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July 11, 1995

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**BY HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

RECEIVED  
JUL 11 1995  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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Re: MM Docket Nos. 94-149, 91-140  
Minority and Female Ownership  
of Mass Media Facilities

Dear Mr. Caton:

Yesterday, the undersigned transmitted to your office, on behalf of Qwest Broadcasting L.L.C., an original and nine copies of its Reply Comments in the above-referenced proceeding.

Some of those copies do not contain a cover page, Table of Contents or Summary. Please substitute the attached complete copies for those filed yesterday.

Respectfully submitted,

*Barbara K. Gardner*

Barbara K. Gardner

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BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Policies and Rules Regarding )  
Minority and Female Ownership of )  
Mass Media Facilities )

MM Docket Nos. 94-149  
and 91-140

To: The Commission

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REPLY COMMENTS OF QWEST BROADCASTING L.L.C.

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July 10, 1995

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TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY . . . . .	ii
I. THE COMMISSION'S PROPOSED ATTRIBUTION AND "INCUBATOR" INITIATIVES ARE NOT BARRED BY <u>ADARAND</u> . . . . .	2
A. Non-remedial Objectives Such As The FCC's Viewpoint Diversity Goal May Continue To Constitute Compelling Interests . . . . .	4
B. The Proposed Attribution And Incubator Initiatives Are Narrowly Tailored. . . . .	7
II. INCUBATOR PROGRAM REQUIREMENTS SHOULD NOT BE SO RESTRICTIVE AS TO DISCOURAGE USE OF THIS INITIATIVE. . . . .	11
III ATTRIBUTION AND RELATED RELIEF SHOULD BE EXTENDED TO THOSE WHO ASSIST MINORITIES . . . . .	13
CONCLUSION . . . . .	15

**SUMMARY**

The Commission should reaffirm its historic dedication to ensuring that minorities are not excluded from the influential mass media industry, in order to promote viewpoint diversity over the airwaves. In Qwest's view, the Commission's incubator and attribution proposals can survive the requisite post-Adarand strict scrutiny, and should be adopted without delay.

In its Comments in this proceeding, Qwest supported FCC initiatives to exempt from attribution all other interests in an entity in which racial and ethnic minorities have voting control and own at least fifteen percent of the equity; to grant multiple ownership rule waivers to broadcasters who "share their talent, experience and financial resources" with minorities seeking to enter, or increase their presence in, the broadcast industry (the "incubator" proposal); and to exempt limited liability companies from treatment as limited partnerships, where to do so would advance minority ownership of broadcast facilities. Under each initiative, investors in minority-controlled ventures would obtain direct or indirect relief from the FCC's multiple ownership rules, in exchange for increasing minorities' access to capital. The purpose of the initiatives, like that of the multiple ownership rules generally, is to enhance the diversity of viewpoints presented on the nation's radio and television stations and cable systems, a longstanding FCC objective.

These initiatives can survive the strict scrutiny test of their constitutionality mandated by the Supreme Court's recent

Adarand decision: they are narrowly tailored to advance a compelling governmental interest. Adarand left untouched the Court's 1990 Metro Broadcasting holding that two FCC minority preference policies whose goal was viewpoint diversity were constitutional. Moreover, the Metro Court's findings that the achievement of viewpoint diversity serves important First Amendment values, and is a demonstrated result of minority ownership of broadcast facilities, also remain undisturbed. Particularly since Congress for years has approved -- even mandated -- FCC minority ownership preferences to foster program diversity, there is a principled basis for finding viewpoint diversity to be a compelling interest.

Moreover, the proposed attribution and incubator initiatives are narrowly tailored to serve that interest. First, they do not burden non-minorities: indeed, such persons benefit directly if they assist minorities, but are not deprived of any opportunities to acquire broadcast stations on an equal basis with minorities if they do not. Second, the FCC not only considered, but for years actually utilized exclusively race-neutral means to achieve the goal of program diversity, adopting minority preferences only after long experience demonstrated that race-neutral means alone could not produce adequate diversity.

Third, the initiatives do not employ a minority quota or set-aside, and they directly benefit anyone, non-minorities and minorities alike, who provides investment capital to minorities. Last, the proposed initiatives can be further narrowly tailored

by providing for both an end date and periodic FCC review of their continuing usefulness, and perhaps also by requiring benefited parties to make written commitments to diverse programming and to the retention of actual minority programmatic control. With these changes, the proposals should survive strict scrutiny.

Contrary to other parties' comments on the FCC's incubator proposal, no net worth test should apply to minority principals of an incubated entity: such a test is not relevant to initiatives intended not to remedy past discrimination, but to increase viewpoint diversity, and indeed would be counter-productive. In addition, attribution relief for an incubating operator should include waivers of the local as well as the national multiple ownership rules, and an incubating operator should not be required to provide most of the incubated entity's acquisition costs, as some commenters propose.

The FCC should adopt its proposal to exempt from attribution non-controlling interests in companies where minorities own a controlling voting interest and fifteen percent of the equity, with the modifications proposed by Qwest to assure meaningful minority participation. The FCC should also adopt its proposal to treat minority-controlled limited liability companies as corporations, and should decline to apply its cross-interest policy where broadcasters participate in an incubator program or qualify for attribution relief by investing in a minority-controlled broadcaster.

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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In the Matter of )  
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Policies and Rules Regarding ) MM Docket Nos. 94-149  
Minority and Female Ownership of ) and 91-140  
Mass Media Facilities )

To: The Commission

REPLY COMMENTS OF QWEST BROADCASTING L.L.C.

Qwest Broadcasting L.L.C. ("Qwest"), by its attorneys, hereby responds to comments on the Commission's Notice of Proposed Rule Making, 10 FCC Rcd 2788 (1995) ("Notice"), in the captioned proceeding. Qwest also addresses the impact of the Supreme Court's recent decision in Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S. June 12, 1995) ("Adarand"), on the FCC's proposed initiatives to increase minority ownership of mass media facilities.

In its Comments in this proceeding, Qwest supported, with suggested modifications in some cases, the following three Commission initiatives: (1) a proposal to exempt from attribution all other interests in an entity in which racial and ethnic minorities have more than fifty percent voting control and own at least fifteen percent of the equity; (2) an "incubator" proposal that would grant multiple ownership rule waivers to broadcasters who "share their talent, experience and financial resources" with minorities seeking to enter, or increase their

presence in, the broadcast industry; and (3) a Commission proposal to exempt limited liability companies from treatment as limited partnerships, where to do so would advance minority ownership of broadcast facilities.<sup>1/</sup> Qwest continues to urge the Commission to adopt these initiatives without delay, notwithstanding the objections of some commenters and the intervening Adarand decision.

I. **THE COMMISSION'S PROPOSED ATTRIBUTION AND "INCUBATOR" INITIATIVES ARE NOT BARRED BY ADARAND.**

The three above-described FCC initiatives are intended to create new investment incentives that will encourage established participants in the broadcasting and cable industries to provide financial and other assistance to minorities seeking to enter, or expand their holdings in, those industries.<sup>2/</sup> Under each initiative, investors would obtain regulatory concessions in exchange for increasing minorities' access to capital. In particular, investors would be granted relief from the Commission's multiple ownership rules, either directly by being permitted to own more broadcast stations than the national or local ownership rules permit, or indirectly by having their

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<sup>1/</sup> The third initiative is proposed in the FCC's concurrently pending attribution proceeding, as an exception to the Commission's proposal generally to treat limited liability companies as limited partnerships for attribution purposes. Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rule Making in MM Docket Nos. 94-150 et al., 10 FCC Rcd 3606, 3640 (1995).

<sup>2/</sup> Notice, 10 FCC Rcd at 2791.

investments in minority-controlled media entities deemed "non-attributable," and thus not counted against the ownership limits. The purpose of the initiatives, like the purpose of the multiple ownership rules generally, is to enhance the diversity of viewpoints presented on the nation's radio and television stations and cable systems, a longstanding Commission objective.<sup>3/</sup>

In Adarand, the Court held that federal affirmative action programs that use racial and ethnic classifications as a basis for decisionmaking are subject to strict judicial scrutiny, that is, they must serve a compelling governmental interest and be narrowly tailored to serve that interest. The Court overruled Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), discussed below, only to the extent that that decision had prescribed a more lenient standard of review for federal affirmative action measures.<sup>4/</sup> As is now shown, Qwest believes that the FCC's proposed minority ownership initiatives can survive strict scrutiny.

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<sup>3/</sup> Id. at 2788; Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 et al., 10 FCC Rcd 3524, 3549 (1995) ("TV Ownership FNPRM") ("[O]ur ownership restrictions . . . are intended to assure that information is dispensed from 'diverse and antagonistic sources.'" (footnote omitted); Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, Notice of Proposed Rule Making in MM Docket No. 95-92, FCC 95-254 at 5-6 (rel. June 15, 1995) (Since at least the 1940s, FCC achievement of objective of maximizing viewpoint diversity has been ensured through ownership and attribution rules framework).

<sup>4/</sup> Adarand, 63 U.S.L.W. at 4530.

**A. Non-remedial Objectives Such As The FCC's Viewpoint Diversity Goal May Continue To Constitute Compelling Interests.**

As noted by the Department of Justice, although Adarand "makes clear that remedying past discrimination will in some circumstances constitute a compelling interest sufficient to justify race-based measures," the decision does not address whether affirmative action programs with non-remedial objectives -- such as promoting diversity -- can be deemed compelling interests.<sup>5/</sup> Under the controlling opinion of Justice Powell in Regents of the University of California v. Bakke, 438 U.S. 265, 311-15 (1978), increasing the racial and ethnic diversity of that university's student body constituted a compelling interest, because it would enrich the academic experience on campus. Adarand leaves this holding undisturbed.

In Metro Broadcasting, the Court in 1990 upheld on non-remedial grounds two of the FCC's affirmative action programs -- the minority ownership preference in comparative proceedings for new licenses, and the minority distress sale program. The Court said that diversification of ownership of broadcast licenses was an important and constitutionally permissible objective of affirmative action because it advances the public's right to receive a diversity of views and information over the airwaves,

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<sup>5/</sup> Memorandum to General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, at 2 (June 28, 1995) ("DoJ Memo").

an important governmental and First Amendment objective.<sup>6/</sup> Although Adarand overruled Metro's use of intermediate rather than strict scrutiny to arrive at this conclusion, it "did not overrule the result in Metro Broadcasting -- a point not lost on Justice Stevens,"<sup>7/</sup> who stated:

The majority today overrules Metro Broadcasting only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government.... The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case....

63 U.S.L.W. at 4539 (Stevens, J., dissenting) (citation omitted; emphasis in original).

As detailed at length in Metro Broadcasting, for more than twenty years Congress has repeatedly sought to foster program content diversity by promoting minority ownership of broadcast facilities.<sup>8/</sup> Such specific approval by Congress of the FCC's minority ownership programs, deemed a mandate by the Metro Court, was critical to that Court's holding that the FCC's non-remedial race-conscious policies were constitutional,<sup>9/</sup> and suggests a basis for finding viewpoint diversity to be a

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<sup>6/</sup> Metro Broadcasting, 497 U.S. at 567-68.

<sup>7/</sup> DoJ Memo at 15.

<sup>8/</sup> Metro Broadcasting, 497 U.S. at 572-79.

<sup>9/</sup> Id. at 563-66.

compelling interest.<sup>10/</sup> The Metro Broadcasting decision also affirms that because receiving a diversity of views and information over the airwaves serves important First Amendment values, assuring the public's right to receive such diversity is legitimately "an integral component of the FCC's mission."<sup>11/</sup> The Metro Court further found that Congress' and the Commission's judgment that expanded minority ownership of broadcast outlets will, overall, result in greater broadcast diversity was "corroborated by a host of empirical evidence,"<sup>12/</sup> a finding that arguably forms the factual predicate for a determination that the FCC's minority ownership objectives can constitute a compelling interest.

As explained in its Comments in this proceeding, Qwest was formed in 1994 to further corroborate the same premise, that is, to assure greater minority participation in the ownership and management of major-market television stations, and thereby to provide a more extensive programmatic response to significant minority audiences. The experience of one of Qwest's principals, Geraldo Rivera, is instructive: Mr. Rivera, an Hispanic, has staffed his Investigative News Group, the production unit for Mr. Rivera's daytime television show, 40 percent with minorities, and the unit is headed by two minorities. These hires, Mr. Rivera

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<sup>10/</sup> DoJ Memo at 33-34.

<sup>11/</sup> Metro Broadcasting, 497 U.S. at 567.

<sup>12/</sup> Id. at 580; see also id. at 578-83, detailing studies demonstrating a link between minority ownership and greater reflection of varying perspectives on the air.

reports, have in turn substantially affected the choice of topics for the program, resulting in greater coverage of urban minorities than would otherwise have occurred. The video productions of Qwest African-American principals Quincy Jones and Don Cornelius are also targeted towards minorities.<sup>13/</sup>

In sum, Qwest urges the Commission to view its historical goal of promoting viewpoint diversity to be a compelling interest.

**B. The Proposed Attribution And Incubator Initiatives Are Narrowly Tailored.**

In addition to advancing a compelling goal, after Adarand any governmental racial classification must be narrowly tailored to achieve that goal. In light of the factors that the courts have used to test narrow tailoring,<sup>14/</sup> we believe that the new Commission initiatives to promote programming diversity can pass strict scrutiny, particularly if they are modified to limit their duration.

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<sup>13/</sup> Qwest thus strongly disagrees with the Abraham Lincoln Foundation for Public Policy Research ("ALF"), whose comments aver that there is no demonstrated connection between FCC minority preferences and programming diversity. Comments of ALF at 18-22. As the Supreme Court noted in Metro Broadcasting, while every minority owner may not contribute to diversity, there is ample evidence that increased minority ownership results in greater programmatic variation overall. Metro Broadcasting, 497 U.S. at 578-83.

<sup>14/</sup> See DoJ Memo at 19-28, 37-38. The Memo observes that all of the factors are not relevant in every case, and that they "may play out differently where a program is nonremedial." Id. at 19.

One important narrow tailoring test is the extent of the burden imposed on persons who are not included in the racial classification that the program establishes.<sup>15/</sup> As noted above, the proposed initiatives are structured to provide attribution and ownership exemptions for persons who invest in minority-controlled media ventures -- and such investors may be of any race. Clearly, non-minorities are not burdened by these incentives; indeed, such persons benefit directly if they assist minorities, but are not deprived of any settled expectations or otherwise harmed if they do not. Minority and non-minority companies alike will have the same rights to bid to acquire available broadcast properties, and, unlike programs where minorities are given bidding credits, under the initiatives at issue here, minorities will have no pricing advantage.

A second narrow tailoring test is whether the agency considered race-neutral means to achieve its objectives.<sup>16/</sup> As the Metro Court affirmed, the Commission has continuously not merely considered, but also utilized race-neutral means to achieve the end of program diversity, and it adopted minority ownership preferences "only after long study and painstaking consideration of all available alternatives, and "after long experience demonstrated that race-neutral means could not produce

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<sup>15/</sup> Id. at 27-28, 38.

<sup>16/</sup> Id. at 20-21, 37.

adequate broadcast diversity."<sup>17/</sup> The FCC and its predecessor agency have, since the late 1920s, sought to promote the diversity of viewpoints that the First Amendment assumes, initially directly by means of race-neutral requirements regarding the coverage of various types of programs.<sup>18/</sup>

More recently, due to marketplace changes and heightened First Amendment concerns, the Commission has eliminated many rules and policies employing the direct technique for assuring viewpoint diversity, and replaced them with structural rules that seek to increase such diversity "by providing opportunities for varied groups, entities and individuals to participate in . . . the broadcast industry."<sup>19/</sup> These structural regulations include not only equal employment opportunity rules and policies, but also race-neutral multiple ownership rules, race-conscious exceptions to those rules, and race-based preferences such as those that were the subject of Metro Broadcasting.<sup>20/</sup> Thus, the instant proposed investment incentives, albeit race-conscious, simply modify ownership and attribution rules whose longstanding objective has been to promote viewpoint diversity; as such, they are narrowly tailored to further directly this important objective.

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<sup>17/</sup> Metro Broadcasting, 497 U.S. at 584, 589. See also id. at 585-93.

<sup>18/</sup> TV Ownership FNPRM, 10 FCC Rcd at 3547-49.

<sup>19/</sup> Id. at 3549.

<sup>20/</sup> Id.

A third narrow tailoring test is the manner in which race is used.<sup>21/</sup> Here, there is no numerical minority quota or set-aside, and while race is an explicit requirement of eligibility for the program in that only investment in minority-controlled ventures will qualify for favored treatment, it is arguable that the direct beneficiaries of the federal program are not the minorities who receive investment capital, but the investors to whom ownership and attribution relief is accorded. *Such persons may be either non-minorities or minorities.* In any event, as noted above, non-minorities are not shut out of the market for broadcast stations, and thus are not burdened; no station is reserved exclusively for purchase by minorities.

With respect to a fourth narrow tailoring test, we suggest that the FCC's proposed initiatives be narrowed to provide for both an end date, and periodic Commission review of whether the incentives are meeting their objective or are no longer necessary. Such adaptations will assist in assuring that these initiatives can survive strict scrutiny.<sup>22/</sup> The Commission may also wish to consider means to assure the continuing efficaciousness of its incubator and attribution programs, such as requiring minority beneficiaries of the programs to make a formal commitment to viewpoint diversity in the program service statements that form part of their applications to acquire stations. In addition, the Commission

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<sup>21/</sup> DoJ Memo at 23-26, 38.

<sup>22/</sup> See id. at 37.

could institute requirements to assure that minorities remain in actual, not merely nominal, control of their stations' programming arrangements, such as by barring local marketing agreements and, as Qwest proposed in its Comments, adopting a three-year holding rule and requiring non-minority investors to certify they do not control the broadcast station's day-to-day operations.

In light of this evidence that the Commission's initiatives are already narrowly tailored to serve a compelling interest and may be further refined to provide additional narrow tailoring, Qwest urges the Commission to adopt them without unnecessary delay.

**II. INCUBATOR PROGRAM REQUIREMENTS SHOULD NOT BE SO RESTRICTIVE AS TO DISCOURAGE USE OF THIS INITIATIVE.**

Turning to the comments of other parties, Qwest observes that several suggestions would, if implemented, discourage investor participation in the proposed "incubator" program. First, no net worth test should apply to minority principals of an incubated entity, as Black Citizens for a Fair Media, et al. urge without elaboration.<sup>23/</sup> Although such a test might be appropriate with respect to an affirmative action program intended to remedy past discrimination, the initiatives at issue here, as explained above, are non-remedial: their objective is to promote viewpoint diversity. Indeed, if

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<sup>23/</sup> Comments of Black Citizens for a Fair Media, et al. at 46.

anything, high net worth should be encouraged among beneficiaries of the proposed initiatives, since the need for diversity of views is arguably greatest in the largest markets, where television stations command the highest prices and therefore are only now beginning to be acquired by minorities. In Qwest's case, despite the contribution of some \$9 million by its minority owners, it is the additional capital, cost-sharing opportunities, and financial markets expertise contributed by Tribune that have helped make the Qwest venture, aimed at acquisitions in the top fifty television markets, a reality. Furthermore, to the extent that minorities have independent means, they are less likely to be "fronts" for non-minority investors.

Second, attribution relief for an incubating operator should include waivers of the local multiple ownership rules; it should not be limited to waiving the national multiple ownership rules, as requested by several commenters. An existing broadcaster is far more likely to have both the incentive and the ability to provide meaningful "incubator" assistance to a minority broadcaster if it already is co-located with that broadcaster by virtue of owning a station in the same market.

Finally, suggestions that the incubating operator provide 60 percent or more of the total costs of the incubated entity's acquisitions (in the form of equity, loans, loan guarantees, or a combination thereof), as proposed by the Minority Media and Telecommunications Council ("MMTC") and Silver

King Communications, Inc., are too stringent.<sup>24/</sup> Cook Inlet's 25 percent test is more realistic (requiring the incubating operator to provide at least 25 percent of fully diluted equity, or 10 percent plus other financial assistance which, with the equity, would total at least 25 percent of fully diluted capital).<sup>25/</sup>

**III. ATTRIBUTION AND RELATED RELIEF SHOULD BE EXTENDED TO THOSE WHO ASSIST MINORITIES.**

In addition to inaugurating an incubator initiative, the Commission should provide attribution and related relief to those who invest in minority broadcasters.

First, the FCC should adopt its proposal to exempt from attribution non-controlling interests in companies where minorities own a controlling voting interest and fifteen percent of the equity. Along with the Minority Media and Telecommunications Council, Silver King and Cook Inlet, Qwest's Comments supported the FCC's proposal, as providing a strong incentive for well-established broadcasters to enter into ventures with minority broadcasters or new entrants.<sup>26/</sup> Qwest disagrees with Black Citizens for a Fair Media, et al., who oppose attribution relief and urge that the Commission rely

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<sup>24/</sup> See Comments of MMTC at 24; Comments of Silver King at 9-10.

<sup>25/</sup> See Comments of Cook Inlet Region, Inc. at 11.

<sup>26/</sup> Qwest urged the Commission to adopt three limits on the non-attribution initiative, in order to ensure meaningful minority participation and continued robust competition on the local level. See Comments of Qwest at 10-12.

entirely on the incubator program, because Qwest believes that the attribution proposal will attract more investors and therefore be more effective in promoting minority ownership, since it imposes fewer requirements on the investor than the incubator program.

Similarly, Qwest disagrees with the view of the National Association of Black Owned Broadcasters ("NABOB") that relaxing the attribution rules "could invite criticism of the policy as one in which minority 'fronts' might be used to take advantage of potential minority ownership policy benefits."<sup>27/</sup> Qwest suggested a requirement that a station whose non-controlling owner benefits from the attribution exemption must remain under minority voting control, with at least fifteen percent minority-owned equity, for at least three years. In addition, Qwest supported the Commission's proposal to require non-minority investors seeking non-attribution to certify that they do not exercise control over the day-to-day operations of the broadcast station. These provisions should preclude non-bona fide uses of the attribution exemption.<sup>28/</sup>

The FCC should also adopt its proposal to treat minority-controlled limited liability companies as corporations, as urged by Qwest and Broadcast Capital Fund, Inc., to provide additional investor incentives. Qwest also supports Cook Inlet's

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<sup>27/</sup> Comments of NABOB at 10-11.

<sup>28/</sup> Comments of Qwest at 11-12.

suggestion that the FCC decline to apply limited partnership attribution criteria to minority-controlled limited partnerships.

Finally, as suggested by Silver King and Cook Inlet, the FCC should decline to apply its cross-interest policy where broadcasters participate in an incubator program or qualify for attribution relief by investing in a minority-controlled broadcaster.

### **CONCLUSION**

The Commission should not retreat from its historic dedication to ensuring that minorities are not excluded from the dynamic mass media industry, in order to promote viewpoint diversity over the airwaves. In connection with its overall post-Adarand review of existing rules and policies designed to promote minority ownership and employment in the mass media, the Commission should assess the Notice's proposed initiatives to provide minorities with increased access to capital. As demonstrated above, Qwest believes that under the guidelines of

the Department of Justice Memorandum, the Commission's incubator and attribution proposals can survive strict scrutiny and should be adopted without delay.

Respectfully submitted

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