Perhaps most disturbing is the broad and ill-defined reference to "a degree of influence" over technology practices being attributable. To Time Warner's knowledge, the Commission has never included "technology practices" -- whatever that vague term means -- in any attribution standard for broadcast or cable television. Indeed, the Cable Attribution NPRM itself recognizes that fact by elsewhere seeking comment on whether "technology decisions and practices" *should be included* in the attribution standards.[106] If the Commission is seeking comment on whether to extend the attribution standards to technology practices, the NPRM cannot claim such practices are *already* encompassed.

Moreover, as set out more fully below, this simply is not the time to expand the scope of attribution to address such additional, unprecedented relationships. The Commission's statutory mandate does not include regulation of "technology practices." Nor do the goals of the 1992 Cable Act involve such practices. A cable system operator might well purchase equipment or "technology" from a small minority shareholder, on an arms length basis or even in connection with that shareholder's investment, without giving that shareholder influence or control over the cable operator's management or programming decisions. Nor should a software firm or other technology company be discouraged from making an otherwise nonattributable investment into cable operators, even if such passive investment is linked to the use of certain software or technology.

B. The Goal of This Proceeding Should Be To Relax The Cable Attribution Standards Generally.

The Cable Attribution NPRM seeks comment on whether to modify a number of specific attribution benchmarks and policies. Although Time Warner will address several of

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[106] *Id.* at ¶ 13.

the specific rules at issue below, it believes that the proper focus for this proceeding should be to relax the cable attribution standards generally in order to allow increased investment in cable system operators and programmers by entities that already hold interests in other operators and programmers.

1. The Commission Is Now Familiar And Experienced with the New Cable Regulatory Regime.

It appears that the Commission adopted the existing broadcast attribution standards for the new cable ownership restrictions at least in part because they were long-established and familiar. For example, the Commission's initial Report and Order in the cable horizontal ownership rulemaking reasoned that:

> the same attribution criteria are used in the network-cable cross-ownership rule. . . . We believe that use of this attribution standard in these related contexts supports use of the same standard in the context of cable horizontal ownership limits.[107]

Moreover, in its Second Report and Order, the Commission noted that the "broadcast attribution model" was adopted with the same "objectives," namely, to focus on ownership thresholds that provide substantial influence or control over management or programming decisions.[108]

There is no longer a need to follow the broadcast attribution standards simply because they are well-established, familiar, or were meant to address somewhat analogous objectives. Indeed, many of the benchmarks under the cable ownership attribution standards, such as the

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[107] Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992/Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-264, 8 FCC Rcd 6828, ¶ 157 (1993) (footnote omitted) ("Horizontal and Vertical Report and Order").

[108] 1993 Order at ¶ 35.

5% voting stock benchmark, have not been modified in nearly *15 years* since they were adopted in the broadcast context.[109] As the Cable Attribution NPRM observes, the Commission is now reviewing comments on proposals that would relax certain of the original broadcast attribution benchmarks. Clearly, the communications industry of today bears little if any resemblance to that of fifteen years ago. Moreover, the Commission now has familiarity and experience in applying the new cable regulatory regime imposed by the 1992 Cable Act, experience it did not have when it adopted in total the existing broadcasting attribution standards to implement the new cable ownership regulations. Given the Commission's familiarity with the ownership rules themselves, it should now have the freedom to consider relaxing the cable attribution standards.

2. Relaxation of The Cable Attribution Standards Would Be Consistent With Congressional Intent and Constitutional Requirements.

Relaxation of the attribution rules would be consistent with the deregulatory intent underlying the Telecommunications Act of 1996. Recognizing that rapid changes in the communications industry may be rendering long-established regulations obsolete or overly-broad, Congress mandated that the Commission review all of its regulations on a biennial basis, and repeal or modify those rules that it deems to be no longer necessary in the public interest.[110] The Telecommunications Act of 1996 itself set the tone for that review by eliminating a number of long-standing ownership restrictions, including the prohibition on the common ownership of cable systems and a local telephone company or a broadcast television

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[109]Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Report and Order in Docket Nos. 20521 *et al.*, 97 FCC 2d 997 (1984) ("Attribution Report and Order").

[110]47 U.S.C. § 161.

network, and the statutory restriction on the common ownership of a cable system and local broadcast television station, as well as relaxing other long-established ownership restrictions.[111] The Commission's review is now in progress, as mandated by the statute.[112]

The need for reevaluation applies not only to ownership restrictions but also to the attribution standards underlying them. Both can become fossilized with time. Assumptions regarding the types of interests that provide control or influence, or the level of control or influence that may be detrimental under a cross-ownership restriction, may become outdated with industry changes as quickly as the ownership rules themselves. Indeed, an overinclusive attribution standard will render an ownership restriction overly broad. Moreover, as noted above, recent court decisions demonstrate that the Commission *must* reassess its rules in light of marketplace changes as a matter of administrative and constitutional law. The recited harms must continue to be real, not merely conjectural; and the regulation must directly alleviate these harms in a material way.[113] Overly broad attribution standards are as legally indefensible as overreaching ownership regulations.

3. Relaxation of the Attribution Rules Will Encourage Investment That Will Further Important Policy Goals.

The Commission has previously recognized that relaxation of the attribution benchmarks will encourage the infusion of new capital into the cable industry, with attendant

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[111]Telecommunications Act of 1996, § 208(f), (i).

[112]*See* 1998 Biennial Regulatory Review--Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry in MM Docket No. 98-35, FCC 98-37, released Mar. 12, 1998.

[113]*See* Turner I; Bechtel v. FCC; Lutheran Church-Missouri Synod v. FCC.

public interest benefits. In 1992, the Commission initiated a proceeding to reduce unnecessary regulatory restraints on investment in broadcasting, stating that:

> We believe that relaxation of all or some of these aspects of our attribution rules may substantially benefit the broadcast and cable industries by affording them access to new sources of capital as well as making available increased investment from existing capital providers . . . . [E]nhanced investment opportunities should provide all media companies with more choices in funding sources, decreased capital formation costs and ultimately more resources with which to provide service to the public.[114]

The availability of new capital is particularly important at this juncture in the cable industry's history. Cable system operators are now in the process of an unprecedented upgrade and rebuilding of their existing plant to support new services such as data transmission, voice communications, Internet access and the implementation of digital video.[115] A 1996 Cable Trends survey by the telecommunications consultancy firm Malarkey - Taylor Associates found that the top 40 MSOs added 130,000 route miles of cable and rebuilt 10,000 miles of plant in 1995.[116] These developments will bring clear public interest benefits to consumers, particularly in the form of new competition to local telephone and Internet access service providers. The costs of this ongoing upgrade are enormous, however. In 1994,

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[114]Review of the Commission's Regulations and Policies Affecting Investment In The Broadcast Industry, Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, 7 FCC Rcd 2654, ¶ 7 (1992) ("Broadcast Investment NPRM").

[115]*See, e.g.*, "TCI Reiterates Plan To Rebuild Metro Systems," The Denver Post, Feb. 20, 1998, at C-2; Sylvia Moreno, "Arlington to Weigh Cable TV Proposal; Upgrade Included In Tentative Deal," The Washington Post, May 21, 1998, at V01 (proposed 15 year franchise to include $50 million in "high tech improvements"); Kevin Maney, "How the Deal Could Affect You," USA Today, June 25, 1998 (reporting that TCI has rebuilt about 30% of its systems); Communications Daily, Mar. 23, 1995, at 9 (reporting that Comcast would spend $100 million to rebuild three counties in Maryland).

[116]"Restraints Ease on Top 40 CableCos, But Competition Is Mushrooming," Interactive Video News, June 10, 1996.

NCTA President Decker Anstrom reported that cable operators expected to spend $14 billion over the next decade to rebuild or upgrade their systems.[117]

Upgrade costs are particularly significant for small and even mid-sized operators and for older, "classic" cable systems.[118] Indeed, the Commission has recognized these burdens in its digital must-carry proceeding, stating that: "Small cable operators may not be able to upgrade their systems, or invest in digital compression technology, due to financial constraints and thus, may delay their transition to digital . . . ."[119] The Commission already has recognized the increasing capital demands for implementing new technologies, such as digital television, as a possible basis for raising the attribution benchmark in its broadcast investment proceeding.[120] That need is particularly significant in the cable industry today. Eliminating or substantially raising the horizontal ownership limits will facilitate capital availability for system upgrades and will allow the benefits of clustering through economically efficient joint ventures rather than costly buyouts.

Relaxation of the attribution benchmarks also would be an important step in furthering new entrants in the communications industries, including minorities. When the Commission

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[117]Communications Daily, Feb. 18, 1994, at 7. *See also* Thomas J. Duesterberg, "Learn From History: Let Cable Evolve," The New York Times, July 5, 1998 (since the easing of rate regulations in 1995, "cable operators have responded with an investment binge of $20 billion to $28 billion to put digital, interactive systems in place and to compete in the voice and high speed data marketplaces"); Ken Freed, "Hard Choices in the Transition to Digital," Video Age International, Mar. 13, 1997, at 14 (estimating the cost of conversion to HDTV for a cable system at $2 million).

[118]Kent Gibbons, "What's A 'Classic' MSO to Do?", Multichannel News, Dec. 8, 1997, at 6.

[119]Digital NPRM, *supra,* at ¶ 52 (emphasis added and footnote omitted).

[120]Broadcast Investment NPRM at ¶ 1.

first proposed to raise the voting stock benchmark to its current level, it "observed that a relaxation of the benchmark might serve the public interest by . . . promoting the entry of new participants, particularly minorities, by increasing the availability of start up capital to these entities."[121] In its 1990 Report to Congress on the cable television industry, the Commission cited TCI's financial support of Black Entertainment Television as enabling the premiere minority-controlled and oriented cable program service to survive.[122] Subsequently, in its rulemaking to remove unnecessary barriers to investment in broadcasting, the Commission stated that:

> We also believe that this action is necessary to ameliorate the difficulties that new entrants to this industry, including, in particular, minorities and women, have experienced in obtaining adequate financial backing and in successfully breaking into broadcast ownership . . . .[123]
>
> Greater access to passive investment should also prove especially beneficial to new entrants, including, in particular, minorities and women, who historically have experienced significant difficulty securing adequate start-up funding.[124]

Recently, leaders of the radio broadcast industry met with the Chairman of the FCC concerning ways to increase minority and female ownership in broadcasting. Reportedly, the group identified the attribution rules, and particularly the 5% voting stock benchmark, as a significant obstacle.[125] Minority media ownership is reportedly just 3%, only half a percent

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[121] Attribution Report and Order at ¶ 6.

[122] 1990 Cable Report, *supra*, at ¶ 83.

[123] Broadcast Investment NPRM at ¶ 1 (footnote omitted).

[124] *Id.* at ¶ 7.

[125] Frank Saxe, "Kennard, Media Moguls Meet; Equity Fund Among Ideas," Radio Business Report, July 20 1998, at 3; Mat Spangler, "Group Heads Meet on Boosting Ownership

(continued...)

increase from 20 years ago.[126] The time has come for action by the Commission to allow additional financing for minority entrants.

Moreover, the Commission recently concluded that a key measure to implement Section 257 of the Telecommunications Act of 1996, to remove unnecessary regulatory barriers on small business entry into telecommunications, is to ensure meaningful comment on the impact of FCC proposals.[127] The present Cable Attribution NPRM generally asks for such comment.[128] The Commission must fully recognize in this proceeding, however, that the strictness of its attribution standards is directly related to the capital available to such new entrants from existing service providers. Pursuant to Section 257, the detrimental impact of overly restrictive attribution rules on small businesses must be expressly considered in reassessing such rules now.

Finally, increased availability of capital resulting from relaxing the attribution benchmarks will also serve the longstanding FCC and Congressional goals of promoting the development of new programming services. In its 1990 Report to Congress on the cable

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[125](...continued)
Diversity," Radio & Records, July 17, 1998, at 4. *See also* Statement of FCC Chairman William Kennard on Meeting with Broadcast Executives on Minority Issues, released July 14, 1998.

[126]Chris McConnel, "Minority Ownership: A Not-Much-Progress Report," Broadcasting & Cable, July 20, 1998, at 7; Jeffrey Tannenbaum, "Where the Money Isn't," Wall Street Journal, May 21, 1998, at R20.

[127]Section 257 Proceeding To Identify and Eliminate Market Entry Barriers For Small Businesses, Report in Gen. Docket No. 96-113, 12 FCC Rcd 16802, ¶ 8 (1997).

[128]Cable Attribution NPRM at ¶ 17.

television industry, the Commission documented the benefits of cable operators' past investments in new cable programming services:

> For example, on several occasions, MSO investment has enabled a programming service to remain in operation when it otherwise would have been forced to discontinue its programming. MSO commenters emphasize that the cable industry provided critical financial support to sustain both Turner Broadcasting (owner of WTBS and CNN) and C-SPAN . . . . In addition, NCTA quotes Discovery Channel Chairman John S. Hendricks' statement that cable operators' investment "rescue[d]" his programming service . . . . Another example is TCI's financial backing of Black Entertainment Television (BET), which BET's own president describes as being "most responsible for the fact that black Americans today have dedicated to their specific viewing interest a 24-hour cable television network." . . . Thus, vertical integration by MSOs with significant subscribership has contributed to program diversity by providing financial support for faltering program services.[129]

The 1992 Cable Act specifically directed the Commission, in enacting cable subscriber limits, to "not impose limitations which would impair the development of diverse and high quality video programming."[130] The House Report recognized that "permitting system operators an equity position in programming services may be an efficient way of financing new service providers . . . ."[131] The Congressional directive that the Commission strike a balance in its regulations so as to preserve investment in new program services should apply not only to the horizontal ownership restrictions themselves, but also the attribution standards that implement them. Overly broad attribution standards only can impair the development of video programming.

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[129] 1990 Cable Report at ¶¶ 83-84.

[130] 47 U.S.C. § 533(f)(2)(G).

[131] House Report at 43.

C. The Commission Should Raise the Voting Stock Benchmarks.

As set out above, Time Warner believes that the attribution standards for the horizontal ownership rules should encompass no more than actual managerial control. With respect to the remaining attribution standards, Time Warner submits that the Commission may safely raise the voting stock benchmark to *at least* 10%, and should seriously consider a 20% benchmark. The Commission first sought comment on a proposed 10% voting stock benchmark six years ago in its rulemaking to reduce unnecessary regulatory constraints on broadcast investments, in which it recognized that "[t]his higher level of nonattributable investment may well attract new sources of capital to the media market and would inevitably create greater flexibility for existing investors to increase their participation in backing media ventures."[132]

Subsequently, in its broadcast attribution proceeding, the Commission has asked commenters for "specific information" demonstrating that this benchmark may be raised, including "detailed illustrations" of the role of minority shareholders in management.[133] Time Warner's own experience confirms the Commission's ability to safely raise the voting stock benchmarks at least to 20%. As Time Warner reported to the Commission in connection with its application to acquire control of WTBS(TV) in 1995, the Seagram Company Limited ("Seagram"), Time Warner's largest shareholder at that time, with a common stock ownership interest of approximately 15%, nevertheless was unsuccessful in its efforts to gain

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[132]Broadcast Investment NPRM at ¶ 9.

[133]Review of The Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rulemaking in MM Docket No. 94-150, 10 FCC Rcd 3606, ¶ 22 (1995) ("Broadcast Attribution NPRM").

representation on Time Warner's board of directors and to influence the decisions of Time Warner management, as was well-documented in the press.[134] For example, Seagram had no involvement in Time Warner's negotiations with Turner and its major shareholders in 1995 concerning their merger.[135] In Time Warner's case, a *voting* common stock interest of 15% did not provide a minority shareholder with any power to influence corporate policy or operations in ways detrimental to Time Warner's shareholders generally.

The Commission already uses higher benchmarks to measure influence or control with respect to other ownership rules and policies. For example, the benchmarks on alien ownership and control imposed by Congress allow aliens to hold up to 20% direct and 25% indirect equity interests.[136] For purposes of the CMRS spectrum aggregation limit, the FCC

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[134]*See*, *e.g.*, "Seagram's Challenge Big in Buying 80% Of MCA," The Atlanta Constitution, Apr. 11, 1995, at D9 ("the Canadian Company has no seat on the Time Warner board and exercises no direct control over time Warner's policies"); Richard Waters, "Bronfman Moves To Win Over Executives on MCA," Financial Times, Apr. 11, 1995, at 1 ("like the Dupont holding, the Time Warner stake has been a passive investment, in part because the company rebuffed 39-year old Mr. Bronfman's bid for a seat on the board"); Andrew Willis, "Going For The Glitter," McLean's, Apr. 17, 1995, at 42 ("Edgar [Bronfman] Jr. has since been snubbed in his quest for a greater role in managing the media company [Time Warner]. . ."); Johnnie L. Roberts, "Hey Edgar, Why MCA?," Newsweek, Apr. 17, 1995, at 59 ("If Bronfman had dreams of running the New York-based company, they were quickly dashed when Time Warner CEO Gerald Levin inserted new anti-takeover rules into his firm's bylaws and refused to give Bronfman a seat on the board."); "Bronfman Appeal Sealed MCA Deal," The [Toronto] Globe and Mail, Apr. 15, 1995, at B1 ("Seagram was on the prowl for an entertainment company because it had no prospect of boosting its 14.9 percent stake in Time Warner Inc., and knew it would always be limited to a passive role.").

[135]*See* Response To Comments of Time Warner Inc. in File No. BTCCT-951020KF, filed Dec. 11, 1995, at 18-19.

[136]47 U.S.C. § 310(b)(3)-(4).

will not attribute a partnership or stock interest held by a small business or rural telephone company that is less than 40%.[137]

A raise in the benchmark for voting stock generally should be accompanied by an increase in the voting stock benchmark for certain passive investors, from 10 to at least 20%, as the Commission proposed in its broadcast investment proceeding. Logically, investors which by their very nature do not exercise influence or control should be allowed to hold a greater interest than other shareholders without attribution. Moreover, as the Commission previously recognized, "[t]his change should be particularly effective in increasing capital availability given the substantial resources which institutional investors, such as insurance companies and mutual funds, can make available to media enterprises."[138]

D. Nonvoting Stock Should Remain Nonattributable.

There is absolutely no reason to alter the nonattributable status of nonvoting stock, which has provided an important investment mechanism in the communications industries for many years. As a matter of corporate law, a nonvoting shareholder cannot influence the day-to-day operators of any particular business owned by the corporation. Nothing in these industries or in corporate law has changed to justify attributing any nonvoting stock interest. Nor do investments by the four major broadcast networks in their affiliated television stations provide any record as to similar actions in the cable television or programming industry.

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[137]47 C.F.R. § 20.6(d)(2). Moreover, as the Commission itself has observed, other agencies utilize a 10% benchmark, such as the SEC (for insider trading restrictions), DOT (air carrier certifications); FTC (Clayton Act premerger notification and waiting period) and ICC (financial reporting). Broadcast Investment NPRM at ¶¶ 37-43.

[138]Broadcast Investment NPRM at ¶ 10.

Clearly, such a drastic change in the attribution rules -- and the restructuring of investments it would require -- demands a factual record that is completely missing here.

E. The Attribution Standards For Limited Partnerships Are Badly In Need of Revision.

The standards governing the attribution of limited partnership interests are perhaps the most badly in need of reexamination and revision. The current criteria have not been changed in more than ten years. During that time, limited partnerships and limited liability companies -- to which the same criteria are applied as an interim policy -- have become one of the most important investment vehicles in the communications industry because of the favorable insulation from liability and tax treatment they provide. At the same time, the Commission's attribution criteria have prohibited a more widespread use of these vehicles for communications-related investments.

The attribution standards for limited partners actually went through several permutations at the time they were adopted. In its 1984 Attribution Report and Order, the Commission initially decided not to attribute limited partners that were subject to the standard provisions of the Revised Uniform Limited Partnership Act, reasoning -- quite correctly -- that a "typical limited partner is in a position similar to that of the holder of a debt or non-voting stock as far as involvement in the management of the company is concerned."[139] On reconsideration, however, the Commission found that the Uniform Act was not sufficiently restrictive, and imposed specific contractual restrictions which must be present in a limited

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[139] Attribution Report and Order at ¶¶ 51-52.

partnership agreement for the limited partners to be afforded nonattributable status.[140] These provisions are quite restrictive, and forbid a limited partner -- unlike a nonvoting or *de minimis* voting shareholder in a corporation -- from even communicating with the company about its day-to-day media business.[141]

The FCC's partnership attribution criteria also are quite sweeping in the parties they encompass. Every limited partner must be subject to these detailed restrictions in order to be exempt from attribution, regardless of how small its equity interest is or how many other limited partners have invested in the entity. Thus, a limited partner with an equity interest of just one-tenth of 1%, in a partnership with 100 limited partners, governed by a partnership agreement granting exclusive management and control to the general partners, would nevertheless be deemed to hold an attributable interest in the partnership unless each and every one of the FCC-prescribed restrictions was included in that partnership agreement. Indeed, the Commission might attribute not only that 0.1% limited partner, but also its own officers, directors, 5% shareholders, or partners (unless insulated). Because the "multiplier" used to cut off indirect interests in corporations at 5% is not applied to noninsulated partnerships, a cable operator would be attributed with the interests of a 0.1% limited partner in the operator's own 0.1% limited partner (or even its partner's partner's partner), unless one limited partner in this chain was fully insulated. Clearly, this situation imposes tremendous burdens on operators, programmers and their investors to determine the entire, lengthy chain of ownership and all of the other interests that each link in this chain of passive investors might hold.

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[140]Corporate Ownership Reporting and Disclosure By Broadcast Licensees, Memorandum Opinion and Order in MM Docket Nos. 20521 *et al.*, 58 RR 2d 604, ¶¶ 34-50 (1985).

[141]*Id.* at ¶ 48.

Moreover, the FCC-required provisions cannot lawfully be applied to some investment partnerships, and thus effectively prohibit the use of limited partnerships as an investment vehicle in certain cases. Specifically, both federal and state securities regulations require that limited partners in "business development companies" structured as partnerships be afforded the right to vote on the election and removal of their general partners, contrary to the requirements of the insulation criteria.[142] In its broadcast investment and attribution rulemakings, the Commission has thus proposed to modify the insulation criteria for such companies to eliminate the conflict with other laws or to combine an equity ownership standard with a limited relaxation of the insulation criteria. The Commission has also sought comment on whether it should modify the attribution criteria to exempt limited partners with an insignificant percentage of equity in *any* widely-held limited partnership, regardless of the insulation provisions.[143]

In light of the need for additional capital in the cable industry, the obvious burden of the partnership attribution standard now used by the Commission, and the Congressional directive that unnecessary regulations be streamlined or eliminated, Time Warner believes that the Commission's insulation requirements for limited partnerships now must be more narrowly tailored in any remaining attribution rules not subject to a managerial control standard. Although the Commission has long recognized the need to accommodate other federal law, including securities regulation,[144] it has completely failed to do so in this case. There is simply

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[142]Broadcast Investment NPRM at ¶ 14.

[143]*Id.* at ¶¶ 14-17.

[144]Tender Offers and Proxy Contests, Policy Statement in MM Docket No. 85-218, 59 RR

(continued...)

no reason to deny insulated status, and thus a potential investment, because the investor wishes to be able to communicate with management regarding its investment, as can a nonvoting or *de minimis* voting shareholder in a corporation, or because an investor wants to enjoy the rights granted by federal or state securities laws.

Time Warner believes that in any attribution standards not based solely upon managerial control, the Commission should relieve from attribution any limited partnership interest of less than 33 percent in any partnership with at least 20 limited partners, if the partnership certifies to the Commission that such limited partner will not be actively involved in the partnership's media affairs.[145] Time Warner also believes that the insulation criteria should be modified with respect to publicly traded limited partnership interests to allow limited partners to vote on the election and removal of general partners and hold other protective rights, to the extent required by state and federal securities laws. The right held by each of a multiplicity of partners to vote on the removal of their general partner does not convey on each limited partner significant influence or control. Moreover, there is no reason to prohibit limited partners from entering into arms-length contractual relationships with respect to the company's media business, as can nonvoting and *de minimis* voting shareholders in a corporation.

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[144](...continued)
2d 1536, 1986 LEXIS 3830 (1986), at ¶ 7 ("we seek to implement procedures which fully accommodate, wherever feasible, other state and federal laws and policies concerning the governance of corporations . . . it is both necessary and appropriate for us to harmonize our actions with other federal policies and objectives . . . .).

[145]The Commission already relies upon such certifications in the limited partnership context, as well as for certain passive investors holding voting stock in a corporation subject to the 10% benchmark.

F. The Commission Should Not Adopt An Equity/Debt Plus Proposal For The Cable Attribution Rules.

In its broadcast attribution proceeding, the Commission sought comment on an "equity/debt plus" proposal, pursuant to which it would attribute an otherwise noncognizable equity or debt interest in a broadcast licensee if: (1) the debt or equity exceeds a certain level, such as 33%, and (2) the debt or equity holder is a program supplier or another local broadcaster.[146] The Cable Attribution NPRM now seeks comment on whether to apply this equity/debt plus proposal to cable and, if so, what relationships should be encompassed by it.[147]

Even if some form of the equity/debt proposal were appropriate for the *broadcast* attribution rules, this proposal is not appropriate for or even relevant to the cable attribution rules.[148] With regard to the attribution criteria now governing the program access regulations, the equity/debt plus proposal would be particularly illogical. The proposal is meant to serve as an exception to the single majority shareholder and nonvoting stock exemptions to the

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[146]Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rulemaking in MM Docket Nos. 94-150 *et al.*, 11 FCC Rcd 19895, ¶ 12 (1996) ("Broadcast Attribution FNPRM").

[147]Cable Attribution NPRM at ¶ 12.

[148]Time Warner believes that the equity/debt plus proposal, if adopted at all in the broadcast context, must be limited to the four established broadcast networks. There is simply no reason to limit the potential influence of new emerging networks such as the WB or UPN, which provide only a limited broadcast schedule, and to do so would only disserve the goals of diversity. Nor should any proposal adopted include program syndicators, who would not exercise the influence of a broadcast network.

broadcast attribution rules.[149] But these exemptions do not even exist in the program access attribution standards, which are already stricter than the broadcast attribution rules.[150]

The proposal is also completely inappropriate to the attribution standards underlying the cable ownership rules, as it resulted from two particular developments regarding broadcast programmers, unique to the broadcast industry. First, broadcast networks were acquiring otherwise nonattributable interests in stations, often to secure their exclusive affiliation over a period of time. In introducing the proposal, the Broadcast Attribution FNPRM stated that:

> network affiliates have expressed concerns that the [attribution] exemptions have allowed networks to extend their nationwide reach by structuring nonattributable deals in which the networks effectively exert significant influence if not control over licensees . . . .[151]

The Broadcast Attribution FNPRM also cited recent broadcast transactions in which "it has appeared that nonattributable investors can be granted rights over licensee decisions that might afford them significant influence over the licensee . . . ."[152] The second trend recognized by the proposal was the increasing use of Local Marketing Agreements ("LMAs"), in which one broadcast station will program and provide operational functions to another local station.[153]

The dynamics in broadcast television are markedly different from those in cable television, given the multichannel nature of cable and the web of regulations now imposed on cable programming decisions and ownership. Cable operators are not the exclusive outlet of

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[149]Broadcast Attribution FNPRM at ¶ 8.

[150]*See* 47 C.F.R. § 76.1000(b).

[151]Broadcast Attribution FNPRM at ¶ 10 (footnote omitted).

[152]*Id.* at ¶ 17 (footnote omitted).

[153]*Id.* at ¶¶ 16-17.

one program network, and thus are not beholden to one programmer and its interests, unlike an affiliate of one of the major four broadcast television networks. Nor do cable networks provide operating functions to the cable system, as in a broadcast LMA situation. In short, the equity/debt plus proposal, as applied to cable, is a solution looking for a problem that does not exist. This conclusion is readily apparent from the Cable Attribution NPRM, which first asks whether to apply an equity/debt plus mechanism, and then asks what relationships that mechanism should address.[154] The addition of new attribution rules must be driven by relationships which need to be addressed, not mechanical proposals which have no meaning absent any new relationship of particular concern.

G. The Commission Should Eliminate, Not Expand, The Cross-Interest Policy.

Time Warner also believes that the time has come to eliminate the remaining vestiges of the Commission's vague cross-interest policy, applied inconsistently at best over the years, and already reduced to just a few issues because of its burden on FCC licensees and the Commission itself. Certainly, this is not the time to expand that policy and reimpose those same burdens.

The cross-interest policy is intended to prevent an entity from having certain "meaningful" interests in two competing media outlets serving substantially the same area. In 1989, after conducting a review of the policy, the Commission concluded that many of the relationships that had fallen under it could "no longer be justified as a matter of sound policy."[155] The Commission first noted the tremendous growth in the number of media outlets,

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[154]Cable Attribution NPRM at ¶¶ 16-17.

[155]Reexamination of the Commission's Cross-Interest Policy, Policy Statement in MM

(continued...)

citing not only broadcast stations but cable penetration, which reduced its concern with the possibility of harm to the public from such relationships.[156] It also found that the policy, by its nature, imposed significant burdens on the public, including "the unintended effect of surrounding certain media transactions with a cloud of uncertainty," inconsistent case law that complicated the planning of complex transactions, the possibility of unintentional violations, the use of the policy by competitors to bring frivolous challenges, the limitations imposed on the availability of qualified personnel, and the administrative costs to the Commission and to parties of seeking FCC rulings on proposed transactions.[157] The Commission sought further comment regarding the need for the three remaining kinds of relationships covered: key employees, joint ventures and nonattributable ownership interests.[158] Unfortunately, some ten years later, that review has never been completed.

None of these remaining interests is of any particular concern with respect to the cable ownership or programming rules. For example, in light of the mandatory broadcast signal carriage rules, it is hard to understand the competitive concern if the owner of a local cable system and the owner of a local television station entered into a joint venture to produce news or public affairs programming, or to share a local studio, or to provide service in another kind

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[155](...continued)
Docket No. 87-154, 65 RR 2d 1734, ¶ 1 (1989).

[156]*Id.* at ¶¶ 21-25.

[157]*Id.* at ¶¶ 26-31.

[158]Reexamination of the Commission's Cross-Interest Policy, Further Notice of Inquiry/Notice of Proposed Rulemaking in MM Docket No. 87-154, 4 FCC Rcd 2035 (1988).

of local business such as wireless communications or Internet access.[159] Similarly, what would the danger be if those two companies shared a chief engineer? Or if the broadcaster took a nonattributable interest in the cable operator? Perhaps the Commission would not even apply the remaining vestiges of the cross-interest policy to these situations. But the parties' uncertainty in this regard, and the possibility of the FCC applying such an *ad hoc* and unpredictable approach, might be sufficient to prevent the arrangement from ever taking place.

The Commission's 1995 Broadcast Attribution NPRM proposed what would have been an unfortunate extension of the cross-interest policy in the broadcast industry. Specifically, the Notice sought comment on whether the Commission should recognize the cumulative effect of various "broadcaster interrelationships" such as nonattributable interests and contractual, family and business relationships.[160] The Cable Attribution NPRM now seeks comment on a similar proposal for:

> the attribution of certain contractual or other business relationships in the cable context (including affiliations that allow different cable entities to purchase programming,

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[159]For example, in 1990 Time Warner sought and received a declaratory ruling from the Commission that its acquisition of a 25% interest in Price Communications' cellular subsidiary would be consistent with the policy, in light of Price's interest in television stations in certain markets where Time Warner held cable systems. The Commission noted in part that each party's cellular investment represented a small portion of its total assets, and found it highly unlikely that they would risk injury to their major business activities to protect an investment representing a small part of those activities. *See* letter from Barbara A. Kreisman, Chief, Video Services Division, to Time Warner Inc. and Price Cellular Communications Corporation, dated Mar. 30, 1990. That ruling came at the expense of the parties' and the Commission's own time and resources.

[160]Broadcast Attribution NPRM at ¶ 94. In the broadcast attribution rulemaking, this original proposal appears to have been replaced by the more specific equity/debt plus proposal. Nevertheless, the Cable Attribution NPRM seeks comment on the application of *both* proposals to the cable rules.

technology or equipment on common terms, analogous to JSAs and LMAs in the broadcast context).[161]

There are many very good reasons not to adopt this proposal. First, it would mark a return to exactly the same problems found by the Commission with respect to the original cross-interest policy. In a myriad of situations, cable operators and programmers could not be certain whether a proposed business relationship would be subject to the policy without the burdensome and time-consuming process of seeking an FCC declaratory ruling. Second, even if the relationships at issue were specifically codified, the Cable Attribution NPRM's premise appears to be faulty. In the broadcasting industry, JSAs are agreements for the joint sale of broadcast advertising spots by two stations, and LMAs involve one entity selling advertising for, providing programming to, and providing services for another entity's station. It is difficult to see how arrangements for the joint *purchase* of programming, equipment or technology are analogous to *sales* arrangements, or could raise similar concerns. In any event, the Commission permits broadcasters to enter JSAs without any regulatory requirements. Even if cable purchase arrangements were analogous to JSAs, there would be no reason to subject them to the cross-interest policy when broadcast arrangements are not. Finally, as detailed above, there is no reason for FCC involvement in "technology decisions," which fall entirely outside of its statutory mandate.

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[161] Cable Attribution NPRM at ¶ 12.

H. Additional Attribution Issues.

Although the following matters are not specifically addressed in the Cable Attribution NPRM, Time Warner believes that they merit discussion in connection with this proceeding:

1. Appointment of Directors.

Time Warner is aware that dicta in certain decisions by the Mass Media Bureau suggest the staff's view that the ability to *appoint* a corporate director, in and of itself, renders a shareholder's interest attributable, regardless of the nature of that interest.[162] However, the Commission's published attribution rules do not contain any such provision,[163] and Time Warner is not aware of the Commission adopting such a policy after reviewing public comment in any attribution rulemaking proceeding. Accordingly, Time Warner requests that the Commission expressly confirm that attribution is not triggered because an entity merely holds the power to appoint less than a majority of the board of directors of a corporation in which that entity does not otherwise hold an attributable interest. Of course, if such entity appoints one of its own officers or directors to the board of such corporation, that individual would hold an attributable interest in both entities, but neither entity would be deemed to hold an attributable interest in the other.

2. Director Recusal Policy.

The attribution rules provide that a corporation that owns a cable television system but engages in other business as well may request that the Commission waive attribution for any officer or director whose duties or responsibilities are wholly unrelated to its primary cable business. With respect to the *parent company* of a cable system owner, officers or directors

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[162] *See, e.g.*, Applications of Telemundo Group, Inc., 10 FCC Rcd 1104, ¶ 24 n.8 (1994).

[163] *See, e.g.*, 47 C.F.R. §§ 76.3555 Note 2, 76.501 Note 2, 76.1000(b).

with duties wholly unrelated to the cable system subsidiary will be relieved of attribution upon the submission of a statement to the Commission properly documenting this fact.[164] In connection with the recusal of certain Time Warner officers and directors who served on the Turner Broadcasting board of directors prior to the merger of those companies, the Commission stated that "the individual must be recused at all times and from all matters that involve and/or implicate the subsidiary holding the licensee, . . . including fiduciary issues which may only indirectly relate to the activities of the broadcast station involved . . . ."[165]

Time Warner believes that this recusal policy is both imprecise and overly broad. For example, it is not clear what matters may "implicate" a subsidiary. This standard would prohibit a recused director from voting on a matter pertaining specifically to that subsidiary or the specific budget for that subsidiary. It might be argued, however, that the director's votes on the overall corporate budget, or certain matters affecting the overall corporation, would "implicate" or "indirectly relate to" the subsidiary as well. The Commission should clarify that a director is not required to recuse himself from any vote involving the company as a whole, or the entire budget of the company, in order to assure nonattributable status. A contrary interpretation would effectively undermine the director recusal policy by removing that director from any meaningful involvement in corporate affairs, in possible derogation of the director's fiduciary responsibilities.

Time Warner also believes that there is no reason for the disparate treatment between directors of a multi-faceted corporation that is the parent of a cable operator and directors of a

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[164]*See* 47 C.F.R. §§ 76.501 Note 2 (h), 76.1000(b).

[165]Turner Broadcasting System, Inc. And Time Warner Inc., 11 FCC Rcd 19595, ¶ 43 (1996) (footnotes omitted).

multi-faceted corporation that itself owns and operates cable systems directly. The directors in both situations should be able to obtain nonattributable status by filing appropriate documentation with the Commission, without having to seek a declaratory ruling first.

3. Treatment of Alien Limited Partners.

In two declaratory rulings in the 1980s, the Commission ruled that noninsulated limited partners were analogous to officers and directors in a corporation.[166] Accordingly, the presence of any noninsulated alien limited partner with any equity interest would violate the statutory prohibitions at that time on alien officers and directors in a corporation.[167] Subsequently, Congress repealed the basis for this analogy, the alien officer and director prohibitions in the Communications Act, as part of the Telecommunications Act of 1996.[168] The Commission subsequently released a brief Order stating that

> [c]onsistent with the elimination of the restrictions on alien officers and directors of corporate licensees, we will also no longer accord any independent significance under the statute to positions held by aliens that may convey the power to manage the affairs of an unincorporated entity or to bind a partnership -- such as a general partner or uninsulated limited partner.[169]

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[166]Declaratory Ruling, Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3)&(4) of the Communications Act, 103 FCC 2d 511, n.43 (1985); Memorandum Opinion and Order, 1 FCC Rcd 12, ¶ 22 (1986).

[167]*See, e.g.*, Continental Cellular, 6 FCC Rcd 6834 (1991).

[168]Telecommunications Act of 1996, § 403(k).

[169]Order, Amendment of Parts 20, 21, 22, 24, 26, 80, 87, 90, 100, and 101 of the Commission's Rules To Implement Section 403(k) of the Telecommunications Act of 1996, 11 FCC Rcd 13072, ¶¶ 6, 7 (1996).