Before the
Federal Communications Commission
Washington, D.C. 20554

Corrected

In the Matter of	)	
	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
Review of the Commission's Cable Attribution Rules	)	

REPORT AND ORDER

Adopted: October 8, 1999 **Released: October 20, 1999**

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part and issuing a statement; Commissioner Tristani approving in part, dissenting in part and issuing a statement.

Table of Contents

				Paragraph
I.	Introduction			1
II.	Background			2
	A.	The Cable Attribution Rules		2
	B.	Questions Raised in the *Cable Attribution Notice*		7
	C.	Summary of the Decisions of this Order		11
III.	Report and Order			15
	A.	The General Attribution Standard		15
		1. Background		15
		2. Comments		16
			a. Industry Differences	17
			b. The Cable Operators' Control Proposal	22
		3. Discussion		33
	B.	Voting Equity Benchmark		40
		1. Comments		41
		2. Discussion		45
	C.	Passive Institutional Investor Benchmark		52
		1. Background		52
		2. Comments		53
		3. Discussion		55
			a. The Appropriate Passive Institutional Investor Benchmark	55

			b.	Definition of Passive Institutional Investors	56
	D.	Partnership Interests			57
		1.	Comments		57
		2.	Discussion		61
	E.	Directors and Officers			65
		1.	Comments		65
		2.	Discussion		66
	F.	Limited Liability Companies			70
		1.	Comments		70
		2.	Discussion		71
	G.	Single Majority Shareholder Exemption and an Equity plus Debt Rule			74
		1.	Background		74
		2.	Comments		76
		3.	Discussion		81
			a.	Single Majority Shareholder Exemption	81
			b.	Equity plus Debt Rule	82
	H.	Program Access Attribution Standard			93
		1.	Background		93
		2.	Comments		95
		3.	Discussion		102
	I.	Cable Reform Issues			113
		1.	Effective Competition		113
			a.	Background	113
			b.	Comments	119
			c.	Discussion	126
				i. LEC Test	126
				ii. Competing Provider Test	131
		2.	Cable-Telco Buy-Outs		134
			a.	Background	134
			b.	Comments	136
			c.	Discussion	137
	J.	Transition Issues			138
IV.	Final Regulatory Flexibility Analysis				142
V.	Paper Work Reduction Act				174
VI.	Ordering Clauses				176

Appendix A – Rule Changes
Appendix B – List of Commenters
Appendix C – Cable Alliances and Partnerships

I. Introduction

1. This *Report and Order* resolves the issues presented for comment in the *Notice of Proposed Rulemaking* (*"Cable Attribution Notice")* in this proceeding,[1] as well as two related issues raised

[1] *Notice of Proposed Rulemaking*, CS Docket 98-32, FCC 98-112 (rel. June 26, 1998) (*"Cable Attribution Notice"*).

in the *Cable Reform Notice*.[2] In the *Cable Attribution Notice,* we initiated a review of our cable attribution rules, which define what constitutes an "attributable" or "cognizable interest" that triggers application of various Commission rules relating to the provision of cable television services (the "substantive cable rules"). In this *Report and Order*, we adopt amendments that will more accurately identify interests that confer on their holders the ability to influence or control the operations of the held entity or create the type of economic incentives that the substantive cable rules are intended to address. In this regard, our amendments to the cable attribution rules mirror to a certain extent those amendments we recently made to the broadcast attribution rules; thus, our reasoning herein largely incorporates and reiterates the reasoning set forth in the *Broadcast Attribution Report and Order.*[3]

II. Background

A. The Cable Attribution Rules

2. A variety of statutory provisions and Commission rules govern the conduct of cable television system operators or other entities in terms of both ownership interests that they may hold in other cable operators or competitive firms, or in terms of their conduct when they own, are owned by, or are owned in common with a "video programmer," a "satellite cable programming provider," or with other entities. For each of these statutory provisions or rules it is necessary to identify what types of ownership interests or other relationships are sufficient that two legally separate entities should be treated as if they were commonly owned or managed or subject to significant common influence. The rules define that level of interest that brings the substantive statutory provision or rule in play to be an "attributable interest." Thus, for example, the Communications Act, Section 613(f)(1)(A), instructs the Commission

> to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, **or** in which such person has **an attributable interest**. . . .[4]

Section 628(b) provides that:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has **an attributable interest**, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of

[2] *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking*, CS Docket No. 96-85, 11 FCC Rcd 5937 (1996) ("*Cable Reform Notice*").

[3] *See Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy,* MM Docket Nos. 94-150, 92-51 and 87-154, *Report and Order* (rel. Aug. 6, 1999) ("*Broadcast Attribution Report and Order*"). The *Broadcast Attribution Report and* Order was issued after two notices for comment were issued. *See Notice of Proposed Rule Making, Review of the Commission's Regulations Governing the Attribution of Mass Media Interests,* MM Docket Nos. 94-150, 92-51 and 87-154, FCC 94-324, 10 FCC Rcd 3606 (1995) ("*Broadcast Attribution Notice*"); *Further Notice of Proposed Rule Making, Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51 and 87-154, FCC 96-436, 11 FCC Rcd 19895 (1996) ("*Broadcast Attribution Further Notice*").

[4] 47 U.S.C. § 533(f)(1)(A) (emphasis added).

> which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[5]

The attribution rules seek to identify those corporate, financial, partnership, ownership and other business relationships that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holders should be subject to the Commission's regulation.

3. Depending on the particular substantive rule and objective to be accomplished, a variety of different attribution standards are used in the Commission's rules. In the cable television area, there are, generally speaking, two strains of attribution rules: the "general attribution standard" and the so-called "program access attribution standard."[6] The general standard is based on, but not identical to, the broadcast attribution rules.[7] Under the general attribution standard, voting stock interests of 5% or more are attributable.[8] For passive institutional investors, voting stock interests of 10% or more are attributable.[9] Non-voting stock interests, options, warrants and debt are not attributable.[10] The general attribution standard provides a "single majority shareholder" exception to the voting stock threshold, which provides that a minority shareholder's voting interests will not be attributed where a single shareholder owns more than 50% of the outstanding voting stock.[11] Partnership interests and direct ownership interests are attributable regardless of the level of equity invested.[12] However, the interests of "insulated" limited partners are not attributed.[13] Directors and officers are also deemed to have an attributable interest.[14] The general attribution standard rules at issue in this proceeding are those that are used in conjunction with the cable horizontal ownership limits rule[15] and the vertical channel occupancy limits rule.[16] We applied the broadcast or general attribution standard to the horizontal limits and channel occupancy limits rules because they constitute broad structural rules designed to promote competition and diversity in the video-

[5] 47 U.S.C. § 548(b) (emphasis added).

[6] For a history of how the cable attribution rules developed, *see Cable Attribution Notice* at paras. 2-9.

[7] *See id.*

[8] 47 C.F.R. § 76.501 n.2 (a).

[9] 47 C.F.R. § 76.501 n.2 (c).

[10] 47 C.F.R. § 76.501 n.2 (f).

[11] 47 C.F.R. § 76.501 n.2 (b).

[12] 47 C.F.R. § 76.501 n.2 (a).

[13] *See* 47 C.F.R. § 76.501 n.2 (g)(1) (a limited partner is "insulated" if the partnership certifies that the partner is "not materially involved, directly or indirectly, in the management or operation of the media activities of the partnership").

[14] 47 C.F.R. § 76.501 n.2 (h).

[15] 47 C.F.R. § 76.503.

[16] 47 C.F.R. § 76.504.

programming marketplace.[17]

4. The Commission adopted the program access attribution standard for cable rules that are designed not only to promote competition and diversity, but also to deter specific discriminatory or improper conduct.[18] The program access attribution standard captures more investment interests than the general attribution standard. Under the program access standard, the single majority shareholder and insulated limited partner exceptions do not apply. In addition, nonvoting stock and limited partnership equity interests of 5% or more are attributable.[19] The program access attribution standard rules at issue in this proceeding are used in conjunction with the following rules: program access,[20] carriage of an unaffiliated programmer,[21] SMATV/cable cross-ownership prohibition,[22] asset transfers between a cable operator and an affiliate,[23] rate pass-throughs for the programming services of an affiliated programmer,[24] leased access[25] and open video systems.[26]

5. This *Report and Order* will also adopt final rules for the definition of the term "affiliate" for purposes of the local exchange carrier ("LEC") portion of the "effective competition" test,[27] and the cable-telco buy-out provisions enacted in the Telecommunications Act of 1996.[28] We asked for comment on the appropriate definition of an affiliate under these rules in the *Cable Reform Notice*.[29] However, because the *Cable Attribution Notice* initiated a more general review of the cable affiliation and attribution rules,[30] we decided to address these two issues in this proceeding.[31] We incorporate the *Cable Reform*

[17] *Implementation of Sections 11 & 13 of Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits, Second Report and Order*, MM Docket No. 92-264, 8 FCC Rcd 8565, 8568-69, 8577-8579, 8593-8596 (1993) ("*Horizontal Ownership Second Report and Order*").

[18] *See Cable Attribution Notice* at paras. 5-8 and orders cited therein for discussion on why the restrictive attribution standard was selected to apply to the substantive cable rules at issue in this proceeding.

[19] *Id.* at para. 5; *see, e.g.*, 47 C.F.R. § 76.501(d) n.5 (attribution rules for the cable/SMATV cross-ownership prohibition rule).

[20] 47 C.F.R. § 76.1001.

[21] 47 C.F.R. § 76.1300.

[22] 47 C.F.R. § 76.501(d).

[23] 47 C.F.R. § 76.924(i).

[24] 47 C.F.R. § 76.922(f)(6).

[25] 47 C.F.R. § 76.970(b).

[26] 47 C.F.R. § 76.1503(c).

[27] *See* Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D).

[28] *See* Communications Act § 652, 47 U.S.C. § 572.

[29] *Cable Reform Notice*, 11 FCC Rcd 5937.

[30] *See Cable Attribution Notice* at para. 15 n.52 ("We seek comment on whether and how any changes in our cable

comments into the record of this proceeding and rely on them in order to issue these final rules.[32]

6. Finally, we note that the *Broadcast Attribution* proceeding addressed the attribution rules that apply to the cable/broadcast station and cable/MMDS cross-ownership prohibitions; thus we do not address those rules in this *Report and Order*.[33]

B. Questions Raised in the *Cable Attribution Notice*

7. The *Cable Attribution Notice,* independently and through reference to the *Broadcast Attribution Notice,* sought comment on a number of issues relating to the attribution standards, including: (1) whether to increase the voting stock benchmark from 5 percent to 10 percent and the passive institutional investor benchmark from 10 percent to 20 percent; (2) whether to expand the category of passive investors; (3) whether and, if so, under what circumstances to attribute nonvoting shares; (4) whether to retain the single majority shareholder exemption from attribution; (5) whether to revise our insulation criteria for limited partners; (6) how to treat interests in limited liability companies ("LLCs") and other new business forms under the attribution rules; and (7) how to treat financial relationships and multiple business interrelationships that, although not individually attributable, should be treated as attributable interest when held in combination.

8. In addition to the issues raised in the initial *Broadcast Attribution Notice*, the *Broadcast Attribution Further Notice* explored additional proposals to increase the precision of the attribution rules. First, we invited comment on whether we should add a new equity/debt attribution rule. Under such a rule, where an interest holder is a program supplier or same-market media entity, we would attribute its otherwise non-attributable equity and/or debt interests in a media entity subject to the cross-ownership rules if those aggregated interests exceed a specified benchmark, proposed to be set at 33 percent.[34] Second, we invited comments on a Commission staff study of attributable ownership interests in broadcast television stations, appended to the *Broadcast Attribution Further Notice*, and on the implications of this study regarding the impact of the proposed attribution rule changes, particularly as to the voting stock benchmarks.[35]

9. In addition to asking for comment on how these broadcast issues pertain to the cable industry, in the *Cable Attribution Notice* we asked for comment on (1) the proposed "equity plus debt" addition to the current cable attribution rules, and specifically those relationships in the cable context that

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attribution rules should affect our various definitions of 'affiliate.'").

[31] *See In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order*, CS Docket No. 96-85, FCC No. 99-57 at paras. 25, 91(March 29, 1999) ("*Cable Reform Report and Order*").

[32] *See* Appendix B for a list of commenters in the *Cable Reform* proceeding.

[33] This *Report and Order* nevertheless amends the attribution notes to 47 C.F.R. § 76.501, which apply to the cable/broadcast station cross-ownership prohibition, because these notes are also used for our other cable rules. However, the amendments to these notes do not change the substance of the cable/broadcast attribution rules adopted in the *Broadcast Attribution Report and Order*.

[34] *Broadcast Attribution Further Notice* at paras. 8-25.

[35] *Id.* at paras. 36-38 and Commission staff study attached thereto.

may provide sufficient incentive and ability for an otherwise nonattributable interest holder to exert attributable influence or control; (2) the attribution of certain contractual or other business relationships in the cable context (including affiliations that allow different cable entities to purchase programming, technology or equipment on common terms) that may implicate diversity and competition concerns, irrespective of debt or equity; (3) the impact of raising the stock ownership benchmark for active and passive investors in the cable context, particularly seeking empirical data and analysis similar to the Commission staff study on the same subject in the broadcasting context; (4) whether to retain, modify, or eliminate the single majority shareholder exemption; and (5) whether a transition period or grandfathering of existing interests is appropriate if we decide to adopt more restrictive attribution rules.[36]

10. We also asked for comment on whether and how we should re-evaluate the application of the program access attribution standard to certain of the rules described above, such as the program access and program carriage rules. Finally, we sought comment on whether and how any changes in our cable attribution rules should affect our various definitions of "affiliate."[37] In particular, we sought comment on whether and how those affiliation rules that are expressly based on our cable attribution rules should change if the underlying attribution rules are changed.[38] In the *Cable Attribution Notice*, we asked for comment on whether there were any relevant differences between the cable and broadcasting industries that would support a cable attribution standard that would differ from the broadcast attribution standard.[39] In this regard, we sought comment on any differences in, among other things, the ownership, financing or management structures of the cable industry and the broadcast industry that might warrant a different attribution standard.[40]

C. Summary of the Decisions of this Order

11. In general, we conclude that the cable industry's ownership and management structures do not in any relevant way differ from those of the broadcast industry such that the cable attribution rules should differ from the broadcast attribution rules. Thus, a large portion of this *Report and Order* will incorporate by reference the reasoning set forth in the *Broadcast Attribution Report and Order*. Where certain cable attribution rules depart from the broadcast attribution rules, the reasons for the departure are discussed. This *Report and Order* takes the following specific actions with regard to the cable attribution rules:

(1) retain the 5% voting stock attribution benchmark, but raise the passive institutional investor voting stock benchmark to 20%;

(2) retain the current definition of passive institutional investor;

(3) apply the limited partnership insulation criteria to limited liability companies;

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36 *Cable Attribution Notice* at para. 12.

37 *See, e.g.*, 47 C.F.R. §§ 76.924(i), 76.970(b), 76.1500(g), 76.1401(b).

38 *Cable Attribution Notice* at para. 15.

39 *Cable Attribution Notice* at para. 13.

40 *Id.*

(4) amend the insulation criteria for attribution of limited partnership interests for purposes of the horizontal ownership and channel occupancy limits rules;

(5) amend the waiver standard for the attribution of directors and officers for purposes of the horizontal ownership and channel occupancy limits rules;

(6) eliminate the single majority shareholder rule;

(7) adopt a 33% equity plus debt attribution rule that act as an exception to the insulated limited partner exception and the current exemptions from the attribution of non-voting equity and debt; and

(8) adopt certain transitional provisions relating to the application of these new rules to existing interests.

12. In addition, we clarify which entities are covered by the program access attribution standard. Under our substantive cable rules, such as the program access rule, it is arguable that the general attribution standard is applied to determine who or what constitutes a cable operator while the program access attribution standard is applied to determine who or what constitutes a programming vendor or other entity covered by the rule. Because the program access attribution standard was intended to apply to all entities under the rules where this standard applies, and because these substantive rules are designed to deter specific misconduct by all covered entities, we will amend these rules in order to clarify that the program access attribution standard applies to all entities covered by those rules. To reflect these clarifications of the attribution rules, we will amend our rules' various definitions of the term "affiliate" where appropriate.

13. With regard to the *Cable Reform* issues, we adopt the general cable attribution standard for the cable-telco buyout prohibition rule because that rule closely resembles the cable/SMATV cross-ownership rule, which is designed to promote competition. For the LEC affiliate prong of the effective competition test, we maintain the 10% voting equity benchmark proposed in the *Cable Reform Notice*, but devise a new attribution rule for the LEC test.

14. Finally, we reject the cable operators' proposals that we discard the attribution rules in favor of an actual control approach to identifying cognizable interests. Such an approach would not accurately capture potentially influential or controlling interests, and would not be workable.

III. Report and Order

A. The General Attribution Standard

1. Background

15. In the *Cable Attribution Notice*, we requested comments relating to the general structure of the attribution rules; invited parties to discuss recent developments in the cable industry, including strategic alliances, partnerships, system swaps, mergers and acquisitions, relevant to application of these rules; and asked whether there were any differences in the ownership, financing or management structures, industry health, typical stockholdings, informal business arrangements, or outside financial claims of the cable

industry and broadcast industry that would warrant different cable attribution rules.[41] This prompted a number of parties to suggest wholesale revisions to the traditional tools of the attribution rules. We address these comments first.

2. Comments

16. Cable operators generally, including NCTA, TCI, [42] and MediaOne, argue that the cable horizontal ownership rules should not continue to follow the broadcast attribution rules because market conditions are different for the cable industry, new cable transactions allegedly insulate cable multiple system operators ("MSOs") from control over the newly created entities, and the Commission should adopt a "control" test for attribution. In response, alternative multichannel video programming distributors ("MVPDs") and a broadcaster argue that the market has not changed since the attribution rules were first enacted and that a "control" approach would not accurately capture influence and would not be workable.

a. Industry Differences

17. TCI argues that the Commission has in the past distinguished between different industries when it rejected a request that the broadcast attribution standard be applied to the telephone carrier/cable cross-ownership rule "largely because these two categories of multiple ownership rules relate at least in part to different industries, affect the interests of different parties, and have disparate underlying objectives."[43]

18. TCI notes that the purpose of the ownership rules is to promote competition and diversity. TCI contends that cable systems, unlike broadcasters, do not generally compete with each other in the same geographic areas for subscribers, local advertising revenues or programming.[44] As a result, TCI argues that the analysis of ownership concentration, competition, collusion and program diversity should be different for cable than for broadcasting.[45] TCI, Comcast and NCTA argue that concerns regarding diversity are different for cable because, unlike a broadcaster, a cable operator provides dozens of channels to satisfy consumers.[46] Thus, NCTA argues that the ability of a minority interest in a cable system to significantly influence the viewing options available to a community cannot be equated with the magnitude of influence that a minority interest exerts on a single broadcast station that may only provide one programming option.[47]

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[41] *Cable Attribution Notice* at para. 16.

[42] On March 9, 1999, TCI merged with AT&T. TCI's cable systems are now owned by AT&T Broadband & Internet Services, Inc ("AT&T Broadband"), an AT&T subsidiary. TCI's programming subsidiary, Liberty Media Group, is now a separate subsidiary of AT&T. Because the comments in this proceeding were filed before the merger, we will identify TCI's comments as those filed by TCI.

[43] TCI Comments at 8 n.15 (*quoting Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Memorandum Opinion and Order*, MM Docket 83-46, 58 R.R.2d 604 at para. 22 (1985)).

[44] *Id.* at 12 n.26-27.

[45] *Id.* at 12 n.26-27.

[46] *Id.* at 15; NCTA Comments at 6; Comcast Reply Comments at 2.

[47] NCTA Comments at 6; *see also* Comcast Reply Comments at 5 (little risk that a minority, non-controlling investor

19. MediaOne argues that the operators have not discouraged the development of new cable programming services.[48] By upgrading its systems from 550 MHz to 750 MHz, MediaOne states that it is adding 30 new analog channels, at least half of which will benefit unaffiliated programmers.[49] In addition, given the growth of direct broadcast satellite ("DBS") services, such as DIRECTV, which offers over 175 channels of cable programming, MediaOne states there is no longer reason for concern that operators will discourage new programming.[50] To compete with DBS, MediaOne states that operators must make diligent efforts to expand their channel capacity for new cable networks, regardless of an operator's interest in promoting affiliated programming.[51]

20. TCI argues that the evidence indicates that vertically integrated cable operators do not disfavor unaffiliated programmers in terms of rates or carriage.[52] In addition, TCI asserts that vertical mergers benefit consumers because a large, vertically integrated cable operator is better positioned than a stand-alone operator to know and satisfy consumers' viewing preferences.[53] Moreover, investors in cable operators are interested in the financial performance of the operator and will not, TCI asserts, tolerate actions designed to foreclose viewpoints or opinions for ideological purposes. Thus, widely held operators, TCI asserts, are prevented from controlling the viewpoints of the services they carry.[54]

21. Disputing the cable industry's arguments regarding the purposes of the applicable cable ownership rules, DIRECTV argues that the purpose of the various rules implicated in this proceeding is to check the bargaining power that MSOs have regarding programmers and the emerging MVPDs.[55] DIRECTV and Univision argue that the MSOs have not shown that the market has changed or that their behavior has changed, especially with regard to program access and must carry.[56] DIRECTV notes that

will exert significant influence over the multitude of carried cable networks).

[48] MediaOne Comments at 6. Since 1992, cable networks have increased from 67 to 162, and of the 88 new networks, over 62% are unaffiliated with any cable MSOs. In addition, of the 77 newly planned cable networks, only 5 are affiliated with MSOs. *Id.* at 7 n.11 (*citing Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, 13 FCC Rcd 1034 Table F (1998) ("*1997 Competition Report*")).

[49] *Id.* at 10.

[50] *Id.* at 11; NCTA Comments at 6 (noting viewers can obtain alternative programming from other MVPDs).

[51] MediaOne Comments at 11. TCI also argues that there are more programming outlets available today than when the big three networks were dominant. These include additional broadcast networks and non-cable MVPDs that provide service to more than 12 million homes. TCI Comments at 15-16.

[52] TCI Comments at 37.

[53] *Id.* at 39.

[54] *Id.* at 40.

[55] DIRECTV Reply Comments at 2-3; *see also* WCA Reply Comments at 3 (Commission should examine how liberalization of attribution rules will affect alternative MVPDs).

[56] DIRECTV Reply Comments at 2-3 (noting plethora of program access cases and the Commission's recent strengthening of the program access rules to provide damages); Univision Reply Comments at 4 (noting that its San Francisco affiliate KDTV obtained on-channel cable carriage with 22 of TCI's 37 San Francisco systems only after the

Comcast has refused to sell its Philadelphia regional sports network to DBS providers on the grounds that the program access rules do not apply to the terrestrial delivery of vertically integrated programming.[57] Univision states that regulatory safeguards such as must carry do not protect its cable network or its satellite-delivered network and that over half of its affiliated low-power stations are not entitled to must carry rights.[58]

b. The Cable Operators' Control Proposal

22. TCI and others, focusing on the horizontal ownership rules, argue that the current attribution standards impair the ability of cable operators to produce significant consumer benefits, realize efficiencies, and enhance competition in telephony and high speed data. Adelphia *et al.*, Time Warner, NCTA, TCI, Cablevision, MediaOne and Comcast propose various alternatives to the attribution rules where the investor would certify that it does not exercise control over the cable system at issue.[59] MediaOne, NCTA and TCI propose that minority interests not be attributable if the investor certifies that it does not control the company's programming.[60] Regardless of the cable operator's interest or investment in a particular system, Adelphia *et al.* proposes that the Commission adopt a rule where a cable operator would be deemed to not "control" a system for horizontal ownership attribution purposes if it could certify that it (1) cannot dictate programming decisions, (2) does not control a majority of the governing board or committee, (3) does not prepare the operating or capital budget (but can review the budget prepared by the managing partner), (4) does not control personnel matters, (5) cannot dictate the use of particular technology, (6) does not have the unilateral right to acquire a controlling interest in the venture.[61] Adelphia *et al.* argues that a cable operator's super-majority approval rights over the sale of assets, dissolution or change of status of an entity are not indicia of control for attribution purposes.[62]

23. NCTA argues that unless an investor has control over a cable system, it is difficult to discern how diversity is implicated because there is little risk that a minority investor will restrict a

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Commission ordered TCI to carry the affiliate in two 1998 orders); *see also* Univision Reply Comments at 8. Univision states that TCI dropped Univision's cable network in favor of TCI's affiliate, Telemundo, another Spanish-language network, once TCI acquired a Denver system. *Id.* at 9-10.

[57] DIRECTV Reply Comments at 5.

[58] Univision Reply Comments at 6.

[59] Adelphia *et al.* Comments at 3; Time Warner Comments at 34-35 ("a 5% equity interest is so small as to be essentially irrelevant"); Adelphia *et al.* Reply Comments at 3; Comcast Reply Comments at 3.

[60] MediaOne Comments at 25; MediaOne Reply Comments at 4; NCTA Comments at 10 (if an investor does not own 50% of more of a company's voting stock, the investor's interest should not be attributable if the investor certifies to the Commission that the investor cannot dictate programming decisions). TCI proposes that no interest, including a partnership interest, less than 10% be attributable. In cases where an MSO has an interest that is more than 10% and less than or equal to 50%, TCI argues that the interest should not be attributable if the MSO certifies that it will not control the company generally and specifically will not control the company with respect to programming, personnel, budget, and technological choices. TCI Comments at 2-3 n.3, 18-19.

[61] Adelphia *et al.* Comments at 20. Time Warner argues that a non-managing joint venture partner should be entitled to vote on budget matters without having an interest attributable to it. Time Warner Comments at 36.

[62] Adelphia *et al.* Comments at 12; *see also* Time Warner Comments at 35-37.

company's editorial control.[63] TCI argues that an attribution standard based on operational control is the least restrictive and most efficient method for the Commission to identify attributable interests. TCI states that attempting to identify "influential" interests in a set of rules is difficult given the alternative ways in which an interest holder's influence might be limited by factors which the rules do not examine.[64] TCI argues that a bright line test, such as the 5% equity interest benchmark, does not necessarily identify interests that posed a threat to the purpose of the ownership rules and therefore unnecessarily limits beneficial investments.[65] The cross-interest policy, which was adopted to identify influential interests not specifically addressed by the attribution rules, examined potential influential interests on a case-by-case basis. TCI argues that this ad hoc approach is slow and expensive.[66] TCI argues that the Commission permits regulated entities to self-certify in a variety of other circumstances because self-certification is efficient and less costly and does not impose an overbroad restriction or require a case-by-case determination.[67]

24. RCN argues that a "control" approach would not be workable because it is vague, would require the devotion of significant resources to a case-by-case analysis of each system, and would invite the creation of carefully designed corporate interests that would indicate lack of control on paper but would not reflect the actual influence that such interests would carry.[68] RCN observes that the practicalities of corporate decision-making are different from structures set forth on paper. RCN argues that a rational decision-maker will make decisions in the best interests of its investors, whether the investors vote or not.[69] CU states that cable operators need little or no direct ownership in a cable system in order to exert pressure with contractual rights.[70] CU states that partners who have minimal ownership use methods to protect their interests by creating options, put-sell provisions, and rights of refusal provisions in partnership agreements.[71]

25. NCTA asserts that the Commission has endeavored to "permit arrangements [under the

[63] NCTA Comments at 8.

[64] TCI Comments at 26 (*citing An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems* at 8, Stanley M. Besen, Daniel P. O'Brien, John Woodbury, and Serge X. Moresi (Aug. 14, 1998) ("*Besen, O'Brien, Woodbury, and Moresi*") (attached to TCI Comments). For example, other large minority shareholders or a coalition of smaller shareholders might limit a minority shareholder's power. TCI Comments at 26; *Besen, O'Brien, Woodbury, and Moresi* at 8.

[65] TCI Comments at 28.

[66] TCI Comments at 30.

[67] TCI Comments at 20. For example, the Commission permits self-certification that a licensee does not cause unacceptable interference with the radio spectrum, an entity's passive investors are indeed passive, an applicant in a competitive bidding process is qualified to bid, an officer or director does not perform certain duties such that an interest should be attributed to the officer or director, and a limited partner's interest meets the insulation criteria. *Id.*

[68] RCN Comments at 14-15.

[69] RCN Reply Comments at 16.

[70] CU Comments at 3.

[71] *Id.* at 3.

attribution rules] in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made . . . ."[72] Most of the cable operators argue that the current rules interfere with the benefits of clustering their systems.[73] They argue that clustering benefits subscribers by enabling cable operators to lower costs; improve current services; more efficiently deploy new, innovative services such as internet, interactive video and telephony; develop and distribute regional programming services; and provide centralized, more responsive customer service.[74]

26. AT&T, TCI, NCTA and MediaOne argue that the Commission should take into account not only the benefits to video programming, but also the benefits that clustering and economies of scale offer for bundled voice, data and cable services.[75] They argue that the Commission should consider the benefits of enabling cable operators to compete with incumbent local exchange carriers ("ILECs") to provide these services.[76] Cable operators argue that they cannot compete with ILECs without being able to form larger clusters comparable in size to the areas served by some of the newly merged ILECs, which are not subject to subscriber limitations and are able to enjoy the benefits of economies of scale.[77]

[72] NCTA Comments at 9 (*citing Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, MM Docket No. 94-150, 10 FCC Rcd. 3606, 3610 (1995)).

[73] MediaOne Comments at 30; NCTA Comments at 23.

[74] Cablevision Comments at 10, 13 ("As the Commission has recognized, clustering can 'reduce costs and improve operating and management efficiencies,' position cable operators to serve as an outlet for regional advertising, and 'enhance MSOs ability to compete successfully in the future with LECs and major electric utilities as providers of data transmission and local telephone services.'") (*quoting 1997 Competition Report*, 13 FCC Rcd at 1115); Bresnan Comments at 6-7 (clustering systems lowers per-subscriber cost of new services because more people bear the cost); AT&T Comments at 11 (large customer base must be substantial to justify upgrading facilities to compete with ILECs); TCI Comments at 49-53; TCI Reply Comments at 19 (noting that a cable operator with a small subscriber base would not be able to recover its development costs for cable internet development); Bresnan Comments at 5, 22-23 (cable modems and digital cable television); NCTA Comments at 9 (clustering reduces duplicative costs); MediaOne Comments at 14; Time Warner Comments at 10; Adelphia *et al.* Reply Comments at 6; Comcast Reply Comments at 6; Cablevision Reply Comments at 7. MediaOne also argues that clustering enables MSOs to advertise their services in order to counter competition from other types of MVPDs. MediaOne Comments at 14.

[75] MediaOne Comments at 7; AT&T Comments at 5 (noting that two of the horizontal limits statutory factors require the Commission to examine "any efficiencies and other benefits" of increased ownership and "the dynamic nature of the communications marketplace"); TCI Comments at 46-49; NCTA Comments at 12 (Commission should take note of convergence of technologies); MediaOne Reply Comments at 2 (current rules hinder its ability to deliver advanced services); Time Warner Reply Comments at 6. MediaOne states that by the end of 1998, over 2.4 million homes passed by its network will be able to receive high-speed Internet access service. MediaOne Comments at 17.

[76] AT&T Comments at 6-9; MediaOne Reply Comments at 9. NCTA and TCI note that an ILEC, Ameritech, opposes clustering. NCTA Reply Comments at 4; TCI Reply Comments at 15.

[77] Cablevision Comments at 3, 9-10 (arguing that clustering will enable cable operators to remain competitive with their rivals such as the newly merged Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET); Bresnan Comments at 6; Cablevision Reply Comments at 18-19; Comcast Reply Comments at 6; Time Warner Reply Comments at 8 (combined SBC/Ameritech and combined Bell Atlantic/GTE will respectively control 33.8% and 35.8% of the nation's local access telephone lines); AT&T Comments at 10; TCI Comments at 53-56; Time Warner Comments at 10; MediaOne Reply Comments at 9; NCTA Reply Comments at 4 (cable's potential as a competitive local exchange carrier is dependant on clustering); MediaOne notes that other cable competitors are also not limited to size limitations, such as DBS providers. *Id.* In MediaOne's largest region, the Northeast, it provides service to 1.2 million customers

27. Adelphia *et al.* argue that there are numerous benefits to their alliances with TCI: (1) TCI partners are able to create more efficient and larger regional clusters, (2) Falcon and Insight will be able to maintain a presence in the cable market unlike other independent cable operators who have been forced to sell, (3) TCI partners benefit from TCI's capital and technical experience, and (4) their alliances with TCI have enabled the partners to reach a critical mass so that they are able to offer better, less expensive technology to subscribers.[78] As a result of clustering and TCI's financial, technical and programming support, TCA and Bresnan argue that they are able to rebuild their systems to provide hybrid fiber coaxial ("HFC") architecture which enables them to provide more channel capacity, multiplexed networks, advanced pay-per-view programming, internet service and telephony.[79]

28. Cablevision acquired approximately 800,000 subscribers from TCI in the New York area, which brought Cablevision's number of subscribers to more than 2.5 million in the New York metropolitan area.[80] Cablevision argues that without TCI's involvement, Cablevision would not have been able to cluster its systems and develop an economy of scale that would have permitted it to achieve the economic benefits of clustering. Through clustering, Cablevision argues that it was able to successfully develop local programming because there are more local subscribers.[81]

29. DIRECTV and Ameritech argue that an MSO's subscribers do not pay lower costs simply because of the purported efficiencies of clustering. Rather, MSOs, they reason, are able to charge lower costs because they use their large size to obtain programming on more favorable terms than smaller companies: "Because this advantage is not grounded in superior efficiency, it is a barrier to effective competition in the multichannel video services industry."[82] TCI argues that if another cable operator cannot achieve the scale necessary to achieve lower programming costs, it should be attributed to that cable

while the FCC-approved merger of Bell Atlantic and NYNEX provides 43,714,000 access lines. *Id.* at 18. MediaOne argues permitting clustering is the only affordable way to achieve these benefits and attract the capital that the LECs are capable of attracting. MediaOne Comments at 15. According to MediaOne, NYNEX saved more than 25% on a $1.5 billion purchase as a result of its merger with BellAtlantic, and SBC and Ameritech project $1 billion in annual savings from their planned merger. *Id.* at 18. The CLECs were able to raise $15 billion over two year to construct local exchange facilities, and five regional bell operating companies and GTE invested $24 billion in 1996 and $26.3 billion in 1997 to enhance their networks for advanced data services. *Id.* at 20; *see also* MediaOne Reply Comments at 9.

[78] Adelphia *et al.* Comments at 11-12. Falcon also states that it was not able to obtain capital for upgrading its systems until it entered into an alliance with TCI. *Id.* at 10. LCI states that it has been able to benefit from the research and experience that only a large MSO like TCI can afford. *Id.* at 19.

[79] Bresnan *et al.* Comments at 7-12.

[80] Cablevision Comments at 4.

[81] Cablevision currently offers "MSG Metro" in the New York metropolitan area. MSG Metro consists of three channels that provide information and entertainment that reflect localized needs and interests. Cablevision Comments at 13 n.18. The ability to serve, as well as spread programming costs over, a greater number of subscribers in a geographically dense area increases the likelihood that a cable operator will develop local and regional programming. Bresnan Comments at 5.

[82] J. Dertouzos & S. Wildman, *Programming Access and Effective Competition in Cable Television* (Aug. 14, 1998) at i., attached to Comments of Ameritech. *See also* DIRECTV Reply Comments at 3-5; RCN Reply Comments at 9 (clustering gives MSOs ability to fight competition from emerging MVPDs).

operator's unpopularity with consumers rather than the fact that another cable operator is able to obtain lower programming costs.[83]

30. RCN argues that how the MSOs will compete with LECs is irrelevant to this proceeding.[84] RCN and Univision argue that TCI's stake in Cablevision and its joint ventures with *Adelphia et al.* will give TCI an important voice in their business plans, harm consumers, and impede competition.[85] Ameritech argues that TCI's system swaps and joint ventures have significantly increased TCI's market power by giving it access to more subscribers.[86] For example, Ameritech notes that TCI's contribution of 850,000 subscribers to Cablevision now gives TCI an attributable interest in Cablevision's 3.5 million subscribers.[87] Given these joint ventures coupled with its ownership of Satellite Services, Inc. ("SSI") (a TCI subsidiary that sells to TCI partners "[m]any of the popular networks. . . at rates which are lower than those which would otherwise be obtainable"[88]), TCI can obtain, Ameritech asserts, virtually any terms it wants from a cable programmer, including exclusivity and steep discounts from even unaffiliated cable programmers.[89] Univision states that given TCI's investment in the joint ventures, it is implausible that the small cable operators will ignore any "suggestions" that TCI might make.[90] RCN notes that the FTC approval of the TCI/Cablevision transaction was based on an antitrust analysis, rather than the public interest analysis that the Commission should apply under Section 613 of the Communications Act, and is therefore irrelevant to this proceeding.[91]

31. Cablevision argues that its transaction with TCI enhances competition by enabling Cablevision to compete with Bell Atlantic, DIRECTV and RCN.[92] Furthermore, Cablevision argues that TCI's transactions actually reduce TCI's market power by transferring subscribers to another company.[93] Time Warner argues that the structure of TCI's joint ventures will not pose an anticompetitive risk.[94]

32. If the control certification proposals discussed above are not accepted or if an operator

[83] TCI Comments at 8.

[84] RCN Reply Comments at 17.

[85] RCN Comments at 10, 14; RCN Reply Comments at 16; Univision Reply Comments at 13.

[86] Ameritech Comments at 8.

[87] *Id.* at 8.

[88] *Adelphia et al.* Comments at 8.

[89] *Id.* at 9.

[90] Univision Reply Comments at 13.

[91] RCN Reply Comments at 9.

[92] Cablevision Reply Comments at 9.

[93] *Id.* at 18.

[94] Time Warner Reply Comments at 27.

cannot make the necessary certification, Adelphia *et al.* argues that as long as the operator owns 50% or less of a venture and does not have managerial control, the operator should be attributed with only its pro rata share of the venture's subscribers.[95] Likewise, Time Warner and MediaOne propose that an MSO should only be attributed with the percentage of a corporation or a partnership's subscribers that equals the MSOs percentage equity interest in the corporation or partnership.[96] For example, if an MSO holds a 25% interest in a partnership, MediaOne argues that only 25% of the partnership's subscribers should be attributed to the MSO.[97]

3. Discussion

33. The cable operators focus their arguments on the attribution rules applicable to the horizontal ownership rules. However, the cable operators have not presented a valid basis for a radical departure from our attribution rules framework, a framework that Congress found appropriate for the Commission to consider for the horizontal ownership rules.[98] The cable operators have not shown differences in the ownership, financing or management structures between the cable and broadcast industries that would warrant creating such a different type of attribution standard for the cable horizontal ownership or other cable rules.

34. Cable operators argue that the programming market has evolved so that even large MSOs have a limited impact on programming, and the attribution rules associated with the horizontal ownership rules inhibit cable clustering. In addition, they argue that the cable attribution rules should be different from the broadcast attribution rules because, unlike broadcasters, cable operators generally do not compete on the local level and the purposes of the broadcast and cable rules are different. These arguments are more appropriately addressed to the scope of the horizontal ownership rule itself, rather than the attribution rules. As we recently stated in the *Broadcast Attribution Report and Order*,

> The attribution rules are designed to attribute entities that wield significant influence on core operations of the licensee. It is the ownership rules that limit investment based on our core policies of diversity and competition.[99]

Arguments with respect to the status of the programming market, vertical integration, non-cable competitors and cable clustering were properly raised and resolved in our companion *Horizontal Ownership Third Report and Order*.[100] Any changes to the horizontal ownership limits should be accomplished directly

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[95] Adelphia *et al.* Comments at 20-21; *see also* Bresnan *et al.* Comments at 22 (at the very least, the Commission should attribute only the percentage of an operator's cable subscribers to an investor that equals the investor's equity interest in the entity).

[96] Time Warner Comments at 38; MediaOne Comments at 26-28.

[97] MediaOne Comments at 26-28.

[98] *See Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 92, 102d Cong., 1st Sess. 80 (1991) ("*Senate Report*") ("In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. § 73.3555 (notes) [the broadcast attribution rules] or other criteria the FCC may deem appropriate.").

[99] *Broadcast Attribution Report and Order* at para. 46.

[100] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*,

through an alteration of the limit rather than through a manipulation of what is considered to be ownership.[101]

35. In any event, we disagree with NCTA and TCI's argument that differences in the services that cable operators and broadcasters provide in the local market present a basis for establishing different sets of attribution standards for the local broadcast ownership rules and the cable horizontal ownership rules. What is relevant here is the market to which the rules are directed and the purposes of the rules. The appropriate market for an analysis of the horizontal ownership rules is the national market, not the local market.[102] In the horizontal ownership limits statute, Section 613, Congress directed the Commission to set limits on the concentration of ownership at the national level.[103] Congress was concerned that the anticompetitive effects of increased concentration at the national level might reduce the availability of diverse programming content.[104] Thus, although the local broadcast rules and the horizontal ownership rules address different markets, their purposes are the same: both sets of rules are designed to promote competition within the industry and a diversity of viewpoints and programming.[105] Given that the cable horizontal ownership limits and the broadcast ownership rules serve similar purposes, it is appropriate, with certain exceptions discussed below, to use the same attribution standards for these rules. As discussed below, the cable operators do not persuade us that the broadcast attribution standards do not accurately capture equity or debt interests that convey influence or control.

36. We also continue to believe that the cable operators' "control" proposals, which we previously rejected in the *Horizontal Ownership Second Report and Order*,[106] do not take into account the variety of ways that an investor may exert influence or control over a company. An individual or firm does not need actual operational control over (or to be the management of) a company in order to exert influence and control over that company.[107] As discussed below, equity, debt and partnership interests confer on their holders influence and control, regardless of whether the holders maintain operational control of the company.[108] Moreover, the TCI transactions discussed in the record of this proceeding demonstrate the

Third Report and Order, MM Docket No. 92-264, FCC No. 99-289 (Oct. 20, 1999) ("*Horizontal Ownership Third Report and Order*").

[101] *Broadcast Attribution Report and Order* at para. 46.

[102] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report* at paras. 125, 152-153, CS Docket No. 98-102 (rel. Dec. 23, 1998) ("*1998 Competition Report*").

[103] *See* 47 U.S.C. § 533(f)(1)(A).

[104] *See* 47 U.S.C. § 533(f)((2)(A)-(G) for list of statutory factors that the statute directs the Commission to consider in order to preserving diverse and innovative programming. *See Horizontal Ownership Second Report and Order*, 8 FCC Rcd at 8568 ("Congress sought to prevent large, vertically integrated cable systems from creating barriers to entry for new programmers and from causing a reduction in the number of media voices available to consumers.").

[105] *See Cable Attribution Notice* at para. 4.

[106] *Horizontal Ownership Second Report and Order* at para. 35.

[107] *See In re Amendment of Parts 20 and 24 of the Commission's Rules: Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap*, Report and Order, WT Docket No. 98-205, FCC 99-244 at para. 91 (Sept. 22, 1999) (rejecting control proposal for wireless rules).

[108] *See In re Amendment of Parts 20 and 24 of the Commission's Rules: Broadband PCS Competitive Bidding and*

control proposal's lack of credibility.[109] TCI's transactions include joint ventures where it has between a third and half the members of the board, rights of first refusal and supermajority rights or the right to veto fundamental decisions such as the sale of assets, declaration of bankruptcy, issuance of equity interests, consolidations, mergers, and capital calls. These rights clearly confer some degree of control or influence by TCI over the joint ventures. We agree with RCN and CU that, under these circumstances, it is more likely that a reasonable entity will consider the spoken or unspoken interests of its investors.

37. TCI's relationships with its partners demonstrates the influence that an investor can have over an entity even if the investor does not have actual, operational control over the entity's programming. Each of TCI's partners may take advantage of TCI's industry alliances, even if the partner is not required by TCI to do so. In the case of programming, each of TCI's partners can purchase at a low price cable programming networks that TCI has chosen to do business with.[110] We find it unlikely that the TCI partners would purchase the same cable networks at a higher price from a company other than TCI's subsidiary, SSI. We agree with Ameritech that the programming purchases by TCI's partners from SSI extend TCI's power in the programming marketplace.[111] Cable networks selected for carriage by TCI have a greater chance of being carried by the TCI partners. Conversely, cable networks not carried by TCI are placed at a disadvantage because they are required to compete with discounted SSI cable networks for carriage on the TCI partners' cable systems.

38. In addition, the control proposals would be unworkable and would not provide regulatory certainty.[112] Under the control proposals, there are too many variables that the Commission and interested parties would have to weigh before a determination of non-control could be made. For example, the Commission would be required to examine, among other things, the contracts between the parties (such as contracts between TCI's programming distributor subsidiary SSI and the TCI affiliates), the entity's corporate documents, the prior and current course of dealings between the parties, the structure of their board and management, and the rights and obligations of the interested parties. Many of these factors are subject to change over time.

39. With regard to the proposal that an investor be apportioned a percentage of a cable system's subscribers equal to the investor's percentage equity interest, we find no basis in the statute or in fact or theory to support such a rule. This proposal assumes that there is some logical basis for attributing an investor only some proportional influence over a cable system commensurate with the investor's

Commercial Mobile Radio Service Spectrum Cap, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-278, 11 FCC Rcd 7824 at para. 121 (1996) (rejecting control proposal by noting that minority owner may exert influence by challenging business decisions, conducting or threatening litigation or by insisting upon business audits).

[109] *See* Attachment C for details of MSO transactions.

[110] *See* Adelphia *et al.* Comments at 8-9; Bresnan *et al.* Comments at 13.

[111] Given these joint ventures coupled with its ownership of SSI, TCI can obtain, Ameritech asserts, virtually any terms it wants from a cable programmer, including exclusivity and steep discounts from even unaffiliated cable programmers. Ameritech Comments at 8.

[112] *See In re Amendment of Parts 20 and 24 of the Commission's Rules: Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap*, Report and Order, WT Docket No. 98-205, FCC 99-244 at para. 91 (Sept. 22, 1999) (rejecting control proposal for wireless rules).

percentage equity interest or that there would be some equitable reason to proceed in this manner. Investor A's 25% equity interest in cable system X, however, does not limit investor A's influence to 25% of cable system X's subscribers or 25% of the decision made by the system. Investor A's 25% equity interest enables it to exert influence or control over all aspects of the operation of the system, including what programming the system selects for all of its subscribers

B. Voting Equity Benchmark

40. We turn next to suggestions for more specific changes in the attribution rules and address first those provisions of the rules that apply in common to both the general and program access attribution provisions. For both types of rules a 5% voting equity interest would be considered an attributable interest.[113] A number of parties have suggested that 5% is too low a number.

1. Comments

41. Bresnan, Time Warner, Chase, Mediacom and Comcast argue that the attribution standard for the cable horizontal ownership cap should be relaxed so that cable operators will have greater access to capital in order to upgrade their systems to true broadband service,[114] to implement new technologies, such as digital television,[115] and to increase investment in new programming services.[116] Bresnan argues that TCI's ownership interest in it and TCI's assistance to it will benefit subscribers who will then have access to hundreds of channels of programming at low costs due to the cost efficiencies of Bresnan's partnership with TCI.[117] Chase argues that the 5% voting interest threshold is simply too low a threshold for many institutions to invest.[118] Chase reasons that raising the voting benchmark to10% will not give investors ultimate control over the company, but will recognize that investors must have some input to reduce the risk of the investment.[119]

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[113] 47 C.F.R. § 501 n. 2(a).

[114] Bresnan Comments at 15-16; Time Warner Comments at 46; Comcast Reply Comments at 3-4; Time Warner Reply Comments at 23-25; Chase Comments at 3; Mediacom Comments at 2-6. MediaOne states that cable operators will spend between $20 and $28 billion to upgrade their systems to accommodate internet, telephony, and digital programming. MediaOne Comments at 7-8; *see also* NCTA Comments at 14.

[115] Time Warner Comments at 47-49

[116] Time Warner Comments at 49.

[117] Bresnan Comments at 17-18.

[118] Chase Comments at 4. Chase is an institutional investor that holds an attributable interest (less than 10%) in Mediacom, a cable systems operator, and a 23% interest in Wireless One, Inc. ("Wireless One"), a wireless cable service provider. Because Wireless One provides wireless services in some franchise areas served by Mediacom and because Chase's interest in both entities are currently attributable under the cable/MDS cross ownership restriction, Mediacom applied for and attained a twelve month waiver of the restriction. Mediacom Comments at 1-2. Chase and Mediacom also request that the Commission relax the more restrictive attribution standard applicable to the cable/MMDS cross-ownership rule. Chase Comments at 7-8; Mediacom Comments at 11-16. This issue was not raised in the *Cable Attribution Notice* and was in fact resolved in the *Broadcast Attribution Report and Order.*

[119] Chase Comments at 5.

42. Except for the horizontal ownership attribution rules that Time Warner believes should be abolished, Time Warner argues that the Commission should raise the voting benchmark to at least 10% and could safely raise it to 20% in order to increase the availability of capital.[120] NCTA argues that there has been no showing that an investor with a 5% interest has the ability to direct a system's core functions. NCTA notes that the Department of Interior uses a 10% threshold for acreage limitations, the SEC uses a 10% threshold for insider trading rules, and the Department of Transportation uses a 10% threshold for certain reporting requirements. Time Warner states that the Commission uses higher benchmarks for other rules such as a 20% direct and 25% indirect equity interest held by aliens in broadcast properties and the 40% interest that small businesses or rural telephone companies are permitted to hold for purposes of the CMRS spectrum aggregation limit.[121]

43. TCI challenges the voting equity benchmark bright line test on the grounds that the "size of the financial interest [is] a highly imprecise indicator of the extent to which the financial interest conveys control."[122] TCI asserts that, in order to determine an investor's control, other factors must be examined, such as the composition of the board, who has authority over management, and the size of other minority shareholders.[123] However, TCI also argues that a case by case analysis of such factors would be too costly in terms of time and money.[124] TCI therefore proposes that the Commission adopt its control certification approach as a middle ground between a bright line test and a case by case analysis.

44. RCN argues that the program access standard should apply to the horizontal ownership rules in order to prevent cable companies from clustering in major markets and blocking RCN from those markets.[125] Comcast states that RCN's request is based on little more than a desire to achieve a competitive advantage.[126] Time Warner states that the need for investment far outweighs a theoretical risk of anticompetitive influence and that RCN's proposal runs counter to the deregulatory intent of the Telecommunications Act of 1996.[127] Because RCN's clustering proposal is more appropriately addressed in the context of the substantive horizontal ownership rules, we do not address it here.[128]

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[120] Time Warner Comments at 51-52 (Time Warner argues that Seagram Company Limited's 14.9% interest in Time Warner was not sufficient to dissuade Time Warner management from purchasing WTBS(TV)); *see also* Cablevision Reply Comments at 15 (recommending raising benchmark to 10%); Comcast Reply Comments at 3 (same).

[121] Time Warner Comments at 52-53.

[122] TCI Comments at 27 (*quoting Besen, O'Brien, Woodbury, and Moresi* at 8).

[123] TCI Comments at 27 (*citing Besen, O'Brien, Woodbury, and Moresi* at 8).

[124] TCI Comments at 30.

[125] RCN Comments at 16-17.

[126] Comcast Reply Comments at 8.

[127] Time Warner Reply Comments at 26.

[128] *See Horizontal Ownership Third Report and Order* at para. 62.

2. Discussion

45. In establishing voting equity provisions of the attribution rules, we focus on issues of control or influence. The attribution rules are intended to exempt from attribution ownership or positional interests that present minimal risk of influence in order to avoid unduly restricting access to capital but to attribute those interests that permit a significant potential for influence or control.[129] Based on the record of this proceeding, our parallel review of the broadcast attribution rules, a review of similar standards by other regulatory agencies, and academic studies relating to corporate governance, we conclude that the existing 5% voting share benchmark better takes into account the relevant considerations than any alternative that has been proposed.[130] We recognize that the dynamics of corporate life are varied and change over time. Thus, it is understandable that a provision of this type may be thought to be an ill fitting test of control or influence in some circumstances that might be revealed by a detailed review of the facts of particular situations. Such a particularized review process, however, would provide no certainty to parties planning transactions and would not necessarily lead to enduring conclusions even as to a particular entity. It is necessary therefore to analyze general benchmarks in order to develop a proper standard.

46. In earlier proceedings, we found, based on an ownership survey, that, in a widely-held corporation, a 5% shareholder is likely to be one of the largest 2 or 3 shareholders and therefore to be in a position to command the attention of management, and that a 5% benchmark was an appropriate threshold for attribution of interests in a closely-held corporation based on several possible ownership scenarios.[131] There is a body of more recent academic evidence that tends to confirm our earlier conclusions, demonstrating that interest holders of 5% can likely exert considerable influence on a company's management and operational decisions. One recent study demonstrated that block trades involving 5 to 10 percent of a firm's voting stock resulted in a 27 percent turnover rate of the chief executive officer of the traded firm, that a 20 to 35 percent block trade resulted in a 40 percent turnover rate of the CEO, and that block trades over 35 percent of the voting equity resulted in a 56 percent turnover rate.[132] The turnover of the CEO was tracked over a one-year period following the date of the trade. These results, spanning an increasing level of ownership starting at 5 percent, demonstrate a consistent relationship between ownership trades and the rate of replacement of top management. The results imply that investors who acquire and hold such large blocks of voting stock can influence the choice of management of the firms in which they invest.

47. Another study presents evidence that 5 percent or greater stockholders vote more actively than less-than-five percent shareholders, and they tend to vote more often against the recommendations of management in votes over corporate anti-takeover amendments.[133] This study suggests that larger owners, starting at a 5 percent level of ownership, tend to be more active in influencing management than smaller

[129] *Broadcast Attribution Notice*, 10 FCC Rcd at 3610.

[130] *See Broadcast Attribution Report and Order* at paras. 10-15.

[131] *Attribution of Ownership Interests*, 97 FCC 2d 997, 1005-08 (1984) (*"Attribution Order"*); *on recon.*, 58 RR 2d 604 (1985) (*"Attribution Reconsideration"*), *on further recon.*, 1 FCC Rcd 802 (1986) (*"Attribution Further Reconsideration"*).

[132] L.E. Ribstein, *Business Associations* 987 (1990).

[133] J.A. Brickley, R.C. Lease and C.W. Smith, *Ownership Structure and Voting on Anti-takeover Amendments*, 20 Journal of Financial Economics 267-291 (1988).

owners. The two studies considered together provide evidence that ownership percentages starting at 5 percent can influence management policies.

48. Based on these studies, we therefore disagree with TCI's argument that the voting equity benchmark is too highly imprecise to be usable in the rules. Moreover, the voting equity benchmark is superior to a test requiring a case-by-case review of each and every cable transaction because it reduces regulatory costs, provides regulatory certainty, and permits planning of financial transactions.

49. We also disagree with commenters' arguments that the cable equity benchmark should conform to certain 10% benchmarks adopted by other federal agencies.[134] Those agencies' rules serve different interests than the Commission's ownership rules. For example, the Department of Transportation's 10% rule is designed to identify substantial interests, and the SEC's insider trading rule is designed to prevent intrinsically illegal or undesirable activities. Our rule is more analogous to the SEC's 5% ownership reporting benchmark.[135] Under the SEC 5% benchmark, any person who becomes a direct or indirect owner of more than 5% of any class of stock of a company must file a statement with the SEC.[136] The general purpose of this reporting requirement is to ensure that investors are alerted to potential changes in control, which is similar to the attribution rule's goal of identifying interests which confer on their holders the potential for influence or control.[137]

50. The commenters in this proceeding have not shown that other Commission attribution rules have similar purposes to the cable rules such that the attribution standards should be the same. The 40% CMRS spectrum rule[138] is designed to foster ownership by certain entities that have traditionally had difficulty gaining access to capital.[139] Likewise, the commenters have not show how the alien ownership limits have objectives similar to the rules involved in this proceeding.[140]

51. Regarding access to capital, we note that total capital available for cable investment is projected to double in 1999 at $ 24.160 billion from $12.326 billion in 1992.[141] Available capital has steadily grown from $16,731 billion in 1996, $21.396 billion in 1997 and $22.607 billion in 1998. In addition, in 1999, cable operators are projected to have approximately $3.44 billion in surplus capital

[134] *See Broadcast Attribution Report and Order* at para. 15 n.35.

[135] *See id.*

[136] Section 13(d)(1) of the Exchange Act, 15 U.S.C. § 78m(d)(1).

[137] *See Securities and Exchange Commission v. Savoy Industries, Inc.*, 587 F.2d 1149 (1978), *cert. denied*, 99 S.Ct. 1227 (1979).

[138] 47 C.F.R. § 20.6(d)(2).

[139] *Broadcast Attribution Notice*, 10 FCC Rcd at 3623 n.68.

[140] We also note that the alien ownership restrictions of Section 310(b) of the Communications Act, as amended, apply only to "broadcast or common carrier or aeronautical en route or aeronautical fixed radio station" licenses. 47 U.S.C. § 310(b).

[141] Paul Kagan Associates, Inc., Cable TV Finance at 2 (May 28, 1999) (noting that the cable industry is "celebrating two years of financial nirvana").

available.[142] This dramatic increase in cable capital and capital surpluses decreases any cause for concern regarding the availability of capital.[143] Nevertheless, to the extent there remain any capital concerns, as discussed below, we are raising the passive investor benchmark to 20%.

C. Passive Institutional Investor Benchmark

1. Background

52. Our attribution rules do not attribute voting stock interests held by "passive investors" of less than 10%.[144] Passive investors are "investment companies, as defined by 15 U.S.C. § 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts."[145] In the *Attribution Order*, we concluded that these entities play passive roles because they lack the interest and the ability to actively participate in the firms in which they invest, and that setting a higher investment benchmark for such investors posed little risk of influence or control[146]

2. Comments

53. Some commenters request that the passive ownership benchmark be raised and the definition of passive investor be expanded. To increase capital availability, Time Warner argues that the threshold should be raised to 20%,[147] and TCI argues that it should be raised to 49%.[148] NCTA argues that the Commission should relax the passive ownership benchmark because passive investors by definition are not involved in a system's core functions and raising the benchmark will increase the flow of capital.[149] For small cable operators, NCTA argues that passive investments should not be attributable at all in order to give them more access to capital.[150]

54. Mediacom, Chase and Comcast argue that institutional investors should be treated as passive investors.[151] Chase argues that institutional investors invest in entities to obtain returns on their equity, not to harm the entities and diminish their profits; therefore, Chase argues that attribution standards

[142] *Id.*

[143] *See also Broadcast Attribution Report and Order* at para. 14 (finding that the strength of the communications and financial markets alleviated concerns over capital availability).

[144] *See* 47 C.F.R. § 501 Note 2(c).

[145] *Id.*

[146] *Attribution Order* at para. 32.

[147] Time Warner Comments at 53.

[148] *Id.* at 51.

[149] NCTA Comments at 16; *see also* TCI Comments at 51 (passive investor safeguards will protect the public interest).

[150] NCTA Comments at 19.

[151] Mediacom Comments at 14-15; Comcast Comments at 3.

for ownership rules should be distinguished from rules designed to control behavior, such as program access and program carriage.[152] Chase asserts that investment companies should be permitted to control seats of the board so long as they do not control the board and do not participate in the day-to-day operations of the entity in question.[153] Chase urges the Commission to recognize that investors must have some input to reduce the risk of the investment.[154]

3. Discussion

a. The Appropriate Passive Institutional Investor Benchmark

55. For the reasons set forth in the *Broadcast Attribution Report and Order*, we will raise the cable passive investor benchmark to 20%.[155] We believe that the legal and fiduciary requirements that constrain a passive institutional investor will ensure their passivity with respect to the management and operational affairs of a company. In addition, we believe that raising the benchmark is a relatively safe way to increase access to capital while continuing to capture influential interests. We will not raise the benchmark higher than 20%. As we stated in the *Broadcast Attribution Report and Order*, we must act cautiously when relaxing the attribution rules so that the purpose of the rules is not undermined. Based on the record before us in the *Broadcast Attribution Proceeding*, we found that voting stock held by passive investors could become decisive in proxy disputes, and passive investors accordingly could not be considered equivalent to limited partners or non-voting shareholders.[156]

b. Definition of Passive Investors

56. We will not expand the passive investor definition to include other types of investors. We are not convinced that other types of investors lack the interest or the ability to participate actively in companies in which they have invested.[157] This is particularly true of public pension funds, many of which have apparently become increasingly active in proxy fights and other devices to put pressure on management perceived to be under-performing.[158] Furthermore, commercial and investment bank activities do not fall under the same fiduciary restrictions, discussed above, that apply to bank trust departments. In addition, we have not been presented with sufficient evidence thus far to revise our earlier tentative

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[152] Chase Comments at 2 n.2, 3-5.

[153] Chase Comments at 8; *see also* Mediacom Comments at 9 (Chase is not actively involved in the management or operations of Mediacom).

[154] Chase Comments at 5.

[155] *See Broadcast Attribution Report and Order* at paras. 17-22. For the text of the new rule, *see* Appendix A; 47 C.F.R. § 76.501.

[156] *Id.* at para. 22.

[157] *See Broadcast Attribution Report and Order* at para. 25.

[158] M.J. Roe, *Strong Managers, Weak Owners* 125 (1994). In the *Attribution Order,* we declined to classify pension funds as passive investors based on evidence that pension funds manage their own investments and actively pursue social goals in their investment policies. *Attribution Order,* 97 FCC 2d at 1014-15.

conclusion not to include SBICs and SSBICs in the definition of passive investors.[159] As we have noted, under certain circumstances, these entities are authorized to exercise control over debtor companies for temporary periods.[160] Furthermore, an investment advisor, acting on behalf of its client, might exert the same level of influence or control as might the client. Therefore, unlike the categories currently defined as passive investors, we do not find evidence of regulatory or other safeguards ensuring that other types of investors will remain passive. While several commenters favored expanding the definition of the passive institutional investor category, they did not supply persuasive evidence or analysis to support their case and, in particular, to contradict evidence that these institutional investors can be actively involved in the companies in which they invest.[161] Indeed, the record here shows that some classes of institutional investors believe they should have the right to control seats on the board and to be actively involved.[162]

D. Partnership Interests

1. Comments

57. 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.[163]

58. Time Warner argues that the attribution standards applicable to limited partnerships are overly restrictive in that a limited partnership investment no matter how small is attributable unless it is "insulated" under what Time Warner asserts are the Commission's overly-stringent standards.[164] Time

[159] In the *Attribution Order*, we declined to accord passive status to SBICs and MESBICs, noting the absence of compelling reason to alter the 5 percent benchmark for these entities and the fact that while these entities are generally prohibited from assuming control of the companies in which they invest, they are authorized to exercise control over debtor companies for temporary periods under specified conditions. *Attribution Order*, 97 FCC 2d at 1016-17 & n. 45.

[160] *Attribution Notice*, 10 FCC Rcd at 3631, *citing Attribution Order*, 97 FCC 2d at 1016 & n. 45.

[161] Chase Comments at 5 (urging that investors must have some input in order to protect their investment).

[162] *Id.* at 5, 8.

[163] 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 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.

[164] Time Warner Comments at 55.

Warner states that the Commission should change its insulation criteria to make them consistent with federal and state securities regulations which require that limited partners in "business development companies" be given the right to vote to elect or remove their general partners. In addition, Time Warner argues that the Commission should permit investors to communicate with the partnership about their investments and to enter into arms-length contractual relationships with respect to the partnership's business, as nonvoting or *de minimus* voting shareholders in corporations are permitted to do, without being attributable.[165] Finally, Time Warner argues that a limited partnership interest of less than 33% should not be attributable in any partnership with at least 20 limited partners if the partnership certifies that the interest holder will not be actively involved in the partnership's media affairs.[166]

59. CU argues that the limited partner insulation exemption should be eliminated because, even though "insulated," limited partners nevertheless exercise some persuasion in partnership affairs that the attribution rules might not capture.[167]

60. Bresnan argues that the Commission should not eliminate its insulated limited partner exception because it would frustrate Bresnan's ability to upgrade its systems.[168] In addition, Bresnan argues that the Commission should apply its "single majority shareholder" exemption to partnerships because a minority shareholder does not have control, Bresnan asserts, over the entity.[169]

2. Discussion

61. For the reasons set forth in the *Broadcast Report and Order*, we find no basis to alter our conclusion that limited partnership interests are distinct from corporate equity voting interests and that our limited partnership insulation criteria are necessary to identify partnership interests that confer influence or control.[170] As we have previously found, partners in a limited partnership have the power, through contract, to determine their respective rights.[171] As a result, the power of a limited partner to influence or control the operations of the partnership may not be proportional to the limited partner's equity interest, because the extent of its power may be modified by contract.[172] Thus, the insulation criteria are designed to identify

[165] *Id.* at 56-57 (giving a multiplicity of limited partners the right to remove a general partner does not give each limited partner significant influence or control).

[166] *Id.* at 57.

[167] CU Comments at 4.

[168] Bresnan Comments at 20.

[169] *Id.* Bresnan asserts that TCI's 20% general partnership interest in TCA II does not give TCI control over TCA II. Bresnan states that TCA II is governed by a partnership committee of five members, of which three are from TCA and two are from TCA. TCA has the explicit right to manage the day-to-day operations of the partnership and the right to purchase TCI's partnership interest, but TCI does not have the right to purchase TCA's interest. *Id.*

[170] *Broadcast Attribution Report and Order* at paras. 130-133; *see also Attribution Further Reconsideration*, 1 FCC Rcd at 803-04.

[171] *Id.*

[172] *Id.*

situations within which it is safe to presume that a limited partner will not be materially involved in the media management and operations of the partnership.[173]

62. We decline to loosen the insulation criteria to accommodate widely held limited partnerships, such as "business development companies," that are organized under federal and state laws that require that investors have powers to exert significant influence or control over their partnerships. Like partnerships, these new business entities have contractual flexibility for organizing their management, thereby giving their investors the contractual ability to determine their rights. More importantly, the federal and state laws that regulate business development companies and partnerships may permit and sometimes require those entities to organize themselves in a manner that would enable their members to exert significant influence or control over the partnership. Thus, federal and state laws may fail to provide sufficient assurances that a limited partner lacks the ability to be materially involved in the partnership's media activities, which is the central purpose of the insulation criteria. Accordingly, if an investor in a business development company cannot meet the insulation criteria because of a federal or state law, then the investor has the ability to significantly influence or control the company, which warrants attribution under our rules.[174]

63. Nevertheless, for the horizontal ownership and channel occupancy limits rules,[175] we agree with Time Warner that the insulation criteria should be revised. The horizontal ownership and channel occupancy limits are designed to address the ability of one MSO or a group of MSOs, by virtue of their size, to impede the flow of programming from the programmers to consumers.[176] An MSO may extend its ability to affect the programming marketplace when it invests in other cable companies. However, where the MSO is not materially involved in the video-programming activities of a limited partnership, its investment does not extend its national programming power and the concerns of Section 613 are not implicated. In these circumstances where programming is not affected, the current insulation criteria prevent investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition to the incumbent local exchange carriers or Internet. In order for the limited partnership to benefit from an investor's expertise in these areas, it is necessary to craft insulation criteria that will not prevent the investor from offering its services to the partnership so long as those services are unrelated to the partnership's video-programming activities.

64. Therefore, we will amend the insulation criteria referenced in footnote 163 above for the horizontal and channel occupancy limits rules to provide that a limited partnership interest shall be attributed to a limited partner unless the partnership certifies that this limited partner is not materially involved, directly or indirectly, in the management or operation of the video-programming-related activities of the partnership.[177] In order to qualify for the insulated limited partnership exemption for purposes of these two rules, (1) the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video-programming 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

[173] *Id.*

[174] *See Broadcast Attribution Report and Order* at paras 131-132.

[175] 47 C.F.R. §§ 76.503, 76.504.

[176] *See* 47 U.S.C. § 613(f)(2)(A).

[177] *See* Appendix A, 47 C.F.R. §§ 76.503, 76.504.

partnership's video-programming 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 video-programming 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 video-programming activities, except that a limited partner may make loans to or act as a surety for the business; and (7) the limited partner may not become actively involved in the management or operation of the video-programming businesses of the partnership. Certifications pursuant to these rules should be served on the Commission as described in the notes to these rules.[178] In order for the Commission to accept the certification, the certification must be accompanied by facts, e.g. in the form of documents, affidavits or declarations, that demonstrate that the insulation criteria are satisfied.

E. Directors and Officers

1. Comments

65. Time Warner makes three requests for clarification of the attribution rules. First, according to Time Warner, alleged "dicta" in Mass Media decisions suggests that the power of a shareholder to appoint a corporate director is in itself an attributable interest.[179] Time Warner requests that the Commission expressly disaffirm this type of attributable interest. Second, Time Warner argues that the Commission's recusal standard for the directors and officers of a parent company with regard to a subsidiary is imprecise and overbroad.[180] Third, Time Warner requests that the Commission clarify that, for purposes of Section 310(b) of the Communications Act, an alien entity may hold (1) noninsulated limited partnership interests in a broadcast licensee of up to 20% of equity or (2) indirect noninsulated limited partnership interests in a broadcast licensee of up to 25% of equity. Time Warner also requests that the Commission employ the multiplier to calculate the equity held indirectly by a noninsulated alien limited partner.[181]

2. Discussion

66. Directors and officers are deemed to have an attributable interest in the entities that they serve.[182] We disagree with Time Warner regarding the parameters of the directors and officers attribution rule. A party that has the right to appoint a director to the board of an entity has the ability to influence the entity's conduct by virtue of the director the party selects; thus under the directors and officers rule that party has an attributable interest in the entity.[183] Likewise, if two entities share common directors or

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[178] *See* Appendix A, 47 C.F.R. §§ 76.503, 76.504.

[179] Time Warner Comments at 64 (*citing Applications of Telemundo Group, Inc.*, 10 FCC Rcd 1104 at para. 24 n.8 (1994)).

[180] *Id.* at 65.

[181] *Id.* at 67.

[182] *See* 47 C.F.R. § 76.503(h).

[183] *See Telemundo Group*, 10 FCC Rcd 1104 at para. 24 n.8