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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To: The Commission

PETITION FOR RECONSIDERATION OF WELLS FARGO COMMUNICATIONS FINANCE, DIVISION OF NORWEST BANK MN, NA

WELLS FARGO COMMUNICATIONS FINANCE, DIVISION OF NORWEST BANK MN, NA

David D. Oxenford
Its Attorney

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20006
(202) 659-3494

Dated: October 18, 1999

Summary

The Equity/Debt Plus rule, if applied to banks and other lending institutions, will hinder the flow of capital into broadcast markets. The rule will create a logistical nightmare for large bank holding companies with numerous subsidiaries, requiring substantial new paperwork to track financial interests. The required disclosures which may have to be made, both to the Commission and to other customers of the bank, may result in the violation of financial disclosure laws. Moreover, the rule may make it more difficult for the bank to enforce its security in loans to media entities. It will also disrupt relationships with existing customers of financial institutions, all for no apparent reason. The Commission has absolutely nothing in the record indicating any improper exercises of control by a bank or other institutional investor. Thus, the rule must be limited in its scope. Because of these problems, the new rule will discourage investment in broadcast, cable and other media companies by banks and other institutional lenders, which is the complete opposite of the Commission's intent in adopting the Equity/Debt Plus rule.

In addition, the Equity/Debt Plus rule is unclear in its application and must be revised so that banks and other lending institutions know what is expected in order to remain in compliance with such rules. The rule makes no provision for evaluating the true market value of a company -- including the value of its appreciated assets on which a bank will base its lending decisions -- in determining if a loan reaches the prohibited 33% level. In addition, the rule makes no provision for investments which change over time, either as the size of the investment rises, or as its relative significance to other investments changes. These situations must be addressed by the Commission.

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Wells Fargo Communications Finance, Division of Norwest Bank MN, NA ("Wells Fargo"), by counsel and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the new Equity/Debt Plus attribution rule, adopted as in the above-referenced proceeding by the *Report and Order*, FCC 99-207, released August 6, 1999 (the "*Order*").[1] As set forth below, the rules were never intended to apply to banks and other institutional lenders such as Wells Fargo, and

[1] The *Order* was published in the Federal Register on September 17, 1999. Pursuant to Section 1.4, this petition is timely filed.

thus must be modified or clarified so as to not impede the flow of capital into the electronic media marketplace.

Introduction

Wells Fargo is an established communications lending group within Wells Fargo & Company, a large financial services company whose holdings include Wells Fargo and Norwest banks. The communications lending group is a division of Norwest Bank MN, NA, and has been operating for many years providing senior debt to broadcasters, cable companies, newspapers and other media entities. As a result of the merger of Norwest and Wells Fargo, the communications lending group has grown and provides funding to media entities nationwide. The company has principally focused on transactions smaller than those often done by major banks with a nationwide media lending business, usually providing the entire senior debt package to small and mid-size companies.

As with any of the large national banks, Wells Fargo & Company, the parent corporation, has numerous subsidiaries providing capital to a variety of business ventures, with such capital provided in a number of different ways. Some of these other subsidiaries provide venture capital to new and emerging businesses, including media businesses. In many cases, such venture money will result in the subsidiary acquiring voting rights in the new business in which they invest. These voting rights allow the venture fund's directors to assist in the evaluation of business opportunities, and to provide related financial services to the companies to which it provides funding. Thus, under FCC rules, such interests are attributable.

The venture funds operate independently of the communications lending group. In many of the situations in which the venture companies provide equity financing to an entity, the lending group of the bank does not provide debt financing. Instead, such financing may come from entirely unrelated banks. In many cases, the lending divisions will not know of the investments made by the venture companies, nor will the venture companies know of loans made by the lending group.

Wells Fargo believes that its operations are not significantly different from those of other large banks which routinely provide capital to the communications industry. In fact, the venture financing provided by such banks often provide an important source of seed money for the formation of new media groups. Because of the independence of operations of these various arms of any big bank, and the fact that these independent groups may well finance different broadcasters in the same market, the strict application of the new Equity/Debt Plus rule will have a detrimental impact on banks and other lending institutions' ability to invest in and lend to media companies, thereby making it more difficult for entrepreneurs to find the capital necessary to start new media companies or to expand existing companies.

The new rule makes attributable the interests of any party that holds a financial interest, whether equity or debt or some combination thereof, in excess of 33% of a media company's total capital, if such holder is either (i) a significant program supplier to the licensee (providing more than 15% of the station's total weekly broadcast programming hours); or (ii) if it has an attributable interest in another media company (including another broadcast station, a cable system or a newspaper) in the same market. If a bank or other lending institution, through its venture capital arm, has an interest of more than 5% of the voting stock in a media company, it may be prohibited from lending to or investing in another media entity in that same market, if the amount invested or lent would equal more than 33% of the "total asset value" of that media entity. Consequently, if an interest is considered attributable under the Commission's multiple ownership rules, it may negatively impact a bank's ability to invest in companies that hold radio, television, cable, MMDS or newspaper licenses in the same market area.

Wells Fargo strongly believes that: (1) the Equity/Debt Plus rule, if applied to banks and other lending institutions, will hinder investment in broadcast entities for several reasons, including the difficulty in tracking such financial interests, the possible violation of financial disclosure laws, and the possibility that the rule will make it more difficult for the bank to enforce its security in loans to media entities; (2) discouraging investment by banks and other institutional lenders was not the Commission's intent in adopting the Equity/Debt Plus rule; and (3) the Equity/Debt Plus rule is unclear in its application and must be revised so that banks and other lending institutions know what is expected in order to remain in compliance with such rules. Consequently, Wells Fargo respectfully requests that the Commission amend the rule to make an exception for banks and other lending institutions, and clarify the rule so as to allow parties to know how it will be applied.

Discussion

I. The Equity/Debt Plus Rule, If Applied To Banks And Other Institutional Lenders, Will Hinder Investment In Broadcasting.

As discussed in more depth below, one of the Commission's main goals in amending the attribution rules was to "avoid disruption in the flow of capital to broadcasting."[2/] Contrary to this goal, the Equity/Debt Plus rule will hinder banks and other lenders from investing in broadcasting by: (1) restricting the amounts that lending institutions are able to invest in and lend to media companies; (2) forcing banks to establish burdensome tracking programs to ensure compliance, (3) limiting

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2/ *See Order* at para. 1.

remedies on foreclosure, and (4) forcing lending institutions to disclose private borrower information in violation of financial privacy laws.

Under this rule, a lender will have to monitor and possibly restrict the amount it invests in and lends to media companies (including radio, television, cable and newspaper companies) in the same market. The rule will negatively impact the business of lenders by requiring lenders to carefully track all of the media interests of companies in which they have financial stakes, either debt or equity, and to cross-reference those interests to make sure that they are not in conflict. If a lender has interests totaling 5% in a media entity in a certain market, it will be prohibited, under the Commission's multiple ownership rules, from investing in or lending to another media company in that same market amounts exceeding 33% of that company's total asset value. Given the thousands of businesses with which a company such as Wells Fargo, through all of its subsidiaries, has relationships, the paperwork burden of such monitoring alone is staggering.

Already, the Debt Equity Plus rule has created one issue that has come to the attention of the bank. This involves a company in which a venture capital subsidiary has an existing voting equity arrangement. That company is planning to acquire stations in a market where another client of the bank, through its lending division, also has stations. Wells Fargo believes that this is but the first of many conflicts which may be discovered, arising from the application of this new rule. In instances such as this one, the new rule will limit business opportunities of the bank's clients, and create strains in existing financial relationships, by prohibiting customers from entering certain markets where the bank has other investments. Such restrictions will clearly disrupt the flow of capital to the media industry.

In addition, the bank may be required, in violation of state and federal financial privacy laws, to disclose to potential media company borrowers, and to the Commission, the names of other media company borrowers in the same market, along with the amounts of their loans. The federal *Right to Financial Privacy Act*, 12 U.S.C. §3401 et seq. (1978), prohibits government authorities from obtaining access to the information contained in the financial records of any customer from a financial institution.[3/] The definition of "financial records" includes "any record held by a financial institution pertaining to a customer's relationship with the financial institution."[4/] Clearly, this definition applies to the names of borrowers and the amounts of their loans. Moreover, the disclosure would have to be made between customers of the bank, to alert one customer to the bank's potential conflicting interests in a given market. Consequently, the Equity/Debt Plus rule may place lending institutions in conflict with financial privacy laws, or with their ethical obligations to their customers, by requiring them to disclose the names and amounts of loans, and the financial structure of one customer to another customer considering an acquisition in the same market.

Moreover, the rule may make it more difficult for lenders to secure their loans to broadcasters. In a typical broadcast transaction, a lender obtains a security interest in the assets of the stations and, because Commission policy forbids taking a security interest directly in an FCC license,[5/] the lender in most cases takes a pledge of the licensee's stock or other ownership interest.

3/ 12 U.S.C. §3402 (1978).

4/ *Id.* at §3401(2) (1999).

5/ *See Walter O'Cheskey*, 13 FCC Rcd 10656, para. 7 (1998); *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, para.12 (1997). *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-2390, n.177, para. 233, *citing,* (continued...)

The pledge allows the lender, in the event of a foreclosure, to obtain control of the licensee (after obtaining prior Commission approval) or to transfer the licenses and all of its assets, including the license, to a third party. The Debt Equity Rule will compromise the ability of the bank to foreclose on such a pledge. This concern could arise even if the bank simply had loans to two media entities in the same market. If the bank were to attempt to take control of the pledged stock of a defaulting company, the Commission would not permit such a transfer if the bank's interest in another company operating in the same market exceeded 33%. Even in a situation where the loans were to two companies, each having stations in ten different markets, if the companies had geographically overlapping interests in but a single market, the bank could be precluded from exercising its foreclosure rights against the defaulting company. The limitations these rules place on the bank's security interests may well limit the bank's interest in financing broadcast transactions.

As set forth below, the Commission did not intend to apply this rule to financial institutions. None of the concerns it cites, nor any of the particular cases it references in this proceeding, involve problems arising from the investments of financial institutions. As the Commission clearly did not intend that the Equity/Debt Plus rule would result in a policy which would lead to the reduction in investment and lending to radio, television, cable and other media companies, an exception to this rule should be made for banks and other institutional lenders.

5/ (...continued)
Radio KDAN, Inc., 11 FCC 2d 934 (1968), *recon. denied*, 13 RR 2d 100 (1968), *aff'd on other grounds sub nom Hanson v. FCC*, 413 F 2d 374 (D.C. Cir. 1969) and *Kirk v. Merkley*, 94 FCC 2d 829 (1983).

II. Discouraging Investment Was Not The Commission's Intent In Adopting The Equity/Debt Plus Rule.

The Commission did not adopt the Equity/Debt Plus rule to discourage investment by banks and other lending institutions. In fact, the Commission intended the opposite effect. The Commission's goal was to attribute combined interests that created undocumented control over broadcast entities, while at the same time, to not discourage investment in broadcast and other media entities. The Commission stated that it wanted an "appropriate" balance between its "goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goal of not unduly disrupting capital flow."[6]

The Commission's decision to amend the rule was mainly to prevent two problems. First, it wanted to prevent program suppliers from investing in affiliates in ways which were not attributable, but nevertheless restricted the ability of the affiliate to change programming. Second, the Commission wanted to stop questionable arrangements, where a licensee, who was prohibited from owning other stations in the market, would financially invest in such stations and then enter into some sort of non-attributable arrangement (such as a joint sales agreement) to exercise some degree of operational control over the station.[7] Every case cited by the Commission as representing a potential problem to be addressed by the Equity/Debt Plus rule involved a programming arrangement, a joint sales agreement, or some other active, operational arrangement.[8] No example cited by the

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6/ *Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19895, 19902 (1996).

7/ *Further Notice* at ¶¶ 16-18.

8/ *See Further Notice* at n.27, n.30; *BBC License Subsidiary L.P. (WLUK-TV)*, 10 FCC Rcd 7926 (1995) (involving operational control over station by network affiliated with station); *Roy M. Speer*, 11 FCC Rcd 18393 (1996) (involving operational control over station by (continued...)

Commission involved the investments by an institutional lender -- and in fact none involved a financial relationship between marketplace competitors where there was not some other operational agreement between the entities which concerned the Commission. The typical institutional investor is simply making a financial investment in its customers, and has none of the operational relationships which triggered the Commission's concerns.[9/] As there is no record in this proceeding of any harm, or even an issue concerning the possibility of such harm, based on financial investments in the same market by a bank or other financial institution, the Commission has no reason to sweep these organizations

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8/ (...continued)
program supplier to station); *BBC License Subsidiary L.P. (KHON-TV et. al)*, 10 FCC Rcd 10968 (1995) (involving operational control over station by network affiliated with station); *Quincy D. Jones*, 11 FCC Rcd 2481 (1995) (involving operational control over station by network affiliated with station); *Letter to Heritage Media, Inc. et. al. from Roy J. Stewart, Chief, Mass Media Bureau*, dated Jan. 18, 1996 (FCC Files Nos. BTCCT-950911KF-KG and BALCT-950628KJ-KL) (involving operational control over station by network affiliated with station); *Letter of Roy J. Stewart, Chief, Mass Media Bureau*, dated May 2, 1995, Re File Nos. BALH-940323GE and BAL-940330EA (Cincinnati, Ohio) (involving joint advertising sales arrangement); *Letter of Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau*, Ref. 1800B2, 8910BS, dated June 8, 1995, Re File Nos. BAL-940525EA, BALH-940525EB (Wellington and Fort Collins, Colorado) (involving joint sales agreement).

9/ The Commission has never considered debt to be an ownership interest. *See Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 FCC Rcd 3606, para. 97 (1995) (In 1984, we decided to exclude debt from attribution on the supposition that attributing debt would severely restrict capital sources for broadcasters, and because debt financing was the least likely of all financing sources to involve an interest that implicates the multiple ownership rules. We believe, at this point, that we should continue to exclude such relationships, standing alone, from attribution under the multiple ownership rules because any other approach would, we believe, severely impair the ability of the broadcasting industry to obtain necessary capital. We would neither wish to inhibit such a key means of obtaining capital nor to disrupt existing expectations and relationships to such a degree.); *See also Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995); *Dorothy J. Owens*, 5 FCC Rcd 6615 (1990); *Applications of Omninet Corporation*, 2 FCC Rcd 1734 n.15 (1987).

with the broad-brush of the new regulatory prohibition.[10] Thus, in order to more effectively achieve the objectives of the *Order*, the Commission should make an exception to the Equity/Debt Plus rule for banks and other lending institutions.

III. The Equity/Debt Plus Rule Is Unclear And Must Be Revised If Applied To Banks And Other Lending Institutions.

Even if retained, the Commission must revise and clarify the Equity/Debt Plus rule. The rule's "33% of the total asset value of the company" benchmark, as explained in the Order, only makes sense in the context of a company with a simple capital structure made up of entirely equity, consisting of paid-in capital, and debt.[11] The rule makes no allowance for the existing assets of the company, and does not include such assets in computing the amount of "equity" in a company. Consequently, an investment by a bank or other lender in a media company with existing assets which have appreciated in value, and which form the collateral for the loan, could well end up exceeding the 33% threshold, even though the debt represents far less than one-third of the real marketplace value of the company. For instance, a broadcaster might start his or her company with a single station. When he or she initially capitalizes his or her company, he or she may put in minimal "capital" initially, instead providing most of the personal financing to the company through personal loans, which are paid back over time as the station becomes successful. Several years later, when the broadcaster decides to buy a second station, he or she may obtain a bank loan for the new station using the old station as part of the collateral supporting the loan. His or her minimal "paid-in capital"

10/ The Commission cannot regulate unless it can identify the harm to be remedied and demonstrate how regulation will alleviate such harm. *See NAACP v. FCC*, 682 F.2d 993, 1000-01 (D.C. Cir. 1982); *HBO v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

11/ The Order, at ¶ 37, defines total asset value as meaning paid-in capital plus debt.

remains unchanged. Using the Commission's formulation of the rule, the appreciated value of the first station, which really forms the "equity" of the company, and which is really the value of the company which can support the loan for the second facility, does not appear to be counted in the Commission's determination of whether the loans on the second station exceed 33% of the "total asset value" of the company. This formulation of the rule, ignoring the value of appreciated assets, captures vastly more entities in its grasp than necessary to avoid concerns about the exercise of control through a debt relationship.

Similarly, the Commission does not explain how or when to calculate "equity" or "debt." In many companies, financing may take many forms. As debt is repaid, the amount of an entity's loans as a percentage of the total capital of a company may change, and an entity may end up with an interest exceeding the benchmark, where no violation existed at the time the loan was made. If the bank also has an attributable interest in another broadcaster in the same market when its interest exceeds the 33% threshold, does it then need to divest itself of the loan to remain in compliance with Commission rules? Various convertible debt and equity interests, or equity interests with preferred returns which accumulate before being paid, or even the accumulated interest on a simple term loan, could push an interest beyond the 33% threshold, even when that interest was not a concern at the time the loan was made. Thus, the Commission must also clarify when the interest is be evaluated.

The Commission will have to consider such situations and revise the Equity/Debt Plus rule accordingly, if the rule is to be applied to banks and other lending institutions. A better solution is to exclude banks and other lenders from being subjected to this rule. This solution will protect investment in broadcasting and media entities and will promote the Commission's overall goal of encouraging local diversity and competition.[12]

Conclusion

As discussed above, contrary to Commission intent, the Commission's new Equity/Debt Plus attribution rule will have a negative impact on the ability of banks and other lending institutions to invest in and lend to media companies. In order to more effectively advance the objectives of the *Order* and promote investment in broadcast and other media entities, Wells Fargo respectfully requests that the Commission amend the new rules to include an exception to the Equity/Debt Plus attribution rule for banks and other lending institutions.

Respectfully submitted,

WELLS FARGO COMMUNICATIONS FINANCE, DIVISION OF NORWEST BANK MN, NA

By: ______________________
David D. Oxenford

Its Attorney

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

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[12] *Id.* at 19903.