implicate our diversity and competition concerns.[249] We noted, however, that we did not intend to reopen our earlier decisions permitting joint sales practices in radio and television. These decisions had allowed joint sales agreements ("JSAs") (*i.e.*, agreements for the joint sales of broadcast commercial time), subject to compliance with the antitrust laws.

118. After issuing the *Attribution Notice*, the staff was presented with cases involving joint sales agreements that raised diversity and competition concerns. These cases raised questions as to whether non-ownership mechanisms such as JSAs that might convey influence or control over advertising shares should be considered attributable under certain circumstances. Accordingly, in the *Attribution Further Notice* we invited additional comments on the potential effects of JSAs among same-market broadcasters on diversity and competition. We also sought comment on whether we should attribute JSAs among licensees in the same market, including both radio and television licensees, irrespective of whether they are accompanied by the holding of debt or equity. In addition, we sought general information concerning the typical contractual terms of JSAs.[250]

119. Comments. Most commenters opposed attributing JSAs. Paxson argued that JSAs, even if coupled with debt or equity interests, should not be considered attributable interests. Paxson noted that the Conference Report on the 1996 Act "praised" the public interest benefits of JSAs, as well as LMAs and other cooperative arrangements.[251] According to Paxson, JSAs affect only a limited aspect of station operations, namely sales, and hence JSAs do not raise concerns equivalent to those associated with LMAs. In particular, Paxson argued, JSAs do not implicate the diversity concerns that underlie the Commission's ownership rules. To the extent that JSAs may raise competitive concerns, Paxson argued that such concerns can be addressed by antitrust review by the Department of Justice.[252]

120. Diversified also opposed making same-market JSAs attributable under any circumstances, even if the parties have other relationships which relate to the debt or equity of the station in question. Diversified cited the cooperative benefits of JSAs, in terms of advertising sales and other matters, that do not require stations to give up their independence. Diversified also argued that the Commission has not presented evidence demonstrating that licensees are losing ultimate control over their stations through JSAs. According to Diversified, changing Commission policy now to regulate JSAs more strictly is unwarranted, especially in light of Congressional deregulation of the telecommunications industry and increasing competition from other video operators within the video marketplace.[253]

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[249] *Attribution Notice*, 10 FCC Rcd at 3649-3651.

[250] *Attribution Further Notice*, 11 FCC Rcd at 19911-12.

[251] Comments in response to Attribution Further Notice of Paxson at 27.

[252] Comments in response to Attribution Further Notice of Paxson at 29. We note that several issues raised in the *Attribution Further Notice* related to JSAs were not addressed by commenters. These included questions concerning typical contractual terms of JSAs (contract lengths, renewability, compensation, and package deals), whether the broker gets involved in station operations, and whether time brokerage agreements usually accompany JSAs.

[253] Comments in response to Attribution Further Notice of Diversified at 6-7.

121. BET and DOJ argued that JSAs should be attributable. DOJ specifically focused on JSAs between same-market radio stations. According to BET and DOJ, control over spot sales by one station affords significant power over the other, and non-attribution of JSAs would allow entities to bypass restrictions on national and local ownership and increase consolidation in the TV market.[254] BET contended that such consolidation would adversely affect competition by increasing barriers for new entrants.[255] DOJ further contended that since radio JSAs place pricing and output decisions for the affected stations under the control of a single firm, competitive rivalry between those stations is eliminated, just as it would be in a merger. According to DOJ, the competitive concerns that arise from increased concentration in a market, therefore, are directly implicated by radio JSAs. DOJ also recommended that the Commission adopt rules requiring the disclosure of radio JSAs to the Commission to enable monitoring of these arrangements by the Commission and antitrust enforcement authorities.[256]

122. Decision. We will not attribute JSAs. Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be attributed.[257] We define JSAs as contracts that affect primarily the sales of advertising time, as distinguished from LMAs, which may affect programming, personnel, advertising, physical facilities, and other core operations of stations. We note that in our *DTV Fifth Report and Order*, we stated that we would look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology.[258] JSAs may be one such joint business arrangement. We recognize the significant competitive concerns about same-market radio JSAs raised by DOJ, but we also note that the factors considered by DOJ and the Commission in analyzing business arrangements may differ in some respects. Although both DOJ and the Commission are concerned about the competitive consequences of business agreements such as JSAs, our concerns are not identical. DOJ's comments explicitly recognize that in addition to competition issues, the Commission is also concerned with issues of diversity and reducing unnecessary administrative burdens.[259] Some JSAs may actually help promote diversity by enabling smaller stations to stay on the air. Furthermore, to reduce administrative burdens, we will not require the routine filing of JSAs with the Commission.

123. Accordingly, after weighing competition, diversity, and administrative concerns, we decline

[254] Comments in response to Attribution Further Notice of BET at 6; DOJ Letter at 8-9.

[255] Comments in response to Attribution Further Notice of BET at 6.

[256] DOJ Letter at 9-10.

[257] As stated in the *Attribution Notice*, in considering revisions to the mass media attribution rules, we seek to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under the multiple ownership rules. Our judgment as to what level of "influence" should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions. *Attribution Notice*, 10 FCC Rcd at 3609-10.

[258] *See DTV Fifth Report and Order*, 12 FCC Rcd at 12834-35.

[259] DOJ Letter at 7.

to impose new rules attributing JSAs as long as they deal primarily with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs.[260] We will retain our current policies concerning JSAs.[261] Furthermore, in the absence of specific evidence of widespread abuse of JSAs by broadcasters, we also decline to adopt the general disclosure and reporting requirement for radio JSAs recommended by DOJ in its comments. We will, however, require broadcasters who have entered into JSAs to place such agreements in their public inspection files, with confidential or proprietary information redacted where appropriate.[262] This requirement will facilitate monitoring of JSAs by the public, competitors and regulatory agencies. We do, however, retain discretion, in any event, to review cases involving radio or television JSAs on a case by case basis in the public interest, where it appears that such JSAs do pose competition or other concerns.[263] Finally, we emphasize that all JSAs are of course still subject to antitrust laws and independent antitrust review by the Department of Justice.[264]

F. **Partnership Interests**

124. Background. Under the Commission's current attribution rules governing partnership interests, general partners and non-insulated limited partnership interests are attributable, regardless of the amount or percentage of equity held. An exception from attribution applies only to those limited partners who meet the Commission's insulation criteria and certify that they are not materially involved in the management or operations of the partnership's media interests.[265]

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[260] With respect to attribution of LMAs, see ¶¶ 83-99, *supra*.

[261] As we reiterated in the *Attribution Further Notice*, separately owned stations can function cooperatively in terms of advertising sales and other aspects "so long as each licensee retains control of its station and complies with the Communications Act, the Commission's rules and policies and the antitrust laws." *Attribution Further Notice*, at n. 57, *quoting*, *Radio Ownership Order*, 7 FCC Rcd at 2787.

[262] We will accordingly amend Section 73.3526 of the Commission's Rules, 47 C.F.R. § 73.3526, which sets forth the public inspection file requirements for broadcasters, and Section 73.3613(e) of the Commission's Rules, 47 C.F.R. § 73.3613(e), which discusses station agreements that must be kept on file at the station and made available for inspection by Commission personnel upon request.

[263] *See, e.g., Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135, 19142 (1996).

[264] *See Radio Ownership Order*, 7 FCC Rcd at 2787; *Notice of Proposed Rulemaking, Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3281 (1991).

[265] These "insulation criteria" include the following: (1) the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company; (2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises; (3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its business; (4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions; (5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) the limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the

125. The *Attribution Notice* asked for comment on whether the insulation criteria remain effective and specifically whether the insulation criteria needed to be tightened or relaxed to meet the needs of certain new types of business entities. For example, widely-held limited partnerships, and in particular business development companies, may be required by federal and state statutes to grant voting rights to limited partners in such matters as the selection and removal of general partners. However, the insulation criteria require that such voting rights be restricted, except under certain circumstances, in order to support a presumption of partner non-involvement in the management of the partnership. The *Attribution Notice* inquired whether the insulation criterion should be relaxed to remove this potential conflict with state law, or whether equity benchmarks combined with a more limited relaxation of the insulation criteria should be applied to these widely-held limited partnerships. We noted that commenters in response to the *Capital Formation Notice* had argued that allowing specific voting rights would not compromise our attribution rules since: (1) the remaining insulation criteria are sufficient to prevent material involvement of a partnership member in media operations; and (2) the dispersed interests in a widely-held limited partnership would preclude member involvement in management and operations.[266]

126. In addition, the *Attribution Notice* asked whether an equity benchmark, such as 5 percent, should be used to establish attribution with respect to all "widely-held" limited partnerships, and if so, how should the Commission define widely-held limited partnerships, and what factors could be used to guarantee that these entities remain widely-held. More generally, the *Attribution Notice* asked whether an equity benchmark, under which investments below the threshold would be exempted from the insulation criteria and would be held non-attributable, should be applied to all partnership forms, widely-held or not. In this latter case, the *Attribution Notice* asked whether we should set the equity benchmarks for partnership interests along lines similar to those used for voting corporate equity interests. We stated, however, that, based on the record thus far, we were not inclined to apply an equity benchmark to limited partnerships but would instead retain the insulation criteria, and that parties that disagreed must provide us with more data and analysis to demonstrate that our earlier decision to apply the insulation criteria is no longer justified. We also asked for information on the financial and legal structures of limited partnerships to enable us to determine whether there is a uniform equity level below which we need not be concerned with the application of the insulation criteria.[267]

127. <u>Comments</u>. No commenters favored adding to the current list of insulation criteria. M/C asked the Commission to clarify: (1) that when the limited partnership is the licensee, or holds a controlling interest in the licensee, then an insulated limited partner may not serve as an employee or contractor, or perform broadcast-related services to the licensee, but that it is not precluded from providing such general services as "banking, insurance, legal and accounting services, real estate management, and the like"; (2) that no insulation restrictions apply to a limited partner if the limited partnership holds a noncontrolling interest in the licensee; (3) that no insulation restrictions apply to officers and directors of the limited partner when the limited partner is an entity, rather than a natural person; and (4) that an

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business; and (7) the limited partner may not become actively involved in the management or operation of the media businesses of the partnership. *See Attribution Reconsideration*, 58 RR2d at 618-20, *on recon*., 1 FCC Rcd at 802-03.

[266] *Attribution Notice*, 10 FCC Rcd at 3635-36.

[267] *Attribution Notice*, 10 FCC Rcd at 3637-38.

insulated limited partner may vote to remove a general partner for cause.[268]

128. Commenters such as CalPERS, FOE and ALTV argued that the insulation criteria should be modified to avoid conflicts with state law.[269] M/C suggested using RULPA (Revised Uniform Limited Partnership Act) standards or applicable state law requirements in place of the current criteria.[270] Capital Cities/ABC argued that the insulation criteria should be replaced with a simple pledge by the interest holder of non-involvement. Capital Cities/ABC also inquired whether insulation of a network's limited partnership interests precluded an affiliation agreement with the broadcaster.[271] Finally, Fox argued that the insulation criteria should be eliminated, and equity benchmarks substituted in their place.[272]

129. On the issue of equity benchmarks for limited partnerships, CalPERs maintained that the participation and influence of a 5 percent interest holder in a limited partnership is essentially indistinguishable from that of such an interest holder in a corporation and should be treated under identical attribution rules. CalPERS also argued that business development companies should not be treated separately, and stated that it is unclear how to define a widely-held limited partnership.[273] Freeman urged the Commission to adopt a 20 percent equity benchmark for limited partners in investment partnerships, and to retain insulation criteria for partners that exceed the benchmark level. Freeman argued that the insulation criteria are designed for smaller "operating" partnerships, rather than for large "investment" partnerships whose limited partners are mostly institutional investors and that some type of passive investor approach should be adopted to encourage investments from this latter form of limited partnership.[274] Finally, M/C also favored using an equity benchmark approach, if a control standard is not adopted.[275]

130. Decision. We see no reason to revise our previous decision to treat limited partnership interests as distinct from corporate voting equity interests,[276] and therefore elect not to adopt equity

[268] Comments in response to Attribution Notice of M/C at 30-31. CalPERS and Freeman Spogli & Co., Inc. ("Freeman") echoed this last question. Comments in response to Attribution Notice of CalPERS at 7; Comments in response to Attribution Notice of Freeman at 7. Goldman also sought clarification on whether limited partners are precluded from providing investment banking services to the licensee under the insulation criteria. Comments in response to Attribution Notice of Goldman at ii.

[269] Comments in response to Attribution Notices of CalPERS at 6; Comments in response to Attribution Notice of FOE at 10-12; Comments in response to Attribution Notice at 8.

[270] Comments in response to Attribution Notice of M/C at 24.

[271] Comments in response to Attribution Notice of Capital Cities/ABC at 11.

[272] Comments in response to Attribution Notice of Fox at 18-21.

[273] Comments in response to Attribution Notice of CalPERS at 2.

[274] *Id.*

[275] Comments in response to Attribution Notice of M/C at 25-27.

[276] *Attribution Further Reconsideration*, 1 FCC Rcd at 803-04.

benchmarks for limited partnership interests. As we stated in the *Attribution Further Reconsideration*, "[t]he partners in a limited partnership, through contractual arrangements, largely have the power themselves to determine the rights of the limited partners."[277] Therefore, the insulation criteria adopted by the Commission serve to identify those situations within which it is safe to assume that a limited partner cannot be "materially involved" in the media management and operations of the partnership.[278] As we also stated therein, the powers of a limited liability holder to exert influence or control are not necessarily proportional to their equity investment in the limited partnership, since the extent of these powers can be modified by the contractual arrangements of the limited partnership.[279] In the *Attribution Notice*, we stated our disinclination to change our approach of applying insulation criteria in favor of an equity benchmark, and we have not been provided sufficient evidence to revise that view and to indicate that these original reasons for declining to adopt an equity benchmark for limited partnerships are no longer valid.

131. We also see no need at this time to add to, relax, or otherwise revise our limited partnership insulation criteria. Some commenters suggested that the insulation criteria should be modified to eliminate conflicts with state law, or that RULPA or other relevant standards should be used in their place. However, in our *Attribution Reconsideration*, the Commission decided for several reasons to abandon the use of RULPA, combined with a no material involvement standard, as a standard for judging whether limited partners were exempt from attribution.[280] First, we judged the joint use of these two disparate standards for determining limited partner exemptions from attribution to be unnecessarily complicated. Second, we noted that there was a lack of uniform interpretation of the RULPA provisions, and that the scope of permissible limited partner activities was not statutorily set by RULPA, but rather was determined by the limited partnership agreement itself. Third, we determined that reliance on the RULPA provisions did not provide sufficient assurance that limited partners would not significantly influence or control partnership affairs. We are convinced that these conclusions remain valid today, and therefore we see no reason to revise our insulation criterion in favor of a RULPA standard. We also feel that similar considerations apply to state laws that regulate limited partnership activities, since these statutes may vary significantly from state to state, and may fail to provide sufficient assurance that the limited partner will lack the ability to significantly influence or control the partnership's media activities.

132. We will not create exceptions for widely-held limited partnerships, such as Business Development Companies, from the current insulation criteria applicable to limited partnerships or otherwise revise those insulation criteria. The essential character of these new business forms for determining attributable interests is the contractual flexibility they allow in setting up and managing the association. Therefore, we believe that the insulation criteria are needed for these business forms to insure "lack of material involvement" on the part of investors. This would imply that in some limited number of cases, interests may not be insulated because of state laws that require investor rights that conflict with the insulation criterion. However, commenters have not provided sufficient evidence concerning the number or importance of such instances that would compel the Commission to create special exemptions

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Attribution Reconsideration*, 58 RR 2d at 616-18.

for these specialized business forms. Since these entities are allowed greater contractual flexibility under state law than are limited partnerships, we believe that greater caution is warranted in dealing with these novel forms. Further, we have not been presented with evidence to demonstrate that the current insulation criteria are no longer valid or effective in achieving their goals.

133. A number of commenters have asked us to clarify certain issues with respect to the scope or other aspects of the insulation criteria. We do not believe that this is the proper forum for declaratory rulings as to the scope of the insulation criteria. Indeed, the questions raised by commenters as to the application of the criteria to specific activities are best resolved by the Commission on a case-by-case basis based on the facts of the case. In addition, some of the proposed clarifications would, in effect, amount to a relaxation of the criteria. For example, Capital Cities/ABC asked the Commission to confirm that an insulated limited partner's interest in a licensee does not preclude the interest holder from also holding an affiliation agreement with the licensee.[281] However, a contractual arrangement to provide programming would be inconsistent with the insulation criterion that "the limited partner may not perform any services for the partnership materially relating to its media activities,"[282] and therefore would not allow insulation of the limited partner's interest. As discussed above, we decline to relax the insulation criteria. Moreover, we believe that the insulation criteria have worked effectively in the past, and that there is no need for further clarification on a general basis in this Report and Order. Any issues that may arise as to the application of the criteria to particular transactions will be resolved on a case-by-case basis.

G. LLCs and Other Hybrid Business Forms

134. Background. In the *Attribution Notice*, we sought comment as to how we should treat, for attribution purposes, the equity interest of a member in a limited liability company or LLC, a then relatively new form of business association regulated by state law, or in other new business forms, such as Registered Limited Liability Partnerships ("RLLPs").[283] LLCs are, in general, unincorporated associations that possess attributes of both corporations and partnerships. The specific attributes of LLCs may vary, since their form is regulated by state statutes.[284] LLCs are, however, generally intended to afford limited liability to members, similar to that afforded by the corporate structure, while also affording the management flexibility and flow-through tax advantages of a partnership, without many of the organizational restrictions placed on corporations or limited partnerships.[285] Depending on the

[281] Comments in response to Attribution Notice of Capital Cities/ABC at 11.

[282] See (6) in note 265, *supra*.

[283] Some states have enacted statutes permitting partnerships to elect to become RLLPs. RLLPs afford the benefits of a partnership, while permitting a mid-level of liability protection, unlike LLCs, which provide full limited liability protection. *Attribution Notice*, 10 FCC Rcd at 3639 n. 120.

[284] As of August, 1996, all 50 states and the District of Columbia had enacted statutes permitting LLCs. Larry E. Ribstein and Robert R. Keatinge, *Limited Liability Companies* § 1.06 (1996). For a general discussion of LLCs, see *id.*, Vol. 1.

[285] Limited liability means that no owner as such is vicariously liable for the obligations of the LLC. *See* Larry E. Ribstein and Robert R. Keatinge, *supra*, § 1.04. Unlike a limited partnership, which must have at least one general partner who has unlimited liability, all the members of an LLC may have limited liability. Additionally, a

requirements of the applicable state statute, LLCs afford their members broad flexibility in organizing the management structure and permit members to actively participate in the management of the entity without losing limited liability. Thus, with some variation depending on the applicable statute, LLCs may be organized with centralized management authority residing in one or a few managers (who may or may not be members) or decentralized management by members.[286]

135. In the *Attribution Notice*, we tentatively proposed to treat LLCs and RLLPs like limited partnerships and adopted that proposal as an interim processing policy. Thus, membership in an LLC or RLLP would be attributed unless the applicant certifies that the member is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the LLC or RLLP. We proposed that such certification should be based on our limited partnership insulation criteria and invited comment on whether those insulation criteria developed with respect to limited partnerships are sufficient to insulate members of LLCs and RLLPs or whether other criteria would be more effective.[287] We also tentatively concluded that we were not prepared to adopt an equity benchmark for non-insulated LLC interests, but we invited comment on that conclusion. In addition, we invited comment on whether, if we adopt the certification approach, we should, either routinely or on a case-by-case basis, require parties to file copies of the organizational filings and/or operating agreements with the Commission when an application is filed.[288] Finally, we asked whether we should differentiate our treatment of LLCs based on whether their management form is centralized or decentralized.

136. Comments. Capital Cities/ABC, FOE, and M/C argued that the Commission should treat LLCs under the current limited partnership attribution rules, since an LLC form of business association is pursued mostly for its tax and liability advantages.[289] Capital Cities/ABC did urge the Commission to relax the insulation criterion that requires the non-involvement of equity holders in the management and operations of the media-related interests of the partnership or association, and rather to allow limited partners to certify in writing that they have not and will not attempt to exercise any influence over the

limited partner may lose limited liability protection if he participates actively in the management of the partnership. By contrast, members of an LLC may maintain limited liability while actively participating in the management of the LLC. *Attribution Notice*, at 3639 n. 123.

[286] Larry E. Ribstein and Robert R. Keatinge, *supra* at § 8.02.

[287] The insulation criteria required to be contained in the limited partnership agreement are discussed in note 265 *supra*. We noted our disinclination to treat LLCs as we currently treat corporations, exempting from attribution the interests of "nonvoting" shareholders without regard to the presence or absence of insulating provisions in an operating agreement. We added that this interim view reflects both our relative lack of experience with this new business form and also our concern that there are no requirements intrinsic to this business form to require members to be uninvolved in the management of the business, absent insulation provisions agreed to by them. *Attribution Notice*, 10 FCC Rcd at 3640-41. We invited comment on whether we should provide an exception to our tentative proposal, on a case-by-case basis, where doing so would advance our policy of enhancing opportunities for broadcast station ownership by minorities. *Id.* at 3640.

[288] *Attribution Notice*, 10 FCC Rcd at 3641. We justified such a possible filing requirement because the organizational variation among such entities may be broad.

[289] Comments in response to Attribution Notice of Capital Cities/ABC at 13; Comments in response to Attribution Notice of FOE at 12-14; Comments in response to Attribution Notice of M/C at 31.

core operations of a broadcast station.[290] FOE argued that the insulation criterion should approximate the Revised Uniform Limited Partnership Act ("RULPA") rules for limited partnerships, under which limited partners can consult with or advise the general partner, attend a partners' meeting, and vote with respect to major financial decisions of the partnership without losing limited liability.[291] Finally, M/C suggested that an LLC be allowed to insulate their interests by incorporating the insulation criteria directly in their governing documents, and that non-insulated LLC interests should be judged by an equity benchmark based on a "control" test.[292]

137. Tribune suggested that the Commission should differentiate LLCs organized as corporations from those organized as partnerships, and apply the corporate attribution rules and the partnership attribution rules, respectively, to these different organizations, which would correspond to the differentiation made by the IRS in treating LLCs for tax purposes.[293] In contrast, Fox argued that all LLCs should be treated as corporations and only those investors who are part of the "control group" should be held attributable, or alternatively, at a minimum the corporate form of an LLC should be treated under voting equity attribution rules.[294] In addition, Qwest argued that the single-majority shareholder rule should be available for LLCs, in those cases where one owner holds over 50 percent of the ownership rights.[295] Fox also argued that programming agreements between program suppliers and LLCs should not be attributable.[296] Finally, CalPERS argued that a uniform equity benchmark should be applicable to all organizational forms.[297]

138. Decision. We adopt our tentative conclusion in the *Attribution Notice* to treat LLCs and other new business forms including RLLPs under the same attribution rules that currently apply to limited partnerships. The insulation criteria that currently apply to limited partnerships would apply without modification to these new business forms. Therefore, LLC or RLLP owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations of the media-related activities of the LLC or RLLP based on existing insulation criteria. We will not distinguish among LLCs based on whether they adopt a more centralized or decentralized form.

139. We believe that this decision is justified for the reasons discussed in the *Attribution Notice*, which are supported by the record. State laws grant more liberal organizational powers to LLCs and

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290 Comments in response to Attribution Notice of Capital Cities/ABC at 12.

291 Comments in response to Attribution Notice of FOE at 13-14.

292 Comments in response to Attribution Notice of M/C at 31.

293 Comments in response to Attribution Notice of Tribune at 6-14.

294 Comments in response to Attribution Notice of Fox at 6.

295 Comments in response to Attribution Notice of Qwest at 8-9.

296 Comments in response to Attribution Notice of Fox at 19.

297 Comments in response to Attribution Notice of CalPERS at 18.

RLLPs than to limited partnership forms. Thus, equity holders can retain their limited liability even though they participate in the management of the entity. Under these circumstances, we believe that it is important to apply the insulation criteria to assure that those equity holders that purport to be insulated from management are in fact so insulated. In addition, even when an LLC adopts a "corporate form" of organization, there is still sufficient discretion afforded by state law so that the owners of the enterprise may retain some level of operational control on their own part. The organizational restrictions applicable to corporations do not necessarily apply. The Commission could also apply a control test to determine attribution, or require these companies to incorporate insulation criteria directly into their governing documents. However, these case-by-case solutions would reduce regulatory certainty and delay processing of applications. We also believe that using equity benchmarks would be inappropriate for reasons similar to those discussed above in terms of limited partnerships. In addition, we have been applying the interim processing policy, it has worked well and effectively, and we see no reason to change it.

140. We agree with those commenters who argued that business associations, such as LLCs, are similar to partnership forms in terms of organizational flexibility, and we will treat them comparably for attribution purposes. Indeed, the greater flexibility in governance granted such entities under state law, to elect either a "corporate form" or a "partnership form" of governance, underscores the need for caution in our approach to the attribution of new business forms. The current insulation criteria serve to directly address our concerns over the influence of an interest holder. Creating specialized attribution standards for new business forms as they arise will serve only to complicate the attribution rules, without better addressing our core concerns over the potential influence exerted by the owners of a particular entity, however organized.[298]

141. To reduce paperwork burdens, we will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will require the same "non-involvement" statement for LLC members who are attempting to insulate themselves from attribution that we require for limited partners who are attempting to insulate themselves. We will also require LLC members who submit the foregoing statement to submit a statement that the relevant state statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Attribution Notice*,[299] that may arise if we require filing of organizational documents.

H. Cable/MDS Cross-Ownership Attribution

142. Background. The *Attribution Further Notice* considered changes to the cable/Multipoint

[298] In the *Attribution Notice*, we sought comment as to whether we should create an exception, on a case-by-case basis, to the application of limited partnership attribution criteria to LLCs where doing so would advance our policy of enhancing opportunities for broadcast station ownership by minorities. *Attribution Notice*, 10 FCC Rcd at 3640. However, relief from the attribution rules based on these policies is more properly addressed in the context of the appropriate minority/female ownership proceeding. *Notice of Proposed Rule Making* in MM Docket Nos. 94-149 and 91-140, 10 FCC Rcd 2788 (1995).

[299] *Attribution Notice*, 10 FCC Rcd at 3641.

Distribution Service ("MDS")[300] cross-ownership attribution rule. Section 21.912 of the Rules, which implements Section 613(a) of the Communications Act, generally prohibits a cable operator from obtaining an MDS authorization if any portion of the MDS protected service area overlaps with the franchise area actually served by the cable operator's cable system.[301] In addition, Section 21.912(b) prevents a cable operator from leasing MDS capacity if its franchise area being served overlaps with the MDS protected service area.[302] For purposes of this rule, the attribution standard used to determine what entities constitute a "cable operator" or an MDS licensee, is generally defined by the Notes to § 76.501..[303] In sum, we presently consider a cable operator to have an attributable interest in an MDS licensee if the cable operator holds five percent or more of the stock in that licensee, regardless of whether such stock is voting or non-voting. We also attribute all officer and director positions and general partnership interests. However, unlike the broadcast attribution standard, our current cable/MDS standard contains no single majority shareholder exception, and attributes limited partnership interests of five percent or greater, notwithstanding insulation.

143. As we recognized in the *Attribution Further Notice*, the strictness of the existing attribution standard severely limits investment opportunities that would advance our goals of strengthening wireless cable and providing meaningful competition to cable operators. We also saw no reason to have different attribution criteria for broadcasting and MDS, and reiterated our previous observation that the broadcast attribution criteria could be used for the purpose of determining attribution in the context of cable/MDS cross-ownership.[304] Thus, in the *Attribution Further Notice*, we invited comment on whether we should apply broadcast attribution criteria, as modified by this proceeding, in determining cognizable interests in MDS licensees and cable systems. In addition, we sought comment as to whether we should add an equity/debt plus attribution rule where the competing entity's holding exceeds 33 percent or some other benchmark. We further stated our belief that these proposed modifications of our attribution rules would increase the potential for investment and further diversity, while preventing cable from warehousing its potential competition.[305]

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300 For purposes of this item, MDS also includes single channel Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS").

301 47 C.F.R. § 21.912(a); *see also Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6828, 6843 (1993) ("*Implementation Order*"), *reconsidered on other grounds*, 10 FCC Rcd 4654 (1995). We note here that the statutory and rule cross-ownership prohibitions do not apply if the cable operator is subject to "effective competition" in its franchise area. *See* 47 U.S.C. § 533(a)(3); 47 C.F.R. § 21.912(e)(3).

302 47 C.F.R. § 21.912(b).

303 47 C.F.R. § 21.912 (note 1(A)).

304 *Attribution Further Notice* at 11 FCC Rcd at 19916, citing *Implementation Order* at 6843. These criteria are contained in the Notes to Section 73.3555 of our Rules, 47 C.F.R. § 73.3555.

305 *Attribution Further Notice*, 11 FCC Rcd at 19916, citing S. Rep. No. 92, 102d Cong., 1st Sess. 46-47 (1991).

144. Comments. The Wireless Cable Association International, Inc. ("Wireless Association")[306] and two finance companies, Blackstone Group L.P. ("Blackstone") and Boston Ventures Management, Inc. ("Boston Ventures"), filed comments on the cable/MDS cross-ownership attribution issues in this proceeding. Reply comments were filed by the Wireless Association, Blackstone, the National Cable Television Association ("NCTA") and GTE Service Corporation ("GTE").

145. All of the commenting parties, except GTE, agreed that the existing attribution rules for cable/MDS cross-interests are overly restrictive and that the less restrictive broadcast attribution rules should apply. Generally supporting our proposal to apply the modified broadcast attribution criteria, the commenters contended that the current attribution rules should be relaxed because they have severely restricted investment for the development of both the MDS and the cable industries.[307] In particular, Blackstone maintained that, if given the choice between two investment opportunities, investors are more likely to choose an established industry, like cable, over a fledgling industry, such as MDS. As a result, the capital available to the newer industry is thereby diminished. Blackstone further asserted that, by prohibiting investments essential to the development of both industries, the current attribution rules also harm passive investors, such as investment companies and their clients, who would not be involved in the day-to-day activities of the cable or MDS companies.[308]

146. The Wireless Association, moreover, agreed with our assessment that there is no reason to have different attribution criteria for broadcasting and MDS. In addition, it stated that the cable/MDS cross-ownership rule was adopted not to preserve diversity of broadcast programming, but to prevent cable operators from precluding competition by warehousing MDS spectrum.[309] As for our current cable/MDS attribution rules, the Wireless Association maintained that attributing small equity interests and insulated limited partnership interests chills investment in the wireless cable industry by institutional investors or venture capital firms that have already invested or would like to invest in the cable industry.[310]

147. Notwithstanding their general support, the Wireless Association and Boston Ventures opposed our proposed 33 percent EDP provision.[311] According to the Wireless Association, the Commission "should not put any sort of artificial cap on simultaneous investment in cable and wireless

[306] It has since changed its name to the Wireless Communications Association International, Inc.

[307] For example, Blackstone contended that, where no cable/MDS service area overlap exists and the cable and MDS companies share a common institutional investor, each company would have to forego opportunities to expand into the service area of the other, even though the institutional investor would have no input into the day-to-day operations of either company. Comments in response to Attribution Further Notice of Blackstone at 5.

[308] Blackstone cited a specific example of the difficulties it experienced as a finance company seeking to make investments within the confines of our current attribution standard. Comments in response to Attribution Further Notice of Blackstone at 3-4.

[309] Comments in response to Attribution Further Notice of Wireless Association at 7.

[310] Comments in response to Attribution Further Notice of Wireless Association at 7.

[311] Comments in response to Attribution Further Notice of Wireless Association at 9; Comment in response to Attribution Further Notices of Boston Ventures at 5.

cable industries absent any indicia that the investor holds voting control."[312] The Wireless Association and Boston Ventures recommended, moreover, that the modified broadcast attribution criteria, with the exception of the 33 percent "equity or debt plus" provision, likewise be applied to the cable/MDS and cable/ITFS cross-leasing rules.[313] Boston Ventures asserted that relaxation of the attribution rules in this way will give investors additional flexibility to structure their cable and wireless cable investments, reduce transactional costs involved in obtaining waivers, and thereby provide additional capital to the cable and wireless cable industries.[314] In addition, the Wireless Association pointed out that the cable/ITFS cross-leasing rule, 47 C.F.R. § 74.931(h) and (i), is not followed by a supplemental note defining the ownership attribution standard applicable to that rule. Given this absence, the Wireless Association suggested that we include a supplemental note stating that the attribution standard applicable to cable/MDS cross-ownership also applies to the cross-leasing rules.[315]

148. In their reply comments, the Wireless Association and Blackstone essentially reaffirmed the statements made in their respective comments. In order to allow greater investment, Blackstone also lent its support to Boston Ventures' proposal that we adopt even less restrictive attribution rules that track those used for CMRS spectrum aggregation limits.[316] The Wireless Association, on the other hand, focused on our proposed 33 percent EDP provision. According to the Wireless Association, the existing cable/MDS attribution rules chill investment in the wireless cable industry, and this problem would not be alleviated by the 33% (or any other) equity or debt "cap" where the investor does not hold voting control. The Wireless Association asserted that we recently recognized this problem when we established cable/LMDS cross-ownership rules, which include no restrictions on debt. Since wireless cable operators will be competing directly with LMDS operators for outside investment, the Wireless Association claims it would be unfair to impose a debt limitation on cable/MDS cross-ownership that would place the wireless cable industry at a disadvantage.[317] It noted that no commenter expressed support for applying an EDP test to the cable/MDS cross-ownership rule. Further, the Wireless Association contended that the main issue being debated regarding the EDP test (the influence of program providers, especially of networks over their affiliates) has no relevance to the cable/MDS cross-ownership rule, which was adopted to prevent the warehousing of spectrum by cable operators.[318] Lastly, the Wireless Association addressed ABC's suggestion that there should be a presumption of attribution for an investment or equity stake over 50%. To the extent that this would also apply to cable/MDS cross-ownership, the Wireless Association

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[312] Comments in response to Attribution Further Notice of Wireless Association at 9.

[313] Comments in response to Attribution Further Notice of Wireless Association at 9; Comments in response to Attribution Further Notice of Boston Ventures at 5.

[314] Comments in response to Attribution Further Notice of Boston Ventures at 5.

[315] Comments in response to Attribution Further Notice of Wireless Association at 10.

[316] Comments in response to Attribution Further Notice of Blackstone at 2-3, citing 47 C.F.R. § 20.6(c) & (d). The Commission is currently considering modifications to the CMRS attribution standard. *Notice of Proposed Rule Making* in WT Docket Nos. 98-205 & 96-59 & GN Docket No. 93-252, 13 FCC Rcd 25132 (1998).

[317] Comments in response to Attribution Further Notice of Wireless Association at 1-2.

[318] *Id.* at 3.

opposed ABC's proposal, stating that the record does not indicate a basis for imposing any "equity or debt plus" test at all.[319]

149. In addition, Boston Ventures recommended that we generally permit investments in voting stock within the limits used to regulate CMRS spectrum aggregation. This means that voting stock and other nonpassive investments that exceed 10 percent, but that are not greater than 20 percent, should be considered nonattributable. Boston Ventures further stated that, as a safeguard, we could require a party to demonstrate that diversity and competition will not be harmed by the proposed investment in cases where the overlap is more than *de minimis*. Then, if experience shows this policy has not harmed competition or diversity, we could simply consider any investment under 20 percent as nonattributable.[320]

150. NCTA generally supported relaxing the existing cable/MDS attribution rules and, in particular, supported the increased ownership thresholds, non-voting stock exemptions and exemptions for certain limited partnerships that were proposed in the *Attribution Further Notice*. However, like the Wireless Association and Boston Ventures, NCTA opposed the proposed 33 percent EDP provision. NCTA maintained that the underlying cable/MDS cross-ownership rule is unnecessary because cable operators have no incentive to warehouse MDS spectrum when they face so much competition from other video programmers.[321] NCTA, along with the Wireless Association and Boston Ventures, urged us to amend, or request Congress to amend, the substance of other MDS, cable, and ITFS cross-ownership and cross-leasing restrictions.[322]

151. As the only party opposing any modification to the cable/MDS attribution rules, GTE argued that a dominant wireline carrier[323] would have an unfair competitive advantage if the rules were modified. First, such a carrier "could use its existing headend facilities for MDS transmission, resulting in possible cross-subsidization of wireline cable and the MDS wireless offering that could increase the costs underlying the franchise area's regulated cable television rates."[324] Another means by which a dominant wireline carrier could gain an unfair competitive advantage, GTE argued, involves our recent approval of Basic Trading Area ("BTA") rights for MDS licensees. According to GTE, a BTA will sometimes represent an area larger than a dominant wireline cable operator's franchise area. If the dominant wireline cable operator had an economic interest in some of the MDS channels within the BTA, then a non-affiliated MDS operator would find it harder to compete. GTE also asserted that the dominant wireline operator could use the incentive of the larger BTA area to subsidize its wireline cable operation and insulate itself from competitive pressures. Still another competitive consideration, GTE maintained,

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[319] *Id.* at 2.

[320] Comments in response to Attribution Further Notice of Blackstone at 6.

[321] Comments in response to Attribution Further Notice of NCTA at 3-4.

[322] Comments in response to Attribution Further Notice of Blackstone at 3, Comments in response to Attribution Further Notice of NCTA at 4-7; Comments in response to Attribution Further Notice of Wireless Association at 4-5.

[323] GTE defined as dominant any entity controlling 50% of the multichannel market, which includes wireline cable, MDS, and DBS.

[324] Comments in response to Attribution Further Notice of GTE at 3-4.

concerns a dominant wireline cable operator's potential ability "to 'triple dip' by gaining economic benefit from its programming ownership, its wireline cable delivery operation, and the wireless MDS delivery operation within a BTA market area."[325] Lastly, GTE also discussed issues concerning the substance of cable/MDS cross-ownership, as distinguished from how to attribute ownership.[326] Those matters, however, are beyond the scope of the *Attribution Further Notice*.

152. Decision. After reviewing all of the comments submitted on our proposals to relax the cable/MDS attribution rules, we are persuaded that the broadcast attribution criteria, as modified by this proceeding, should be applied in determining what interests in MDS licensees and cable systems are cognizable. We continue to see no reason, and none has been suggested by any of the commenters, that would warrant different attribution criteria for broadcasting and MDS. As we have discussed here and in the *Attribution Further Notice*, investment opportunities critical to the development of MDS as a competitive service to cable have been severely limited by the current attribution standard.[327] Therefore, continued application of the current cable/MDS attribution standard would frustrate our goals of strengthening wireless cable, providing meaningful competition to cable operators and benefitting the public interest by offering consumers more choice in their selection of video programming providers. In view of these considerations and the record before us, we conclude that the public interest would be better served if the modified broadcast attribution criteria were employed for the purpose of determining attribution in the context of cable/MDS cross-ownership. Such modification of our existing attribution standard will increase investment possibilities without adversely affecting competition. Thus, we believe this attribution standard will identify ownership interests with the potential to exert significant influence on a licensee's management and operations, and the cross-ownership provision by its very nature will address the concern that common ownership of different multichannel video programming distributors may reduce competition and limit diversity. We are persuaded, moreover, that relaxing our current attribution standard will have genuine meaning for institutional investors who, though not involved in the day-to-day activities of either cable or MDS companies, have been precluded from making investments in MDS due to pre-existing or anticipated investments in cable.

153. We are not persuaded by GTE's arguments that the proposed modifications to our attribution rule will give dominant wireline carriers an unfair competitive advantage. As we have already determined, the modified, less restrictive broadcast attribution criteria, coupled with the adoption of an EDP standard, will enable the MDS industry to avail itself of increased investment opportunities. This will help, rather than hinder, wireless cable's efforts to become a stronger, more viable competitor to cable, while safeguarding against the anticompetitive concerns which the cable/MDS cross-interest rules were designed to prevent. Since we remain convinced that shareholders with a 5 percent or greater ownership interest may well be able to exert significant influence on a licensee's management and operations, we reject Boston Ventures' proposal that we adopt even less restrictive attribution rules that track those used for CMRS spectrum aggregation limits.

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[325] Comments in response to Attribution Further Notice of GTE at 4.

[326] Comments in response to Attribution Further Notice of GTE at 4-5.

[327] We have recently taken additional steps to expand investment opportunities to further strengthen MDS. *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998), *recon.*, FCC 99-178, released July 29, 1999.

154. The Wireless Association also fails to persuade us that it would be unfair to impose a debt limitation on cable/MDS cross-ownership when no such limitation has been placed on cable/LMDS cross-ownership. We consider it significant that, unlike our recently adopted cable/LMDS cross-ownership rules, the cable/MDS cross-ownership rule implements a statutory prohibition, Section 613(a) of the Act. Therefore, in revisiting our cable/MDS attribution standard, we must consider both the rule and the statutory implications. As we tentatively concluded in the *Attribution Further Notice*, the potential exists:

> for certain substantial investors or creditors to have the ability to exert significant influence over key licensee decisions through their contract rights, even though they are not granted a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much or more influence or control over some corporate decisions as voting equity holders whose interests are attributable.[328]

That tentative conclusion has been affirmed here, and we believe applies with equal force to our competitive concerns underlying cable/MDS cross-ownership. We have also determined that our broadcast attribution rules will be triggered when the aggregated debt and equity interests in a licensee exceed a 33 percent benchmark. Our EDP broadcast attribution provision is intended to address our concerns that multiple nonattributable interests could be combined to exert influence over licensees such that they should be attributable. Based on the same reasons, we likewise regard the 33 percent EDP provision as an appropriate addition to the modified cable/MDS attribution standard. Furthermore, by adopting the 33 percent EDP provision for cable/MDS attribution, we believe that we are acting in a manner consistent with the statutory directive by furthering congressional intent to promote competition among video providers.

155. Accordingly, we will adopt the broadcast attribution criteria, as modified in this proceeding, for determining cognizable interests in MDS licensees and cable systems. The modified attribution criteria will also apply to the cable/MDS and cable/ITFS cross-leasing rules. A supplemental note will follow those cross-leasing rules and state that the attribution standard applicable to cable/MDS cross-ownership also applies to them. In addition, given the considerations discussed above, and for the same reasons we are adopting the 33 percent EDP provision for the broadcast attribution standard, we will adopt the 33 percent EDP provision as part of the cable/MDS attribution standard. A description of the resulting changes to our existing cable/MDS attribution standard follows.

156. In assessing cable/MDS attribution, we will distinguish passive investors from non-passive investors, applying the voting stock attribution benchmark applicable to each. As a preliminary matter, the definition of "passive investors" will be identical to that used in the context of broadcast attribution, and thus limited to bank trust departments, insurance companies and mutual funds. Passive investors will be subject to the same 20 percent voting stock benchmark as we adopt today for broadcast passive investors. With regard to a non-passive voting equity benchmark, we have already determined that shareholders with a five percent or greater ownership interest still have the ability to wield significant influence on the management and operations of the firms in which they invest. Therefore, we will continue to apply our five percent benchmark to determine the attributable interests of non-passive

[328] *See Attribution Further Notice*, 11 FCC Rcd at 19904-05.

investors. We believe that employing a more liberal voting stock benchmark for passive investors than that used for non-passive investors will provide the MDS industry with increased access to much needed investment capital, while maintaining the Commission's ability to apply its ownership rules to influential interests.

157. Though positions such as officers and directors will remain attributable interests, we will further relax the current cable/MDS standard by exempting from attribution minority stockholdings in corporations with a single majority shareholder and non-voting stock, to the extent permitted by the other rule changes made in this proceeding. However, here as in broadcasting,[329] we will carefully scrutinize cases to ensure that nonattributable minority or non-voting shareholders are not able to exert greater influence than what their attribution status should allow.

158. We further note that adoption of the EDP attribution rule for cable/MDS will limit, under certain circumstances, the availability of the single majority shareholder and non-voting stock exemptions from attribution. Under the EDP rule as adopted for cable/MDS attribution, where a cable franchise area and an MDS protected service area overlap, we will consider an investor (including a cable operator or MDS licensee) that has already invested in either the cable operator or MDS licensee, to have an attributable interest in the other entity if that interest exceeds 33 percent of the total assets of that entity. Thus, when the investor's total investment in the other entity, aggregating all debt and equity interests, exceeds 33 percent of all investment in that entity (the sum of all equity plus debt), attribution will be triggered. We will use total assets as a base in aggregating the different classes of investment, equity and debt, and will presume that nonvoting stock should be treated as equity.[330] We will set the threshold at 33 percent for the cable/MDS EDP rule because we see no reason to have a different benchmark than that which will be used for the broadcast EDP rule.

159. We will also modify the existing cable/MDS attribution standard with respect to partnership interests and new business forms, such as LLCs and RLLPs, consistent with our treatment of such entities in the broadcast context. First, we will continue to hold all partnership interests attributable, regardless of the extent of their equity interests, unless they satisfy the insulation requirements. However, we will not attribute sufficiently-insulated limited partnership interests when the limited partner certifies that it is not materially involved, directly or indirectly, in the management or operation of the partnership's cable or wireless cable activities.[331] Nor will we adopt voting equity benchmarks for limited partnership interests. A limited partnership interest will not be attributable if the limited partner meets the Commission's insulation criteria and makes the requisite certification. Second, consistent with our earlier findings, we will subject widely-held limited partnerships, such as Business Development Companies, to the same set of attribution rules as limited partnerships. We will also treat LLCs and other new business forms, including RLLPs, under the same attribution rules that currently apply to limited partnerships. We

[329] *See* ¶ 44, *supra.*

[330] *See* ¶ 61, *supra.*

[331] To qualify for the exception from attribution, the limited partner must meet the Commission's "insulation criteria" listed in n. 265, *supra.* A limited partner who is a party to an application for a new MDS station (Form 304), or the assignment (Form 702) or transfer of control (Form 704) of an MDS license and seeks this exemption from attribution must submit, as an exhibit to the application, a certification which addresses the Commission's "insulation criteria."

believe that these changes, which generally relax our existing cable/MDS attribution standard and make them consistent with the broadcast attribution rules, will afford increased opportunities for investment in the wireless cable and cable industries.

1. **Broadcast-Cable Cross-Ownership Attribution Rules**

160. In the *Attribution Further Notice*, we stated that we would address, in this proceeding, the attribution criteria applicable to the broadcast-cable cross-ownership rule, Section 76.501(a) of the Commission's Rules.[332] While we recognized that the attribution standards used in a number of other cable rules were implicitly or explicitly based on Section 76.501 of the Commission's Rules, we stated that we were considering establishing a separate proceeding to modify the attribution criteria for the other cable multiple ownership rules.[333]

161. Accordingly, we will modify the attribution criteria applicable to the cable/broadcast cross-ownership rule to conform to the new broadcast attribution criteria adopted in this Report and Order. In this manner, all the broadcast attribution criteria will remain consistent. When we revised the cross-ownership attribution rules in 1984, we stated that there did not seem to be a justification for separate benchmarks as applicable to cable systems. We did not receive comments in this proceeding to justify treating the cable/broadcast cross-ownership attribution rules differently from the other broadcast attribution rules at issue in this proceeding. We reiterate that the attribution revisions made herein apply only to the cable/broadcast and the cable/MDS cross-ownership rules (and cable/ITFS cross-leasing rules) and that revisions to the other cable attribution rules will be addressed CS Docket No. 98-82.[334] We also note that because these cross-ownership rules apply where the entities at issue are in the same market, these entities will always be subject to the EDP rule assuming that the requisite financial interest is held.

Transition Issues

162. Background. In the *Attribution Notice*, we stated our concern that any action taken in this proceeding not disrupt existing financial arrangements, and accordingly invited comment as to whether we should grandfather existing situations or allow a transition period for licensees to come into compliance with the multiple ownership rules if we adopted more restrictive attribution rules.[335] As we stated in the *Attribution Further Notice*, commenters who addressed this issue in response to the *Attribution Notice* overwhelmingly urged the Commission to grandfather existing interests indefinitely if it adopted more restrictive attribution rules because of the disruptive effect and the unfairness to the parties of mandatory divestiture.[336]

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[332] *Attribution Further Notice,* 11 FCC Rcd at 19897 n. 6.

[333] *Id.* at n. 6. We have, in fact, established a separate proceeding to consider the attribution criteria applicable to the other cable multiple ownership rules. *Notice of Proposed Rule Making* in CS Docket No. 98-82, 13 FCC Rcd 12990 (1998).

[334] *Notice of Proposed Rule Making* in CS Docket No. 98-82, 13 FCC Rcd 12990 (1998).

[335] *Attribution Notice*, 10 FCC Rcd at 3615.

[336] *Attribution Further Notice*, 11 FCC Rcd at 19913-14 & n. 62.

163. In light of significant changes in the multiple ownership rules mandated by the 1996 Act, we sought additional comment on these issues, particularly on the option of a transition period, in the *Attribution Further Notice*. We stated that the impact of attributing previously nonattributable interests after a transition period and following a relaxation of the multiple ownership rules, could be far less onerous than if the attribution rules were changed without such a relaxation of the multiple ownership rules. We tentatively concluded that any grandfathering should apply only to the current holder, and that if the joint holdings were later sold, the ownership grandfathering would not transfer to the assignee or transferee. Further, we tentatively concluded that any interests acquired on or after December 15, 1994, the date of adoption of the *Attribution Notice* in this proceeding, should be subject to the final rules adopted in the *Report and Order* in this proceeding.[337]

164. Comments. ABC supported the Commission's proposed grandfathering rule, *i.e.*, that those interests acquired before December 15, 1994 should not be subject to new attribution rules, as long as they are not assigned or transferred.[338] Tribune urged the Commission to grandfather any interests made attributable in cases conditioned on the outcome of this proceeding if the underlying application for Commission consent was filed before the *Attribution Notice* was adopted in this proceeding, *i.e.*. December 15, 1994.[339] Viacom suggested that the Commission should order that all transactions made subject to the new attribution rules should be brought into compliance within a reasonable time (such as 18 months) of the release date of the order adopting the new attribution rules.[340]

165. Paxson argued that existing station combinations that do not conform to the new rules adopted in this proceeding should be grandfathered and allowed to be sold in combination without the need for additional showings. Further, Paxson stated that if waivers of the new rules are granted, successful applicants should be permitted to sell the affected stations in combination and should not be forced to split them up. Common ownership permitted by waivers should be grandfathered upon sales of the stations. According to Paxson, if the Commission does not accord full grandfathering to existing LMAs and JSAs under new attribution standards, termination of existing business relationships would penalize entities that reasonably relied on an existing regulatory scheme in taking risks to provide expanded service in the public interest.[341]

166. In this same vein, Pappas and Qwest believed that it would be inequitable and constitute a grave injustice to force licensees under a new, radically different guideline to somehow restructure their financial arrangements or potentially lose their station. Therefore, to the extent the Commission revises its attribution rules to prohibit existing financial arrangements which were entered into in reliance upon the Commission's longstanding policies, according to these commenters, they argue that the Commission should grandfather all financial arrangements that were entered into prior to November 5, 1996, when the

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337 *Attribution Further Notice*, 11 FCC Rcd at 19913-15.

338 Comments in response to Attribution Further Notice of ABC at 10.

339 Reply Comments in response to Attribution Further Notice of Tribune Broadcasting Company ("Tribune") at 22-23.

340 Comments in response to Attribution Further Notice of Viacom at 13.

341 Comments in response to Attribution Further Notice of Paxson at 18-19, 30.

Attribution Further Notice was adopted.[342]

167. BET opposed grandfathering existing relationships, arguing that the proposed attribution rule changes should not greatly disrupt existing financial and operational arrangements in light of relaxation of the ownership rules. Instead, BET proposed the use of predictable waivers based on market concentration and size, where the waiver would not increase market consolidation. In addition, BET urged the Commission to adopt a 24-month transition period for relationships that would be affected by a rule change.[343]

168. Decision. We conclude that any interests acquired on or after November 5, 1996, the date of adoption of the *Attribution Further Notice* in this proceeding, should be subject to the rules adopted in this *Report and Order*. We believe this cutoff date is reasonable and appropriate. We proposed the new EDP rule in the *Attribution Further Notice*, and it was therefore then that parties were on notice of the proposed new rule and that any interests acquired on or after that date could be subject to any rule changes. Thus, we believe that the November 5, 1996 grandfathering date is more reasonable than the earlier grandfathering date we proposed.[344] Accordingly, any interests (other than radio LMAs) newly attributable pursuant to this *Report and Order* that would result in violations of the ownership rules, will be grandfathered if the triggering interest was acquired before November 5, 1996. Except in the case of TV and radio LMAs, such grandfathering will be permanent until such time as the grandfathered interest is assigned or transferred.

169. In this Report and Order, we have decided to count attributable radio LMAs for purposes of applying all applicable multiple ownership rules, including the one-to-a-market rule and the radio-newspaper cross-ownership rule, not just the radio duopoly rules. As discussed above, we will treat grandfathering of radio LMAs on case-by-case basis. The issue of grandfathering television LMAs is resolved in the television local ownership proceeding.

170. We will apply the November 5, 1996 grandfathering date to interests, newly attributable under our EDP rule, that would result in new violations of the multiple ownership rules. Such grandfathering will be permanent so long as the interest is not transferred or renewed. Thus, if an inter-market LMA triggers the EDP rule, grandfathering will be for the term of the LMA, since the LMA cannot be renewed. Grandfathering will apply only to the current holder of the attributable interest. If the grandfathered interest is later assigned or transferred,[345] the grandfathering will not transfer to the

[342] Comments in response to Attribution Further Notice of Pappas at 6; Reply Comments in response to Attribution Further Notice of Pappas at 15; Reply Comments in response to Attribution Further Notice of Qwest Broadcasting L.L.C. ("Qwest") at 8.

[343] Comments in response to Attribution Further Notice of BET at 6-7.

[344] While we tentatively concluded in the *Attribution Notice* that any interests acquired on or after December 15, 1994 should be subject to the final rules adopted in the *Report and Order* in this proceeding, we have decided to use the date of adoption of the *Attribution Further Notice* as the grandfathering date.

[345] In the case of an inter-market LMA, this would include both the brokered and the brokering station.

assignee or transferee.[346] New owners cannot demonstrate the same equitable considerations that prompt us to grandfather existing owners whose current interests are now unavoidably placed in violation of the multiple ownership rules based on adoption of the EDP rule. Such new owners will be given a year to come into compliance with the multiple ownership rules.

171. For non-grandfathered interests that are now attributable, *i.e.*, those acquired on or after November 5, 1996, and which must be divested to comply with our multiple ownership rules, we believe that a twelve-month period should be sufficient for parties to identify buyers.[347] Accordingly, parties holding such non-grandfathered interests must come into compliance, filing an appropriate application if necessary, within 12 months of the date of adoption of this *Report and Order*.[348]

172. We note that grandfathering treatment of television LMAs that result in violations of the multiple ownership rules varies depending on whether they are intra-market LMAs that are attributable under the *per se* LMA attribution rule or inter-market LMAs that are attributable under the EDP rule because they are accompanied by a financial investment that exceeds the 33 percent threshold. For intra-market LMAs, the grandfathering period is as discussed in the *TV Local Ownership Report and Order*. Grandfathering for interests newly attributable under the EDP rule is permanent, and, accordingly, for inter-market LMAs attributable under EDP, grandfathering will last for the length of the LMA term since no renewal or transfer is permitted.

173. Different considerations apply to these two kinds of LMAs. As discussed fully above, ¶ 89, *supra*, intra-market LMAs are attributed because they affect the local market. Inter-market LMAs are attributed only under the EDP rule as program supply contracts accompanied by a substantial financial investment. There is no reason to exempt inter-market LMAs from the grandfathering treatment accorded to other program supply contracts newly attributable under the EDP rule because they are accompanied by a financial investment that exceeds the EDP threshold. Indeed, like these other program suppliers, and unlike the holder of an intra-market LMA, the holder of an inter-market LMA can simply come into compliance by adjusting its financial investment so that the EDP threshold is not exceeded.

K. **Ownership Report, Form 323**

174. We intend to modify the Ownership Report form, Form 323, to reflect the addition of the

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[346] This limitation on grandfathering of attributable interests is consistent with past Commission practice. *In re Applications of Stauffer Communications, Inc.*, 10 FCC Rcd. 5165 (1995); *In re Applications of Multimedia, Inc.*, 11 FCC Rcd. 4883 (1995).

[347] This 12-month transition period is consistent with previous Commission practice. *See Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in MM Docket 91-140, 7 FCC Rcd 6387, 6402 (1992) ("Revision of Radio Rules and Policies") ("...licensees currently engaged in time brokerage will have one year from the effective date of these rules to modify their time brokerage agreements to account for both the 15 percent attribution restriction and the 25 percent limitation on same-service, same-market simulcasting.").

[348] We recognize that we have specified a different divestiture period in some of the cases that have been conditioned on the outcome of this proceeding. In all of these cases, we will apply the one-year divestiture period. Thus, in a case conditioned on the outcome of this proceeding, where, for example, a six-month divestiture period is specified, the twelve-month period specified herein would nonetheless be operative.

EDP rule, as well as the other attribution changes adopted in this *Report and Order*. We direct the Mass Media Bureau to make the necessary modifications to the form to reflect these changes. Further, the Mass Media Bureau is delegated authority to revise the Ownership Report rule, Section 73.3615, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this *Report and Order*. Thereafter, we will issue a public notice with the revised Ownership Report Form and Ownership Report rule to reflect and incorporate these changes.

IV. **Administrative Matters**

175. Paperwork Reduction Act of 1995 Analysis. This R&O contains either new or modified information collections. Therefore, the Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to comment on the information collections contained in this R&O as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this R&O in the Federal Register. Comments should address: (a) whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C1804, 445 12th Street S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503, or via the Internet to fain_al.eop.gov.

176. For additional information concerning the information collections contained in this R&O contact Judy Boley at 202-418-0217.

177. Pursuant to the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. § 601 et seq., the Commission's Final Regulatory Flexibility Analysis in this *Report and Order* is attached as Appendix B.

Ordering Clauses

178. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i), (j) 303(r), 307, 308, and 309, Part 73 of the Commission's Rules is amended as set forth in Appendix A, below.

179. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix A SHALL BE EFFECTIVE sixty days after publication in the Federal Register.

180. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order* in MM Docket Nos. 94-150, 92-51, and 87-154, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

181. IT IS FURTHER ORDERED that the new or modified paperwork requirements contained

in this *Report and Order* (which are subject to approval by the Office of Management and Budget) will go into effect upon OMB approval.

182. IT IS FURTHER ORDERED that this proceeding is hereby terminated.

183. For additional information concerning this proceeding, contact Mania K. Baghdadi, Mass Media Bureau, Policy and Rules Division, (202) 418-2120; or Jane Gross, Mass Media Bureau, Policy and Rules Division, Legal Branch, (202) 418-2130; or Berry Wilson, Mass Media Bureau, Policy and Rules Division, Policy Analysis Branch, (202) 418-2170.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary