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

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FEDERAL COMMUNICATIONS COMMISSION
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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 Investments in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To: The Commission

REPLY COMMENTS OF
GENERAL ELECTRIC CAPITAL CORPORATION

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SUMMARY

Broadcasters are embarking on an era of unprecedented demand for capital investment in their industry. New and ever-increasing forms of competition put pressure on broadcasters to upgrade facilities and improve programming. The conversion to digital transmission will be very costly, and broadcasters may have to pay fees to use their advanced television channels for certain non-broadcast services. Relaxation of the television ownership rules -- whether through legislation or the Commission's companion docket -- will also stimulate the demand for financing as the number of sales transactions increases in response. In view of the economic and competitive challenges facing the traditional broadcast industry in the United States, the Commission must ensure that any changes to its rules do not discourage investment in the industry. To the contrary, through these rule modifications, the Commission should seek actively to encourage such investment while achieving its other regulatory objectives.

GE Capital, as a substantial lender to and equity participant in the communications industry and a sister corporation of NBC, believes that the Commission can best achieve the dual goals of stimulating investment in broadcasting while ensuring compliance with the existing multiple ownership rules by relaxing the attribution rules where appropriate and ensuring that all of its rules are clearly drafted and uniformly applied. The Commission should eliminate those rules and policies -- such as the cross-interest policy -- that inject substantial uncertainty into the regulatory process with little or no corresponding public interest benefit. Likewise, where possible, the rules should provide bright-line tests so that

no licensee or investor is unfairly advantaged by selective enforcement or manipulation of ambiguous rules.

GE Capital believes that the Commission's twin goals can be achieved if the Commission increases the voting stock benchmarks from five percent to 10 percent for active investors and from 10 percent to 20 percent for passive shareholders. If the Commission is concerned that a 10 percent holding by a non-passive shareholder may convey greater influence or control in some corporations than in others, it should develop a numerical index, in the nature of the Hirschman-Herfindahl index, based on the number of shareholders, the number of shares outstanding, and the distribution of those shares. GE Capital also believes that the single majority shareholder rule should be retained, since it is based on valid assumptions concerning the powers of minority shareholders, and strongly opposes the suggestion in the Notice that this bright-line standard be replaced with a time-consuming and unpredictable case-by-case review that would discourage investors.

Non-voting stock has been an important source of capital in the broadcasting industry. However, investors in non-voting stock would likely turn to other industries if these interests were deemed attributable. Therefore, the Commission should reaffirm that non-voting stock will continue to be treated as non-attributable. Further, rather than restricting the rights of non-voting shareholders to protect their investments, the Commission should clarify and reaffirm that non-voting shareholders may hold such current voting rights regarding extraordinary matters as are necessary to protect the fundamental nature and value of the investment and, in addition, may hold additional contingent rights that are triggered by events beyond the control of the non-voting shareholder without resulting in attribution. The

Commission should not expand its regulation of combined non-attributable interests except in cases of abuse, where it should instead invoke its enforcement authority. Finally, the Commission should expand its current safe harbor for "involuntary conversions" of stock or other equity interests beyond the current extremely narrow class of passive investors to protect such "involuntary" equity holders against temporary violations of the multiple ownership rules.

Limited partnerships have also been an important source of capital. However, large partnership funds consisting of many limited partnerships find the Commission's current insulation criteria unrealistic, burdensome, and overly subjective. Accordingly, the Commission should instead adopt a simple and realistic test for insulating limited partnership interests based either on the criteria for limited liability in the state of formation or in the Revised Uniform Limited Partnership Act. Limited liability companies also promise to be an important new investment vehicle in the broadcast industry if the Commission adopts appropriate attribution standards for LLCs. Rather than treating LLCs as partnerships and super-imposing the wholly unsatisfactory limited partnership insulation criteria on them, the Commission should recognize that because of the flexibility in the formation and governance of LLCs, these business forms can resemble a general partnership, a limited partnership, or a corporation and should be treated accordingly under the attribution rules.

The Commission should eliminate the cross-interest policy. Because it is applied on a case-by-case basis, the policy leads to substantial uncertainty in structuring transactions. Moreover, its objectives are achieved by the antitrust laws, the multiple and cross-ownership rules, and the rules and policies governing unauthorized assumptions of de facto control.

Finally, in the event the Commission takes the ill-advised step of making its attribution rules more restrictive and less certain in their application, all existing investments must be grandfathered. To require a massive restructuring of those investments when the broadcast industry is facing its greatest economic and competitive challenges would be devastating to the industry.

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General Electric Capital Corporation ("GE Capital"), by its attorneys, submits these Reply Comments in response to the Notice of Proposed Rulemaking adopted by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceedings ("Notice").

I. INTRODUCTION

With the Notice, the Commission launched a review of its attribution rules -- the rules by which it defines those interests that constitute "cognizable" interests for the purpose of applying and enforcing the multiple ownership and cross-ownership rules. The Commission cited changes in the broadcasting industry as the basis for the re-examination of the attribution rules, as well as concerns that certain non-attributable interests may permit a degree of influence that warrants their attribution and that otherwise permissible cooperative arrangements are being used in combination to indirectly obtain interests in broadcast stations that would otherwise violate the multiple ownership rules.[1] At the same time, however, the Commission recognized that its attribution rules must not "unduly restrict[] the means by which investment capital may be made available to the broadcast industry."[2] To that end, the Commission seeks to ensure that any new rules adopted are clear to broadcast licensees and provide reasonable certainty and predictability to allow transactions to be planned, while also ensuring ease of processing and the submission of information needed by the FCC to make its public interest determinations.[3]

GE Capital agrees that the time is right to reexamine the attribution rules. As we discuss below, the need for capital investment in the broadcasting industry is greater than ever. In order to attract capital, however, the regulatory scheme must (i) provide clear rules so that investors and licensees can structure transactions to comply with the multiple and cross-ownership rules, (ii) treat all similarly situated parties equally and even-handedly, and (iii) recognize and safeguard the rights of lenders and passive investors to protect their investments. As the overwhelming majority of parties argued in their opening comments, however, the Commission's objective of attracting substantial new capital to the broadcast industry will not be achieved if it adopts proposals that further restrict the attribution rules or

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[1] Notice, ¶¶ 2-3.

[2] Id., ¶ 5 (footnote omitted).

[3] Id.

that inject greater uncertainty into the regulatory process by subjecting most transactions and relationships to time-consuming and unpredictable case-by-case review.

II. THE ATTRIBUTION RULES MUST ENCOURAGE CAPITAL INVESTMENT IN BROADCASTING IF THE COMMISSION WISHES TO PRESERVE TRADITIONAL OVER-THE-AIR BROADCASTING

A. The Need for Investment Capital in Traditional Broadcasting Has Never Been Greater

Traditional broadcasting, which historically has been the primary means of delivering information and entertainment to Americans, faces more competition today than ever before. This competition -- in the form of direct broadcast satellite, wireless and wired cable, video transmission by telephone companies, videocassette recorders, on-line computer services, and other services -- puts enormous pressure on traditional broadcasters to upgrade their facilities, improve their programming, and expand their outlets to keep pace with competitors who frequently face far fewer regulatory burdens and restrictions.

Broadcasters also face an unprecedented period of capital-intensive development as they make the transition from analog to digital transmission. After the Commission adopts a high-definition television ("HDTV") standard and makes spectrum available for HDTV channels, broadcasters will be given a limited period of time in which to convert to digital broadcasting. Some estimates of the cost of this conversion are as high as $12-15 million per station, regardless of the size of the station or the market in which it operates.[4] For many licensees, this conversion could be far more costly than acquiring the station in the first

[4] See, e.g., "Broadcast, Cable Make Their Spectrum Pitches," Electronic Media at 50 (March 21, 1994).

place.[5] Although the Commission originally proposed a 15-year transition period, pressure has been building -- particularly after the first-ever spectrum auctions raised over $9 billion for the U.S. Treasury -- to compress that schedule so that the broadcasters' current analog channels may be recaptured by the FCC for subsequent auction.[6] Therefore, broadcasters' need for new capital will be substantial and immediate.

The relaxation of the broadcast ownership rules -- either as the result of pending legislation[7] or action in the Commission's companion docket on the television ownership rules[8] -- also will stimulate the need for capital, probably on an unprecedented scale. As the Commission is well aware, transactions involving radio stations reached record highs after the radio ownership rules were relaxed in 1992. A similar but even more dramatic result can be expected on the television side, where the dollar values involved are appreciably higher.

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[5] Of the 55 sales of stand-alone television stations reported in Broadcasting and Cable for 1994, 29 (53 percent) involved a purchase price of $13 million or less, and 25 of those 29 (86 percent) involved a purchase price of less than $10 million. See "The $1 Million-Plus Club," Broadcasting and Cable at 45-46, 76 (February 27, 1995).

[6] See, e.g., "Hundt: No Free (Digital) Lunch," Broadcasting and Cable at 24 (April 10, 1995); Remarks of Chairman Reed E. Hundt before the Wertheim-Schroder/Variety Conference (April 4, 1995) ("At the FCC we are also especially focussed on retrieving the old vacated spectrum now used for analog transmission. After a reasonable time for the bulk of the country's households to convert to digital reception, we should be able to retrieve the spectrum now used for analog broadcast spectrum. Some consider it to be the most valuable spectrum in the air").

[7] The Telecommunications Competition and Deregulation Act of 1995 (S. 652) as passed by the Senate on June 15, 1995 would lift all numerical limits on the ownership of radio and television stations and would increase the television audience reach limitation to 35 percent. The telecommunications reform legislation currently pending in the House would also ease ownership restrictions.

[8] See Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221); Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8).

Finally, broadcasters may face the prospect of spectrum fees or even auctions if they seek to provide non-broadcast and other services over portions of their assigned HDTV channels. Telecommunications bills currently being considered in both the House and the Senate would require broadcasters to pay an amount equivalent to the value of spectrum that has been auctioned for similar use,[9] and a number of FCC Commissioners have spoken out in favor of such payments.[10]

B. The FCC's Attribution Rules Should Encourage Rather Than Impede Investments in Broadcasting

The FCC recognizes that its attribution rules should encourage rather than impede investments in traditional broadcasting. Yet a number of the proposals under consideration in this docket could have the effect of discouraging investments in broadcasting just when broadcasters' need for capital is increasing dramatically due to increased competition for audience, the transition to digital broadcasting, and the possibility of spectrum fees. If the Commission wishes to retain a vibrant, competitive, and free over-the-air broadcast service, it must keep these economic factors in mind and must adopt rules that encourage investors to make capital available to broadcasters by tailoring the rules to reflect reality, creating certainty in the application of the rules, and minimizing the regulatory burdens imposed on passive investors.

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[9] See S. 652, Section 207; H.R. 1555, Section 301.

[10] See, e.g., "Hundt: No Free (Digital) Lunch," Broadcasting and Cable at 24 (April 10, 1995); Remarks by Commission James H. Quello before the NAB's Broadcast Engineering Conference (April 9, 1995).

The Commission must also ensure that its attribution rules are applied uniformly so that no licensee or entity is unfairly advantaged by favorable interpretations of ambiguous rules that are not available to all competitors or by selective enforcement of the rules. The primary means of ensuring a level playing field is to craft rules that provide certainty to licensees and investors and to eliminate those rules and policies -- such as the cross-interest policy and the current insulation criteria for limited partners -- that inject substantial uncertainty into the process of complying with regulatory requirements.

III. GE CAPITAL'S INTEREST IN THE ATTRIBUTION RULES

GE Capital's experience as a substantial lender and equity participant in the communications industry, as well as its status as a sister corporation of National Broadcasting Company, Inc. and the NBC Television Network, make it uniquely qualified to comment on the attribution rules and the Commission's proposals for modifying those rules.[11] Yet GE Capital invests in a wide range of non-communications businesses as well. As a prudent investor, its investment decisions are guided by its assessment of where it can obtain the greatest return. If that assessment points in the direction of aircraft leasing or power generation, the investment dollars will follow. Likewise, if communications-related businesses appear promising, investments will be made in that sector.

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[11] GE Capital's substantial investments in the communications industry prompted it to file reply comments on the issue of the taking of security interests in broadcast licenses and protecting lenders rights in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992) ("Capital Formation Notice"). The record from that proceeding has been incorporated into this proceeding. Notice, ¶ 9.

In the vast majority of cases, GE Capital's investments in the communications industry are strictly passive investments that are treated as non-attributable interests under the current rules. In the very few cases where the interests consist of common voting stock, GE Capital treats these interests as fully attributable and complies with all applicable regulatory requirements.[12] The regulatory issues become more complex, however, when these non-attributable and attributable interests are combined for regulatory purposes with the interests of GE Capital's sister corporation, NBC, which currently owns seven television stations and the NBC Television Network.[13] To ensure compliance with all requirements, it is essential that the Commission's attribution rules provide certainty, reflect business reality, and promote appropriate regulatory objectives.

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[12] In 1990, for example, GE Capital acquired all of the voting stock of Pegasus Broadcasting, Inc. ("Pegasus") in a consensual work-out. At the time of the acquisition, Pegasus owned three television licensee subsidiaries. GE Capital therefore sought and obtained Commission consent to the transfer of control of the Pegasus licensee entities to it. See FCC File Nos. BTCCT-900425KH, et. seq. Similarly, GE Capital obtained FCC consent to acquire control of an AM/FM radio station combination and a stand-alone television station in other consensual work-outs. GE Capital did not seek at the outset of these relationships to become an owner/operator of broadcast stations. In each instance, however, the need to preserve the assets and the value of the stations as ongoing businesses led GE Capital to acquire control over the stations on an interim basis. Of the six broadcast stations acquired by GE Capital in this manner, five have since been sold to third parties.

[13] NBC, through a subsidiary, also holds a construction permit for unbuilt Station KUSG(TV), St. George, Utah (FCC File No. BTCCT-941222KO).

IV. THE ATTRIBUTION BENCHMARK SHOULD BE RAISED

A. The Attribution Benchmark for Voting Stock Should be Raised from Five Percent to 10 Percent for "Active" Investors

The FCC's attribution rules were adopted in 1953 to foster the dual objective of "diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[14] As many commenters in this proceeding have observed, the diversity of viewpoints available today through countless media outlets could not even be imagined in 1953. Indeed, as recently as 1984-86, when the Commission last reexamined the attribution rules,[15] it did not envision the magnitude of choices available today through electronic media alone resulting from the explosive growth in the number of cable programming channels, the introduction of DBS, digital compression of satellite and cable channels, the growth of wireless cable, the widespread availability of on-line services including the limitless Internet, and the dramatic expansion in the number of AM, FM, low power, and full power television stations.[16] In view of the number and diversity of electronic media outlets available in the United States,

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[14] Amendment of Multiple Ownership Rules, 18 FCC 288, 292-93 (1953).

[15] See Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Report and Order, 97 F.C.C.2d 997 (1984) ("1984 Attribution Order"), on recon., 58 R.R.2d 604 (1985) ("1985 Attribution Order"), on further recon., 1 FCC Rcd 802 (1986).

[16] This wide array of choices will only continue to grow as Digital Audio Radio Satellite Service and other innovative communications services become available and television broadcasters take advantage of the spectrum flexibility that may be afforded to them either by the FCC or the Congress. See News Release, "FCC Proposes Rules and Policies for Digital Audio Radio Satellite Service," IB Docket No. 95-91, Gen. Docket No. 90-357 (released June 15, 1995); S. 652, Section 207; H.R. 1555, Section 301.

the Commission's current regulatory focus on fostering viewpoint diversity seems misplaced.[17] If anything, Americans are becoming overwhelmed by the sheer magnitude of the choices available to them. In such an environment, concerns about diversity and choice based on the circumstances of a bygone era should not dictate the regulatory focus for the future. GE Capital recognizes, however, that as long as the multiple and cross-ownership rules are still in place, the Commission must have a clear, well-defined mechanism for identifying which interests must be considered in determining compliance with those rules.

In the Capital Formation Notice, the Commission proposed to increase the attribution benchmark for voting stock from five to 10 percent. In the Notice in the current proceeding, however, the Commission stated that commenters in the earlier proceeding did not provide the FCC with "critical information" it needed before it could conclude that raising the benchmark to 10 percent would not exclude "many substantial and influential interests" from attribution. Accordingly, even though the commenters who addressed the issue in response to the Capital Formation Notice unanimously favored raising the benchmark to 10 percent, the Commission has stated in the Notice that it is not "comfortable" with this conclusion.[18] GE Capital believes the Commission's reluctance to raise the benchmark stems primarily

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[17] See Remarks by Commissioner James H. Quello before the Broadcasting/Cable Interface VIII Conference (October 4, 1994) ("To encourage broadcasting to remain a vital free component of the new information infrastructure, the Commission must look forward to fundamentally changing its regulatory focus. The Commission must stop looking at broadcasting as the centerpiece of the communications infrastructure, and instead realize that it is now becoming one component of a much larger and more complex media marketplace.")

[18] Notice, ¶ 21.

from its blurring of the line between influence and control and its misguided effort to sweep some -- but not all -- types of influence within the purview of the attribution rules.

The distinction between control and influence can be drawn fairly precisely. The Commission has long defined de jure control as more than 50 percent of the voting control of an entity.[19] Although the Commission has never adopted a single definition of de facto control, preferring to address such questions on a case-by-case basis, it has had little difficulty in recognizing, and sanctioning where appropriate, cases in which a person or entity has assumed de facto control over a broadcast licensee by virtue of the ability to control key decisions of the licensee in the core areas of personnel, programming, and finances.

Influence, however, is a much more amorphous concept that does not lend itself well to quantification. As a number of commenters in this proceeding have pointed out, influence over broadcast licensees comes in many forms -- including investors, lenders, program suppliers, advertisers, joint sales partners, listeners and viewers, competitors, consultants, media critics, and even the Commission itself.[20] Yet the Commission does not consider most of these sources of influence to be attributable and indeed has eliminated or proposes to eliminate a number of its rules and policies that regulate these sources of influence, including some that are related to the core areas of program content and viewpoint diversity. For example, the Commission has (i) de-regulated joint sales of advertising time among

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[19] Id., ¶ 4.

[20] See, e.g., Comments of M/C Partners, The Blackstone Group, and Vestar Capital Partners at 13-16.

competing stations in the market;[21] (ii) eliminated consultants (including programming consultants) from the cross-interest policy;[22] (iii) eliminated the network station ownership rule and the secondary affiliation rules;[23] and (iv) proposed to eliminate the requirement to file network affiliation agreements with the Commission.[24]

The voting stock benchmark nevertheless serves a purpose because it provides a bright-line measure of the degree of influence deemed sufficient to warrant attribution of the interest for purposes of the multiple and cross-ownership rules. The current five percent benchmark, however, is unduly restrictive and will frustrate the objective of increasing the flow of capital to broadcast stations. Except in the largest of publicly traded corporations, a five percent voting stock interest will not confer on its holder the power to materially influence the key decisions of the licensee in the Commission's three core areas of concern. Therefore, GE Capital supports raising the benchmark to 10 percent.

If the Commission is concerned that a 10 percent holding will vest undue influence in a shareholder under certain circumstances (such as where it represents the single largest block of stock in a publicly traded corporation), the Commission should identify those circumstances specifically and adopt rules to address them. One possibility would be to adopt a numerical index -- akin to the Hirschman-Herfindahl index -- based on the number of

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[21] See Elimination of Unnecessary Broadcast Regulation, 59 R.R.2d 1500 (1986).

[22] See Reexamination of the Commission's Cross-Interest Policy, Policy Statement, 4 FCC Rcd 2208 (1989).

[23] See Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, 10 FCC Rcd 4538 (1995).

[24] See Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts, Notice of Proposed Rule Making, 10 FCC Rcd 5677 (1995).

shareholders, the number of shares outstanding, and the distribution of the shares among the shareholders.[25] The answer is not, however, to maintain an unrealistically low benchmark that will inhibit investment or to base assessments of influence on vague standards that must be applied on a case-by-case basis and are subject to varying interpretations or, worse, manipulation.

B. The Attribution Benchmark Should be Raised from 10 Percent to 20 Percent for Passive Investors

The justification is equally compelling for raising the benchmark for passive investors from 10 percent to 20 percent. As the Investment Company Institute pointed out in its comments in this proceeding and in response to the Capital Formation Notice, most mutual funds have investment policies prohibiting them from investing for purposes of management or control. Therefore, such funds do not seek seats on the boards of directors of companies in which they invest and do not seek to influence the day-to-day management of those companies or otherwise take an activist role with respect to the companies represented in their portfolios. Nor do these funds wish to take on the "burdensome consequences" of exceeding the benchmark. According to the Institute, the assets of equity mutual fund have grown from $83.1 billion in 1984 to $909.1 billion in 1995. The Institute predicts that more of this pool of equity fund assets would be channeled into broadcasting if the benchmark were raised. Under these circumstances, it is clear that raising the passive investor benchmark to 20 percent would further the Commission's objective of increasing the flow of

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[25] See, e.g., Omaha TV 15, Inc., 4 FCC Rcd 730 (Rev. Bd. 1988) (developing an index analogous to HHI for determining integration credit in comparative broadcast proceedings).

capital to broadcasters without undermining the Commission's parallel concerns with respect to control and influence.[26]

V. THE SINGLE MAJORITY SHAREHOLDER RULE SHOULD BE RETAINED

In the Notice, the Commission expresses concern that the single majority shareholder exception may be used to evade the multiple ownership rules. The Commission also questions the validity of its earlier conclusion that a minority shareholder cannot exert significant influence on a licensee where there is a single majority shareholder.[27] GE Capital believes that the original rationale for the single majority shareholder was valid when the rule was adopted and remains valid today. While minority shareholders may be able to exert some degree of influence over the majority shareholder, they cannot, by virtue of corporate governance requirements, dictate to or control the actions of the majority shareholder. Thus, there is no reason to restrict the availability of this exemption, particularly since, as a number of commenting parties observe, the exemption has fulfilled the Commission's objective of facilitating capital formation.

The Commission is concerned, however, that the minority stock interest in a corporation with a single majority shareholder, when combined with other non-attributable interests, may alter this balance and require a different result. Implicit in the Notice is the

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[26] However, GE Capital supports those commenters who advocate broadening the categories of passive investors who are entitled to rely on the higher benchmark. See, e.g., Comments of Capital Cities/ABC, Inc. at 6-7; Investment Company Institute at 3; M/C Partners, The Blackstone Group, and Vestar Capital Partners at 20. In Section IV(B) hereof, GE Capital proposes criteria for identifying those additional categories of passive investors to whom the relaxed attribution rules would apply.

[27] Notice, ¶ 51.

suggestion that any such combinations would have to be examined on a case-by-case basis. GE Capital strongly opposes this suggestion. The Commission's goal in this proceeding should be to adopt clear rules that foster certainty and fairness while achieving the Commission's legitimate regulatory objectives. Lack of clarity in the rules and inconsistent enforcement discourage investors, and a case-by-case approach to the single majority shareholder exemption would only magnify this problem. This is not to suggest, however, that the Commission should ignore abuses of the single majority shareholder exemption where such abuses are brought to its attention. As noted in the comments of EZ Communications, Inc.,[28] the Commission has considerable experience and well-established precedent for evaluating allegations of unauthorized transfers of de facto control. This experience and precedent provide a sufficient basis for addressing alleged abuses. Therefore, the rule should be retained in its present form.

VI. NON-VOTING STOCK

A. Non-Voting Stock Should Remain Non-Attributable

As the Commission recognizes, non-voting stock is a critically important source of capital for the broadcasting industry because it permits investment without the burdensome consequences of attribution and compliance with the multiple and cross-ownership rules and without diluting licensee control.[29] In the Notice, however, the Commission observes that there may be a gap in its rules that permits a non-voting shareholder to "potentially influence

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[28] Comments of EZ Communications, Inc. at 4-5.

[29] See 1984 Attribution Order, 97 F.C.C.2d at 1020-21.

the operations of the licensee to protect his investment and limit his risk."[30] GE Capital believes this concern is misplaced and that the Commission should retain its current rule treating non-voting stock as non-attributable both because the rule is based on accurate assumptions about the powers of non-voting stockholders and because the rule is a bright-line test that provides certainty to investors. As discussed below, the Commission has repeatedly recognized and reaffirmed the rights of non-voting stockholders not merely to influence but in fact to vote on matters that fundamentally affect the value of and risks associated with their investments. To eliminate or otherwise restrict the availability of these rights just when broadcasters are facing their greatest competitive and economic challenges would be devastating to the industry. Therefore, GE Capital urges that rather than restricting the availability of non-voting stock and the attendant investor protections, the Commission should reaffirm that non-voting stock is non-attributable. Further, the Commission should clarify that the rights afforded to non-voting stockholders to protect their investments against the actions of voting shareholders that may have a significant impact on the value of that investment do not render such non-voting interests attributable.

B. The Rights of Non-Voting Stockholders to Protect Their Investments Should Be Clarified and Reaffirmed by the Commission

Through case law, the Commission has established that non-voting stockholders may vote on certain extraordinary matters, such as amendments to the certificate of incorporation; sales of essentially all of the company's assets, dissolution of the company, and incurring

[30] Notice, ¶ 53.

specified indebtedness not in the ordinary course of business, without risking attribution.[31] In addition, the Commission has ruled that non-voting shareholders may hold the power to compel dividends or other financial distributions attached to the non-voting interest without triggering attribution.[32] All of these rights are current voting rights that relate directly to preserving the fundamental character and value of the non-voting stockholder's investment (i.e., amendments creating new classes of stock that dilute the non-voting stockholder's investment) and to avoiding financial risks not bargained for the at the outset of the relationship (i.e., incurring excessive debt). Without these basic protections, broadcasters will not be able to attract investors who do not wish to have ownership of the affected stations attributed to them.

Non-voting shareholders frequently have other rights as well, many of which are in the nature of contingent or potential rights that are usually triggered by events beyond the control of the non-voting shareholder. Some of these rights could not be exercised without effecting a transfer of control requiring prior Commission consent. Other rights could be deemed to confer on their holders an attributable level of influence if exercised. Although many of these additional contingent rights would not be exercised by the non-voting stockholder if it wished to avoid attribution, the existence of these rights ensures that the corporation spends its shareholders' money prudently. Again, such protections are essential if the Commission seeks to encourage investors to make substantial capital available to

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[31] See, e.g., National Broadcasting Company, Inc., 6 FCC Rcd 4882 (1991); see also News International, 97 F.C.C.2d 349, 357-66 (1984) (voting and consent rights of minority shareholders that serve to protect interests).

[32] 1984 Attribution Order, 97 F.C.C.2d at 1021.

broadcasters while simultaneously requiring them to relinquish the right to be involved in the day-to-day operations of their investment. Therefore, the Commission should clarify and reaffirm that the existence of these rights does not change the character of non-voting stock from non-attributable to attributable.

The Commission has long recognized that lenders may impose substantial positive and negative covenants on their borrowers without the potentiality of exercising their remedies under these covenants constituting either an attributable interest or a transfer of control.[33] It is important to remember that such covenants do not strip the broadcast licensee of power -- they neither prohibit nor require action on the part of the licensee. However, these covenants do embody certain assumptions and borrower representations on which the lender has based its decision to invest in the licensee. If the continuing accuracy of these assumptions or representations is materially undermined by the licensee's actions, the lender has a choice -- negotiated at the outset of the relationship -- to either revise its assumptions and maintain the relationship or to exit the relationship.

Non-voting shareholders likewise base their stock acquisition decisions on assumptions and representations by the issuer about the conduct of the issuer's business, and the stock purchase agreement frequently confers on the non-voting shareholders rights to alter their relationship with the issuer in the event these assumptions and representations are no longer true. If the exercise of such rights would constitute a transfer of control under Section 310(d) (such as the right to convert non-voting stock to a controlling block of voting stock

[33] See Flathead Valley Broadcasters, 5 R.R.2d 74 (Rev. Bd. 1965); Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 FED. COMM. L. J. 277, 336-37 (1991).

upon the occurrence of an event), then the non-voting shareholder would seek FCC consent prior to exercise.[34]

The Commission should clarify that non-voting stockholders are permitted to hold rights similar to those of lenders, the exercise of which would be contingent on the occurrence of specified events beyond the control of the non-voting shareholders, such as a failure to meet agreed-upon debt-equity ratios or a material default under a loan agreement.[35] Under such rules, the purchasers of non-voting stock could balance the cost

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[34] As GE Capital pointed out in its comments in pending MM Docket 92-51, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, concerning the granting of security interests in broadcast licenses, this may be a right without a meaningful remedy, since the transfer of control application must be signed by a party affiliated with the issuer. This requirement allows the issuer either to block the filing of the application or to extract a "signing bonus" from the party seeking to exercise its rights as a non-voting stockholder or lender.

[35] The Commission recently addressed this issue in the context of the competitive bidding rules for designated entity applicants in the upcoming auction of the entrepreneurs' block spectrum for broadband personal communications services. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994). There, the Commission stated:

> With respect to provisions benefitting non-majority or non-voting shareholders, we recognize that inclusion of such provisions is a common practice to induce investment and ensure that the basic interests of such shareholders are protected. . . . We agree with petitioners that allowing such provisions enhances the ability of designated entities to raise needed capital from strategic investors, thereby bolstering their financial stability and competitive viability. . . . We therefore clarify that under our case law non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in de facto control. Such decisions generally include: (1) issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt or otherwise encumbering corporate assets; and (6)

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