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

FEB 7 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS 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

COMMENTS OF BOSTON VENTURES MANAGEMENT, INC.

Boston Ventures Management, Inc. ("BV") hereby submits these comments in the above-captioned Further Notice of Proposed Rulemaking ("Further Notice") in support of the Commission's proposals to relax the overly restrictive attribution standards governing interests in Multipoint Distribution Service ("MDS") and Instructional Fixed Television Service ("ITFS"), which are commonly known together as "wireless cable." As an investor in a variety of telecommunications and media ventures, BV has become an indirect interest-holder in various wireless and wired cable systems. BV has an interest in ensuring that the Commission's rules encourage investment opportunities in wireless and wired cable systems in a manner that stimulates the growth of wireless cable businesses to their full potential, permits diverse ownership of multichannel video programming distributors ("MVPDs"), and affords consumers the benefits of competition.

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At a minimum, BV encourages the Commission to harmonize the attribution standards used to apply the cable/MDS cross-ownership rule with the modified broadcast attribution standards that the Commission has proposed previously in this proceeding. As part of this harmonization, the Commission should eliminate the inconsistencies among the three separate rules[1] that comprise the cable/MDS cross-ownership restriction. In addition, the Commission should formalize in its rules an additional exception that permits non-passive investment in cable and wireless cable operators if the investment does not exceed the limits the Commission has adopted in calculating compliance with the Commission's Commercial Mobile Radio Service ("CMRS") spectrum aggregation limit.[2] BV believes that these rule changes will encourage much-needed investment in the wireless cable industry while remaining faithful to Congress' intent in adopting the cable/MDS cross-ownership restriction in the first instance.

I. INTRODUCTION

BV is a private investment management firm that focuses its investments in the service sector of the economy with a strong emphasis on the telecommunications and media industries. Currently, BV manages four funds that have become investors in companies including Continental Cablevision, Metromedia, American Media, River City Broadcasting and NewsCorp. In general, BV's investments are passive and hold minimal, if any, management role

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1 BV recognizes that the Commission has implemented the statutory cable/MDS cross-ownership ban (47 U.S.C. § 533) through three rules: the cable/MDS cross-ownership rule (47 C.F.R. § 21.912(a)); the cable/MDS cross-leasing rule (47 C.F.R. § 21.912(b)); and the cable/ITFS cross-leasing rule (47 C.F.R. § 74.931(h)). Throughout its comments, BV refers to these three rules as the cable/MDS cross-ownership rule.

2 47 C.F.R. §20.6 (c) and (d).

in an investment other than traditionally accepted shareholder protections for extraordinary actions taken by a company.

BV is constantly in search of investment opportunities that will provide it with superior returns over the course of its investment time frame. The Commission can assist investment funds, such as BV, in this search by establishing a regulatory regime governing MVPDs that considers the fundamental economic realities facing start-up companies in the MVPD marketplace. Start-up companies and companies expanding into new services and geographic markets need capital and they need it early in the process. Without this capital, it is nearly impossible for these companies to provide the genuine competition in the MVPD market that both Congress and the Commission have determined is a public interest priority. BV believes that by relaxing the attribution standards governing investment in wireless and wired cable operators, the Commission actually will stimulate the emergence of robust, independent competitors in the MVPD market. This result is, in fact, completely consistent with the purpose underlying the statutory cable/MDS cross-ownership prohibition, which was intended to prevent a dominant cable industry from acquiring and warehousing MDS spectrum.[3]

BV has indirect investments in Wireless Broadcasting Systems of America, Inc. ("WBSA"), a wireless cable operator, as well as in Falcon Holding Company, a cable television multiple system operator. In light of minor overlaps in coverage area and subscribers of certain of WBSA's wireless cable systems and Falcon's cable systems, the Commission has granted WBSA a waiver of its cable/MDS cross-ownership rules contained in Sections 21.912 and

[3] *See* H.R. Conf. Rep. No. 102-268, 102d Cong., 2d Sess., (1992) at 81.

74.931 of the Commission's rules to permit the investment by BV.[4] In addition, WBSA has pending before the Commission several waiver requests of the cable/MDS cross-ownership rule to permit additional overlap with the operating territories of certain of Falcon's cable systems in light of WBSA's geographic expansion plans.[5] It is with this involvement and experience that BV comments on the Commission's proposed attribution rule modifications in this proceeding.

II. THE COMMISSION ATTRIBUTION RULES SHOULD BE RELAXED TO ENCOURAGE INVESTMENT IN WIRELESS AND WIRED CABLE OPERATORS.

In the Further Notice, the Commission has proposed to harmonize the attribution standards governing the application of the cable/MDS cross-ownership rules with those of its modified broadcast ownership attribution standards.[6] BV endorses the Commission's proposal, with one exception. The Commission should not apply the proposed 33% "equity or debt plus" test in applying the cable/MDS cross-ownership restriction.

Three of the Commission's specific proposals: (a) to raise the attribution benchmark for voting stock from 5% to 10% (and from 10% to 20% for so-called "passive investors"); (b) to count non-voting stock and properly insulated limited partnership interest as non-attributable; and (c) not to attribute minority voting stock interests of any size where there is a single majority shareholder, will increase the attractiveness of wireless and wired cable operators as an investment. Had these attribution standards been in place two years ago, WBSA

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[4] 47 C.F.R. §§ 21.912, 74.931; *See* Letter from Lynne Milne, Esq., Senior Attorney, MDS Section, Video Services Division to Howard J. Barr, Esq., dated March 9, 1995.

[5] *See e.g.,* Application of WBSE Licensing Corporation, FCC Form 304, (File No. BMDP 960510OP), Waiver Request at Exhibit 3 (filed May 9, 1996), as amended January 31, 1997.

[6] Further Notice at ¶ 44.

would not have had to endure the delay and complication of obtaining waivers to permit BV to invest in WBSA. Although BV is not technically an investment company under the Investment Company Act of 1940, the 10% attribution floor, the non-voting stock and insulated limited partnership alternatives provide will provide BV with an increased number of options by which to structure its investments, thus increasing the attractiveness of such investments.

These proposals will not only give investors such as BV additional flexibility to structure their investment in wireless and wired cable entities (which in and of itself increases the attractiveness of these industries to investors), but they also will reduce the transactional costs involved with obtaining waivers of the Commission's rules. Such costs under the current cable/MDS cross-ownership attribution rules hinder investment in both wireless and wired cable systems, thus denying both industries necessary capital to expand their qualify and scope of service offerings.

The Commission should further harmonize the three rules that make up the cable/MDS cross-ownership ban as recommend by the Wireless Cable Association's comments filed contemporaneously with these comments. Currently, there are several inconsistencies among the three rules that add uncertainty to any potential investment in wireless cable and discourage investment in the wireless cable industry. BV recognizes that some of the inconsistencies reflect the statutory language underlying the Commission's rules; however, it is imperative that the Commission harmonize the three rules to the extent possible and also recommend to Congress any statutory changes that are necessary.

To remedy these defects, BV supports WCA's suggestion that the Commission amend the cable/ITFS cross-leasing rule to (a) apply it only to areas inside the cable operator's actual service area; (b) define "prohibited overlap" area as the 35-mile radius around an ITFS transmitter; and (c) amend the "overbuild exemption" so that it applies only where an overbuild qualifies as "effective competition." These changes will go far in providing consistency among the three rules that make up the cable/MDS cross-ownership restriction.

III. THE COMMISSION SHOULD GENERALLY PERMIT INVESTMENTS IN VOTING STOCK WITHIN THE LIMITS USED TO REGULATE CMRS SPECTRUM AGGREGATION.

To encourage additional investment in wireless and wired cable operators, the Commission should further revise its rules regarding the attribution standards used in enforcing the cable/MDS cross-ownership rule to track the provisions of the CMRS spectrum aggregation rule.[7] Specifically, BV suggests that the Commission generally not count as attributable voting stock and other non-passive investments that exceed 10%, but that are no greater than 20%. This upper limit of 20% is consistent with the attribution rules governing application of the Commission's CMRS spectrum aggregation limit.[8]

In devising the CMRS rule, the Commission determined that a 20 percent attribution limit would encourage investment in the provision of CMRS without reducing competition for CMRS in any given geographic market.[9] Indeed, the Commission reasoned that:

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7 *See* n. 2 *supra.*

8 47 C.F.R. §20.6(d)(2).

9 *See Report and Order, Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Spectrum Cap*, in WT Docket No. 96-59 and GN Docket No. 90-314, 11 FCC Rcd 7824 (1996).

> a higher benchmark of 20 percent should apply for purposes of the CMRS spectrum cap in order to encourage capital investment and business opportunities in CMRS. Given the changing technology and the variety of competing services that will be subject to this limitation, we believe that increased flexibility in our rules will enable CMRS providers to adapt their services to meet customer demand.[10]

This same reasoning applies to the MVPD market.

To safeguard the Commission's concerns about diversity and competition in the MVPD market, the Commission could, if it deems necessary, require a party to demonstrate that diversity and competition will not be harmed by the proposed investment, in situations where there is more than the *de minimis* amount of overlap between the service area of the wireless cable and wired cable systems. Such investments between 10% and 20% should presumptively be in the public interest. If, after experience with this waiver policy, the Commission determines that diversity has not been harmed and companies are not warehousing spectrum or otherwise denying consumers the benefits of full competition in the MVPD market as a result of such investments, the Commission could then remove the diversity and competition showing requirement from its rules and generally not count as attributable all investments under 20%.

IV. CONCLUSION

As set forth above, BV encourages the Commission to harmonize the attribution standards used to apply the cable/MDS cross-ownership rule with those of the modified broadcast attribution standards and ensure consistency among its three separate rules that make up the cable/MDS cross-ownership rule. The Commission also should modify the rules to permit nonattributable investment up to 20% in wireless and wired cable systems. BV believes that

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[10] *Id* at ¶ 119 (footnote omitted).

these rule changes will encourage investment in the wireless and wired cable industry while remaining faithful to Congress' intent in adopting cable/MDS cross-ownership restrictions.

Respectively submitted,
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February 7, 1997