RECEIVED
JUL 10 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221

To: The Commission

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF FOX TELEVISION STATIONS INC. AND FOX BROADCASTING COMPANY

William S. Reyner, Jr.
Marvin J. Diamond
Mace J. Rosenstein

HOGAN & HARTSON L.L.P.
Columbia Square
555-13th Street, NW
Washington, D.C. 20004-1109
202/637-5600

July 10, 1995

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

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221

To: The Commission

REPLY COMMENTS OF FOX TELEVISION STATIONS INC. AND FOX BROADCASTING COMPANY

Fox Television Stations Inc. ("FTS") and Fox Broadcasting Company ("FBC") (collectively, "Fox"), by their attorneys, hereby submit their Reply Comments in the captioned rulemaking proceedings.

I. INTRODUCTION

In Comments filed on May 17, 1995, Fox argued that there is no sound basis for increasing restrictions on broadcast television ownership and that the scope of standards for attribution under the Commission's broadcast ownership rules should not be expanded. Fox further argued that efforts to define or determine a level of "influence" at which non-controlling interests should be deemed attributable would necessarily be arbitrary and counter-productive and, consequently, Fox proposed that attributable interests should be limited to controlling interests. Fox submits these Reply Comments in further support of those positions.

II. ATTRIBUTION SHOULD NOT BE BASED ON NON-CONTROLLING INFLUENCE

There is broad support among the commenters for Fox's opposition to an expansion of attribution based on the degree of non-controlling influence. For example, Westinghouse Broadcasting Company ("Group W") correctly notes that it is impossible to identify what combination of factors is likely to lead to an actual ability to exert influence, and that to anticipate them would result in overly restrictive standards which would unwisely preclude legitimate business arrangements. Group W Comments at 6. Capital Cities/ABC, Inc. ("ABC") notes that the Commission has not predicated attribution on such an amorphous and speculative species of permissive "influence" in the past and should not do so now. ABC Comments at 9. CBS, Inc. ("CBS") states that it would be counterproductive to raise the benchmarks for attribution and then introduce individualized assessments of company size, management composition or minority shareholders rights. CBS Comments at 4.

All of these commenters correctly recognize that an ad hoc approach which attempts to balance a variety of factors would necessarily be arbitrary, would delay transactions and would discourage investment capital. The reality is that influence is a function of too many variables. The degree of potential influence of any particular investor -- or, for that matter, a person with any economic relationship with a licensee -- depends on such factors as alternative sources of debt and equity, the financial strength of the licensee and its controlling party or parties, the experience and personality of the controlling party and management, and the nature and extent of competition in the marketplace.

Those with influence will also vary from case to case. Major creditors, program suppliers, key employees, close relatives, media critics, financial advisors, sales representatives and regulators, among others, all may exert varying degrees

of influence over particular licensees. But those with non-controlling equity interests will not necessarily or even probably have more significant influence or potential influence than those without such interests.

Expanding attribution based on amorphous concepts of influence runs the additional risk of allowing the Commission's regulatory procedures to impede competition. If competitors have an opportunity to challenge the attribution of non-voting equity interests based on degrees of influence, particularly if an ad hoc standard were to be adopted by the Commission, there would be an unavoidable invitation to abuse that would burden the FCC staff, delay transactions and impede investment -- something the Commission obviously would not want. The Commission should recognize that these potential harms and abuse would necessarily arise from the scope of the attribution standard itself, even if the Commission were to raise the national ownership caps. Thus, as commenters such as Group W (Comments at 3) agree, raising those caps should not be used as a basis for expanding the attribution standard, or even continuing to include non-controlling interests as being attributable.

It is axiomatic that there must be a good reason with affirmative benefit to the public interest to justify increased regulation. But the comments do not provide any support for an expansion of the standards of attribution, and in fact demonstrate why the definition of attributable interest should be narrowed. There is no reason to apply a difficult and necessarily amorphous "influence" standard for attribution when an existing statutory standard would suffice: namely, *control.*

Indeed, control - and not influence - has actually been the principal reference point for the broadcast ownership rules and related attribution standards. In commencing the reexamination of those rules and standards in 1983, the Commission stated that an "[attribution] benchmark that is not a reasonably tailored proxy for <u>control</u> over programming will not advance diversity concerns yet

will curb broadcasting investments." Notice of Proposed Rulemaking in MM Docket 83-46, Reexamination of the Commission's Rules and Regulations Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, FCC 83-46, released February 15, 1983, at ¶ 17 (emphasis added). Most recently, in commencing reexamination of the network programming rules, the Commission stated that those rules were premised in part "on the requirement of the Communications Act that licensees retain control over their stations, which is the basis of the Commission's ownership and attribution framework for ensuring diversity and competition." Notice of Proposed Rule Making in MM Docket No. 95-92, Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, at ¶6.

There is no longer any reason even to use a voting equity percentage as a proxy for control. The Commission is already required to ascertain control under Section 310(d). And there is a long history and expansive body of caselaw to assist in the determination of control. That determination should be sufficient for identifying those who hold attributable interests. Non-controlling interests should be excluded.

III. THE SINGLE MAJORITY SHAREHOLDER EXCEPTION SHOULD BE RETAINED

Like Fox, most commenters support the retention by the Commission of the single majority shareholder exception. See, e.g., Group W Comments at 4-8; CBS Comments at 10-12.

Only a few commenters propose otherwise. In its comments, AFLAC Broadcast Group, Inc. ("AFLAC") urges elimination of the exception by arguing that it was based on the erroneous assumption that minority shareholders in such situations would have no significant influence over the conduct of the licensee. AFLAC Comments at 16. Even the NPRM seems to have reflected a belief that the

exception was based on such an erroneous conclusion. NPRM at ¶ 51. But that was not, in fact, the rationale behind the exception.

The single majority exception was based not on the absence of influence, but rather on the recognition that, where there is a single majority shareholder, minority shareholders, even acting in concert, "would be unable to direct the affairs or activities of the licensee . . . ." Attribution Order, 97 FCC 2d at 1008-09. The exception was based on the absence of control, not influence. Thus AFLAC is completely off-base in stating that Fox's most recent investment in SF Broadcasting of Wisconsin, Inc. ("SF Wisconsin"), parent of the licensee of WLUK-TV, Green Bay, Wisconsin, "represents a complete mockery of the attribution rules" because Fox allegedly has "substantial influence."

The fact is that SF Wisconsin has a single majority shareholder: Savoy Pictures Entertainment, Inc. ("Savoy"). Anyone who has dealt with Savoy knows that they more than stand up for their own interests, that they (and not Fox) exercise de facto as well as de jure control of SF Wisconsin, and that Fox does not direct the affairs of SF Wisconsin. Thus Fox's investment in SF Wisconsin is totally consistent with the letter and the intent of the single majority shareholder exception, and that consistency is not altered by Fox's other contractual relationship with the station, including its network affiliation.

Contrary to the comments of AFLAC (at 15-19) and the Network Affiliated Stations Alliance (at 9-12), non-controlling investments and influence by networks and other large owners, particularly in companies with single majority shareholders, benefit the public interest and should not be curtailed through an expansion of attribution or an elimination of the single majority shareholder exception. Two prime examples of such benefits are Fox's investment in New World Communications Group, Inc. ("New World") and its proposed investment in Blackstar Communications, Inc. ("Blackstar"). The details of Fox's investment in

New World are well known to the Commission ([cite]) and won't be recounted here. It should suffice for the purposes of this proceeding to note that that investment does not reflect any undue level of influence or control by Fox over New World. As New World has recited in its Comments in this proceeding,

> "New World's decision to change the network affiliations of its stations to the FOX Television Network ('FOX') was caused not by a Fox investment, but rather by a programming decision to increase the amount and quality of its stations' entertainment, local news and public affairs programming. To meet these goals, New World required the availability of high visibility time slots for new entertainment programming and for its stations' local news and public affairs programming. Affiliation with Fox was the only practical way New World could accomplish its objective. However, because New World calculated that the switch in affiliation would likely involve the short-term loss of viewers and revenues, New World bargained for Fox to make an investment in New World to reimburse it partially for these revenue losses and increased expenses." New World Comments at 6-7.

New World has a single majority shareholder, Ronald O. Perelman. Fox's investment in New World was not the result of, and does not provide leverage for, undue influence. Rather, it was done on New World's initiative to benefit New World. Indeed, as New World notes, cross investment between contracting parties is an efficient way to avoid potential long-term problems arising from the contractual relationship. New World Comments at 7 n.14. The Commission should not revise its attribution standards to stand in the way of such contractual relationships.

Similarly, Fox's proposed investment in Blackstar, which is controlled by John E. Oxendine, a single majority shareholder, would benefit the public interest by providing needed risk capital to a minority-owned company. In a March

8, 1995, letter to the Commission in the WNYW-TV proceeding, Mr. Oxendine stated that it was Fox's proposed equity investment which would enable him to access the capital markets in a way that he had previously been unable to accomplish. "Fox was the only network which was willing to take a chance with us and to provide my group with guaranteed access to the most difficult level of capital necessary for entry into this highly competitive business." If the Commission eliminates the single majority shareholder exception, and insists on treating as attributable network investments in their affiliates, an important source of capital for small companies and minority businesses will be effectively eliminated.

Fox submits that the rationale for the exception -- that control is the determining factor and that those without control should not be attributable -- was correct. Not only should the single majority shareholder exception be retained, but, as Fox has argued, the rationale should be expanded even to entities without a single majority shareholder. Non-controlling shareholders should not be attributable.

IV. ABSENT CONTROL, NON-VOTING STOCK AND DEBT SHOULD REMAIN NON-ATTRIBUTABLE REGARDLESS OF THE LEVEL OF INFLUENCE

Consistent with the positions outlined above, Fox submits that an otherwise non-attributable investment by a network in an affiliate should not be rendered attributable by virtue of the network/affiliate relationship, regardless of the legal form of the licensee entity. Thus a network should be able to have a non-attributable, non-controlling equity interest in a corporate affiliate, a partnership affiliate, or a limited liability company affiliate. Networks do not control their affiliates. And the existence of a non-controlling equity interest by a network in the affiliate does not materially increase the "influence" that a network may have in an affiliate's operations. Even if insulation criteria are retained for limited

partnership interests, they should not be applied to prohibit a network/affiliate relationship.

While Fox agrees that it is important that the Commission continue to have attribution rules that are clear and fairly applied, the Commission must be very cautious to avoid articulating new rules that seek in vain to measure varying levels of non-controlling influence. The relationship between affiliates and networks has never been more competitive, due in large part to the non-voting minority interest that Fox acquired one year ago in New World. This new level of competition has injected new vitality into over-the-air television broadcasting at a time when television broadcasting is finding it increasingly difficult to compete in a world of multi-channel offerings. If this investment had been attributable to Fox, it would never have occurred.

While it seems straightforward and reasonable to accept the request of National Broadcasting Company, Inc. ("NBC") to have the Commission address whether a party should be permitted to escape attribution where it "takes a greatly disproportionate share of the risk of ownership" (NBC Comments at 8), the mere fact of passive equity investment by a network in an affiliate should not be attributable. While Fox has chosen to attempt to make its distribution platforms more competitive by making non-voting investments in certain new affiliates, NBC has chosen or found it necessary to make virtually the same investments in the form of network compensation. For example, in Detroit, NBC entered into a long-term agreement with Post-Newsweek Stations Michigan, Inc. that resulted in a reported increase in network compensation from three million dollars to twenty-one million dollars annually. Similarly, in Boston, Massachusetts, NBC entered into a ten-year affiliation arrangement with WHDH-TV, Inc. that provides for affiliate compensation payments reportedly in excess of ten million dollars annually. Fox's modest investments in affiliates certainly should trigger no different regulatory

response than should NBC's affiliation arrangements which bear no relationship to past levels of affiliate compensation. The fact of the matter is that neither network's economic arrangements results in the type of influence that should be of any concern to the FCC.

The Commission need not fear that allowing such non-attributable investments will somehow allow networks to exert undue influence or control over their affiliates. The recent substantial increases in the level of payments by the major networks to their affiliates is a marketplace reflection of the substantial bargaining power that affiliates have in their network relationship and the absence of network control and domination. Fox estimates that the additional competition created by FBC's presence has resulted in a transfer of wealth of more than 250 million dollars annually from the three established networks to their affiliates. This transfer is the best evidence of the lack of network dominance and the increase in affiliate leverage.

The Commission should not attempt to micromanage the economic relationship between affiliates and networks. Their freedom to bargain is the best way to maximize economic efficiency and competition. Some affiliates may prefer to receive compensation payments, and some may prefer to share risk and reward by receiving equity capital or loans from their network. No attribution distinctions should be based on the form of non-controlling payments or investments by a network to or in its affiliates.

V. THE COMMISSION SHOULD SUBSTANTIALLY INCREASE THE NATIONAL OWNERSHIP CAPS

Fox supports those commenters who have urged a substantial increase in the national ownership caps for television ownership. The market for video delivered programming is local in nature, and would not be adversely affected by repeal of the caps. Moreover, elimination of the caps entirely would enhance the

viability of free over-the-air television. TCI is reported to have interests in numerous cable networks. The government is about to unleash the seven Baby Bells into the local video marketplace with their almost limitless financial resources. Faced with such powerful competition, Fox is not asking for any special protection from competition, but rather is asking that the shackles of unnecessary regulatory restraints on its ability to meet the competition in the marketplace.

VI. CONCLUSION

The primary focus of these proceedings should be on taking actions that would promote the health and viability of free over-the-air television. With this predominant goal in mind, there would be no rational benefit from increasing the attribution standards or restricting equity interests that are less than controlling. To the contrary, an expansion of attribution, and a failure to eliminate the applicability of the attribution standards to non-controlling equity investments, would adversely affect the public interest by diverting needed capital, introducing regulatory confusion and delay and placing a burden on limited regulatory resources.

Respectfully submitted,

FOX TELEVISION STATIONS INC. AND
FOX BROADCASTING COMPANY

By _____
William S. Reyner, Jr.
Marvin J. Diamond
Mace J. Rosenstein

Hogan & Hartson
Columbia Square
555-13th Street, NW
Washington, D.C. 20004-1109
202/637-5600

July 10, 1995