the licensee's] programming and other core operational decisions").

investments, it is unclear whether CalPERS could have exercised a right to vote on removal of the general partner consistent with the Commission's insulation criteria, e.g., whether the general partner's inability to serve the partnership would be considered "so removed from the ordinary as to require recourse by prudent investors to an express right of removal." 1 FCC 2d at 807, n.17.

In light of this potential ambiguity regarding the circumstances constituting adequate "cause" for removal of a general partner, CalPERS suggests that the Commission might take this opportunity to clarify that proper grounds for such removal would include any event constituting "cause" under the partnership agreement or state law.[5/] In CalPERS' experience, circumstances constituting cause in investment protection clauses are typically similar to those in debt instruments which specify default events permitting the lender to "call the loan" in order to protect its funds. Thus, the Commission should include the following circumstances as permitting a vote on a "for cause" removal: (i) financial breaches; (ii) contractual breaches; and (3) fiduciary breaches (all of which may be subject to rights of cure prior to removal). A "for cause" situation could also include "the entry of a verdict, judgment, order, or injunction against the general partner or its principals that

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5/ The Commission has previously indicated that circumstances warranting a "for cause" to vote on removal of a general partner would not be limited to its delineated situations, stating: "[a]s the scope of circumstances or conduct that may render a general partner liable to removal is broadened, it becomes increasingly important that actual determinations of removal be independently reached." Id. at 807, n.21 (emphasis added). Furthermore, in authorizing the limited partner removal right, the Commission recognized that "the power to remove a general partner for cause is a right which many limited partners reasonably perceive to be necessary to adequately protect their investment." Id. at 803.

prohibits or materially impairs the general partner or its principals from conducting the business of the partnership or the financial condition or affairs of the partnership."

Alternatively, if the Commission determines that this broader interpretation of "for cause" is not warranted, CalPERS suggests that the Commission should, at a minimum, reconcile its insulation criteria with state limited partnership laws. Because some states, like California, mandate that limited partners have the right to remove a general partner, limited partners in those states are unable to comply with both state law and the Commission's insulation criteria -- even if this right is never exercised and even if the limited partner is not otherwise materially involved in the media investment. Other commenters in the prior rulemaking proceeding have recognized this conflict.[6/] To remedy this problem, the Commission could specify that limited partners whose partnership agreements are required under state law to provide limited partners with the right to vote on removal of a general partner will still be considered insulated from attribution, provided that: (i) the general partner makes the required "no material involvement" certification; (ii) the limited partnership agreement contains all other required insulation provisions; and (iii) the insulated limited partner is not in fact "materially involved" in the media company's activities.

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6/ See, e.g., Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket 92-51, Comments of ML Media, filed June 12, 1992, at 3 ("ML Media's limited partnership interests were offered by prospectus in states which require limited partners to have the ability to vote on the election and/or removal of general partners. As a result, ML Media has, over the years, been unable to give the unqualified certification that its limited partners are sufficiently insulated to be entitled to non-attribution status... ")

Finally, the Commission should clarify its requirement of an independent third party determination of "cause." The Commission currently requires that the partnership agreement specify that a neutral arbiter, rather than the limited partner, will make any factual determinations regarding the liability of a general partner for removal. 1 FCC Rcd at 802. The reasoning behind this requirement is that the ability to remove a general partner only "for cause," if it must be independently determined, does not convey the ability to influence or control the media-related affairs of the partnership. Id. at 803. However, the Commission has not specified what constitutes an "independent determination" of cause, because it did not "intend to restrict the range of alternative mechanisms that might satisfy this interdependence requirement." Id. at n.21.

CalPERS suggests that the Commission clarify or modify these requirements to provide greater flexibility for limited partners such as pension funds to exercise their fiduciary duties, if necessary, to vote to remove a general partner. The "for cause" determination should be permitted to be made by any third party independent of the insulated limited partners seeking to invoke the removal process -- e.g. other, non-insulated limited partners; or, where feasible, an independent party mutually selected by the general and limited partners to resolve disputes. In many cases, it is unlikely that the general partner would cooperate in selection of a neutral arbiter, and thus other mechanisms not inconsistent with insulation should be allowed.[7/] This change would ensure that an independent party still must make the

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7/ For example, all limited partners other than the insulated limited partner might participate in the determination of "cause" for removal, with the insulated limited partner's interest treated as voting in the same percentage as all other, non-insulated (continued...)

"for cause" determination. Thus, the insulated limited partner would not possess the power to control the partnership's media affairs.

### B. Other Reasonable Actions Directed Solely to the Protection of the Limited Partner's Investment

Additionally, the Commission may wish to confirm that limited partners may participate in a partnership's affairs to the extent that such actions are limited to reasonable investor protections, as opposed to participation in the day-to-day activities of any media business or media-related activities of the partnership. In determining which limited partnership interests should be attributable, the Commission has specifically confined its attribution to "those interests which convey the ability to influence or control the media-related affairs of the partnership." 1 FCC 2d at 803. Thus, the Commission's attribution rules and its insulation criteria are not meant to cover those interests that do not provide limited partners with the power to influence or control the partnership's media affairs. Moreover, the Commission has suggested that the insulation criteria focus primarily on involvement with the "day to day" operations of the general partner and its media businesses, through either communications with them or "voting on matters relating to the day-to-day operations of the business." Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 58 Rad. Reg. 2d 604, ¶ 48 & n.63 (1985).

CalPERS does not seek to become involved in the day-to-day affairs of its media investments. CalPERS relies on the general partners for their expertise in the media field. However, because CalPERS is under a statutory duty to its members

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7/(...continued)
limited partners' votes on that determination, for purposes of whatever percentage vote may be specified in the limited partnership agreement or applicable state law.

to invest its members' funds with the care and diligence of a prudent investor (Cal. Gov. Code § 20205.8), it may seek certain typical investor protections in its partnership agreements. These investor protections only serve to ensure that the limited partner, like any prudent investor, is informed about partnership developments that are not in the ordinary course of business and that may pose new or unacceptable investment risks.

For example, some limited partnerships may have "advisory committees" which may meet from time to time to be informed, in general terms, about the partnership's investments. CalPERS, as well as each other significant investor in a limited partnership, will often have a representative on such a committee. The functions of the committee typically include the following: (i) meeting periodically with the general partner to be advised about the general status of each of the partnership's investments; (ii) passing on transactions that may involve a potential conflict of interest between the general partner and the partnership; (iii) approving or disapproving of the general partner's periodic valuation of the partnership's investments; and (iv) approving or disapproving of proposed investment transactions by the partnership that otherwise would violate fundamental investment policies established by the partnership agreement.[8/] The members of such a committee are never given any right to vote or pass on any operational matters of any portfolio company of the partnership, including any such company that is a licensee.

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8/ Examples of these investment policies include: (a) prohibitions against the partnership's investing more than 20% of its partners' committed capital in any one company; (b) prohibitions against investing more than 10% of the partners' committed capital in the securities of publicly traded companies; and (c) prohibitions against the partnership's investing in hostile takeovers, real estate, oil and gas, financial derivatives, and other investment partnerships.

The Commission's current insulation criteria do not specifically address such investor protections. However, the Commission's focus on involvement and communications with the general partner concerning day-to-day activities of the media-related business, together with the fact that the Commission specifically limited its attribution to "those interests which convey the ability to influence or control the media-related affairs of the partnership," 1 FCC 2d at 803, strongly suggest that such investor protections should not by themselves make a limited partner's interest attributable. To clear up any possible confusion, the Commission should clarify, or if necessary "relax," its insulation criteria to this extent.

### C. Additional Insulation Criteria are Not Necessary

The Commission has also requested comment on whether additional insulation criteria are necessary to assure that the goals of the attribution rules are achieved. Notice, ¶ 55. CalPERS urges the Commission not to adopt additional insulation criteria. CalPERS would like to continue to invest in media companies through limited partnerships, but may be discouraged from doing so if additional insulation criteria were adopted because of the potential conflict between such criteria and CalPERS' duties as a fiduciary, the costs associated with compliance, and state law. CalPERS has been concerned with the effects of certain existing insulation criteria (e.g., general partner removal rights), and believes that additional insulation criteria could hamper its ability to protect the investment of its fund members and fulfill its fiduciary duty.

The Commission itself has recognized that exemption of insulated limited partners "facilitates the infusion of capital into broadcasting enterprises...and eliminates unnecessary and potentially costly regulation while still maintaining the

integrity of the diversity rationale underlying the multiple ownership rules." 58 Rad. Reg. 2d, ¶ 27. The Commission's existing insulation criteria, combined with the required certification, are more than adequate to ensure that limited partners with substantial equity interests are not involved in the media-related affairs of the business.

## III. THE COMMISSION SHOULD ADOPT AN EQUITY OWNERSHIP BENCHMARK FOR NON-INSULATED LIMITED PARTNERSHIP INTERESTS, REGARDLESS OF THE SIZE OF THE PARTNERSHIP.

Under current rules, limited partnership interests that do not comply with all insulation criteria are attributable regardless of the amount of equity held. CalPERS believes that the Commission should alter this approach and apply the same equity benchmark to non-insulated limited partnership interests that it applies to voting stock interests.[9/] Limited partnership equity interests below the specified percentage should be non-attributable, with only those above the specified percentage treated as presumptively attributable in the absence of the requisite insulation. This change would provide more even-handed treatment of comparable media investments, and would likely increase capital investment and encourage new entry without implicating the diversity and competition underpinnings of the multiple ownership rules.

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9/ CalPERS also supports increasing the voting stock benchmark from 5% to 10%, and the benchmark for so-called "passive" investors from 10% to 20%. Because CalPERS expects that other parties' comments will adequately address these points, these initial comments do not address specific issues relating to these proposals.

### A. The Same Equity Threshold Applied to Voting Stock Interests Should Apply to Non-Insulated Limited Partnership Interests

In adopting the current 5% benchmark for voting stockholdings in the 1984 Attribution Order, the Commission found that such a benchmark was "likely to identify nearly all shareholders possessed of a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution." 97 FCC 2d at 1006. Upon reconsideration, the Commission declined to adopt a similar equity benchmark for non-insulated limited partnerships primarily based on its view that "the equity interest of a limited partner bears no necessary relation to his or her ability to influence the affairs of the partnership. . . . " 1 FCC Rcd at 804, ¶ 12. In CalPERS' experience, however, the two situations are quite similar. In both cases, a small percentage equity interest ordinarily is insufficient to affect operational decisions of a licensee so as to implicate the purposes of the Commission's multiple ownership rules.

As earlier commenters have noted, decisions on structuring such media investments are not based on assessments as to the degree of participation or influence to be acquired by the investor. In the case of many private institutional investors, the choice of business organization and capital formation -- corporate or partnership -- is driven largely by tax considerations.[10/] In CalPERS' case, other independent factors determine the particular form of the investment, but there is no practical difference in the concept of participation and influence CalPERS generally can exercise as a 5% (or

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10/ See Notice, ¶ 59; Comments of the Prudential Insurance Company of America, filed June 12, 1992, at 11. However, public retirement systems such as CalPERS enjoy tax exempt status under Section 115 of the Internal Revenue Code.

10%) limited partner in a media investment fund and as a 5% (or 10%) voting stockholder in a corporation.

The basic premise of the current attribution rules -- i.e., that the "power of a limited partner is not related to his proportional partnership share" (Notice, ¶ 63) -- is contrary to the way most media investment funds are presently structured. Generally speaking, the ability to shape the formation and activities of most investment limited partnerships decreases proportionately with smaller equity interests, just as a shareholder's ability to influence the business decisions of a corporation decreases proportionately with smaller stock interests. In addition, adoption of an equity benchmark for non-insulated limited partnership interests should not be limited to business development companies or other widely-held limited partnerships, but should apply to all limited partnerships. There is nothing inherent in the nature of business development companies that justifies unique treatment with respect to this issue, and it is unclear what standards could be used adequately to define "widely-held" limited partnerships that would be eligible for application of such revised criteria.

### B. The Commission Should Apply The Same "Multiplier" Approach to Both Limited Partnership Interests and Voting Stock Interests

Similarly, the use of a "multiplier" in vertical ownership situations to determine the attributable status of a remote interest in the ultimate licensee should not be limited to corporate structures. As in the case of successive stock interests, the use of a multiplier in the context of limited partnership investment funds "would more realistically reflect a party's attenuated interest in a licensee." 97 FCC 2d at 1018.

In both cases, "[m]ultiplication of the interest is intended to account for [a] diminution of involvement in attributing ownership interests." Id.

With respect to pension funds, in particular, the Commission has previously observed that "one of the major problems encountered by pension funds . . . -- investment in two or more portfolio companies with investments in broadcasters -- will be relieved in most instances by the multiplier provision . . . ." 97 FCC 2d at 1016. While this is true under current rules for successive stock interests, the absence of an equity benchmark for limited partnership interests precludes this benefit in the case of media limited partnership funds.

In CalPERS' situation, for example, it has interests between five to thirty percent in a number of investment funds structured as limited partnerships which include broadcasters and other media companies in their portfolios. Depending on the particular fund's limited partnership agreement, CalPERS' limited partnership interest may or may not be insulated in accordance with all of the Commission's current criteria. The fund's interest in a particular media company will also vary, but in most cases will exceed both the 5% and 10% thresholds. As a result, CalPERS may be found to have an attributable interest in one or more portfolio companies even though its proportionate equity interest under a "multiplier" approach would be below the applicable benchmark. Application of a uniform equity benchmark and multiplier, regardless of the particular capital structure employed for the investment (e.g., voting stock or limited partnership) would remove this cloud of uncertainty that may deter additional investments.

### C. The Emergence of Limited Liability Companies and Other Hybrid New Business Forms Further Supports a Uniform Equity Benchmark

The Notice also seeks comment as to how the Commission should treat, for attribution purposes, the equity interest of a member in a Limited Liability Company ("LLC"), which is a relatively new form of business association permitted and regulated by statute in at least 45 states. As the Notice acknowledges, LLCs are "unincorporated associations that possess attributes both of corporations and partnerships" (Notice, ¶ 64), the particular characteristics of which may vary from state to state (id., ¶ 66). Other new business forms, such as Registered Limited Liability Partnerships ("RLLPs") raise similar issues.

In light of its hybrid partnership/corporate character, LLCs and similar entities would be difficult to categorize under the Commission's current attribution scheme. The Notice tentatively proposes to treat LLCs and RLLPs as the Commission now treats limited partnerships, requiring certification that the LLC or RLLP member is not materially involved in the management or operation of media-related activities. But an equally persuasive case could probably be made for treatment of such interests as analogous to stockholdings, which other government agencies have considered.[11/]

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11/ For example, in recognition of LLCs' hybrid character, an informal interpretation issued earlier this year by the Federal Trade Commission Premerger Notification Office takes the position that LLCs must be analyzed on a factual case-by-case basis to determine whether a particular LLC will be treated as a corporation or partnership for purposes of the premerger notification requirements of the Hart-Scott-Rodino Act.

While CalPERS presently is involved in only one media-related LLC, it believes that the Commission should apply the same equity ownership benchmark to all the various forms of media investment implicated by the attribution rules -- voting stock, limited partnerships, and LLCs and RLLPs as well. This would better rationalize the Commission's approach in this area, and would reduce the potential that the Commission's specific insulating requirements for limited partnerships could deter needed capital infusion to the newly-emerging LLC and RLLP business forms.

## IV. THE COMMISSION SHOULD APPLY ITS HIGHER EQUITY THRESHOLD TO A BROADER CLASS OF INSTITUTIONAL INVESTORS, INCLUDING PENSION FUNDS, IN APPROPRIATE CIRCUMSTANCES.

Under the Commission's current rules, a small class of defined "passive" investors (bank trust departments, insurance companies, and mutual funds) are subject to a 10 percent benchmark. In its Notice, the Commission has tentatively indicated that it does not intend to broaden the class of "passive" investors. Notice, ¶ 50. If the Commission ultimately concludes that it will not afford "passive" investor status to pension funds, CalPERS requests that the Commission apply a higher stock threshold -- whether it be the same as "passive" investors or a slightly lower threshold -- to a broader class of institutional investors, including pension funds, which are an important source of capital to the broadcast and cable industries and which, given their legal charters, are unlikely to become actively involved in any media-related activities associated with their investments.[12/]

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12/ While CalPERS cannot state definitively that a broadening of the class of investors entitled to a higher attribution threshold would necessarily produce an (continued...)