officers, or have employees that serve as directors or officers of the other entity, the directors and officers render the entities attributable because of the influence that directors and officers have over an entity.

67. Time Warner argues that the recusal standard for the officers and directors of a parent company with regard to a subsidiary is imprecise or overbroad.[184] As a general matter, we believe that the recusal standard is appropriate. In addition to the guidance provided by the rule, 47 C.F.R. § 76.503(h) (officer or director's duties must be "wholly unrelated to the broadcast licensee or cable television system subsidiary"), the Commission has provided interpretative guidance in a series of decisions.[185] We have stated that parties must take steps to prevent "the recused director from exercising authority or influence in areas that will affect" the subsidiary.[186] For example, we have approved steps where the recused director is not involved in decisions or discussions regarding the particular subsidiary, financial reports are aggregated so that the subsidiary's performance figures are not separately displayed for the director, and reports to the director are redacted to remove information regarding the subsidiary.[187]

68. For purposes of the horizontal ownership and channel occupancy rules,[188] we will amend the matters for which a director or officer must recuse himself or herself in order to achieve the purpose of those rules. As discussed in Section III.D above, the horizontal ownership and channel occupancy rules are designed to place limits on a cable operator's programming power. As long as directors and officers appointed by a partial owner of a cable operator are not involved in the video-programming activities of the partially owned cable operator, the concerns of Section 613 that an MSO's programming power will be extended by its ownership interest are not implicated. Permitting directors or officers who have knowledge and expertise in areas other than video programming, such as telephony or Internet, to serve with a cable company will benefit the cable company as technologies converge. Therefore, to achieve these objectives for the horizontal ownership and channel occupancy limits rules, appointed or common directors and officers, and the partnership equivalent thereof, shall not be attributable if they do not participate in the video programming activities of either entity.[189] To demonstrate that the officer or director meets the above-stated criteria, the relevant entity shall petition the Commission for a waiver as set forth in the rule.[190]

69. Finally, we will not address Time Warner's request regarding alien ownership of broadcast licensees. The *Cable Attribution Notice* did not raise for comment the attribution rules applicable to those rules; therefore, this is not the appropriate forum to address Time Warner's request.

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[184] *See* 47 C.F.R. § 76.503(h).

[185] *See, e.g., Telemundo Group*, 10 FCC Rcd at 1106; *Turner Broadcasting System, Inc.*, 11 FCC Rcd 19595 at para. 43 (1996); *Craig O. McCaw*, 9 FCC Rcd 5836, 5915-16 (1994), *aff'd sub nom., SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); *Viacom, Inc.*, 9 FCC Rcd 1577, 1579 (1994).

[186] *Turner Broadcasting*, 11 FCC Rcd 19595 at para. 20.

[187] *Telemundo Group*, 10 FCC Rcd at 1106.

[188] 47 C.F.R. §§ 76.503, 76.504.

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

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

F. Limited Liability Companies

1. Comments

70. Chase and Mediacom request that we expand the insulated limited partner exception to include insulated members of limited liability companies LLCs.[191] Mediacom argues that the insulation criteria will prevent an LLC investor from exerting control over management.[192]

2. Discussion

71. For the reasons set forth in the *Broadcast Attribution Report and Order*, we will treat LLCs and other new business forms including registered limited liability partnerships ("RLLPs") under the same attribution rules that currently apply to limited partnerships.[193] The insulation criteria applied above to limited partnerships will apply also to these new business forms.

72. State laws grant more liberal organizational powers to LLCs and RLLPs than to limited partnership forms. Thus, equity holders can retain their limited liability even though they participate in the management of the entity. Under these circumstances, we believe that it is important to apply the insulation criteria to assure that those equity holders that purport to be insulated from management are in fact so insulated. In addition, even when an LLC adopts a "corporate form" of organization, there is still sufficient discretion afforded by state law so that the owners of the enterprise may retain some level of operational control on their own part. The organizational restrictions applicable to corporations do not necessarily apply to LLCs.

73. To reduce paperwork burdens, we will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will apply the same "non-involvement" requirements for LLC members who are attempting to insulate themselves from attribution that we require for limited partners who are attempting to insulate themselves.[194] We will also require LLC members who seek not to be attributed to submit a statement that the relevant state statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Broadcast Attribution Notice*,[195] which may arise if we require the filing of organizational documents.[196]

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[191] Chase Comments at 7-8; Mediacom Comments at 14.

[192] Mediacom Comments at 14.

[193] *Broadcast Attribution Report and Order* at paras. 138-140.

[194] *See* 47 C.F.R. § 76.501 note 2(g)(2).

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

[196] For the text of the new rule, *see* Appendix A; 47 C.F.R. § 76.501.

G. Single Majority Shareholder Exemption and an Equity Plus Debt Rule

1. Background

74. In the *Notice* in this proceeding and through cross-reference to the *Broadcast Attribution Notice*, we asked for comment on whether adjustments should be made in the general attribution rules to eliminate the single majority shareholder exemption. [197] We also asked whether there should be an exemption to the single majority shareholder, debt and nonvoting equity exceptions in cases where a minority shareholder held a significant portion of an entity's equity (voting and nonvoting) and debt.[198] We asked whether such a shareholder's interests in the entity might give the shareholder the ability to influence or control the entity. We asked for comment on a specific proposal for a new "equity or debt plus" ("EDP") attribution rule.[199] The proposed EDP rule would ascribe an attributable interest to an investor that has an interest that exceeds 33% of the total assets (equity plus debt) of an entity and the investor is either (1) a program supplier of the entity or (2) a same-market media entity subject to the broadcast cross-ownership rules.[200] Where an investor held an EDP interest, the nonvoting equity and single majority shareholder exceptions would not apply.[201]

75. We also asked whether there are relationships in the cable context that would enable an otherwise nonattributable interest holder to exert significant influence or control that would warrant a new attribution rule capturing that interest.[202] We asked whether contractual or other business relationships between cable entities (such as affiliations that allow cable entities to purchase programming, technology or equipment on common terms) implicated the diversity and competition concerns of the cable rules.[203]

2. Comments

76. CU states that cable operators have a monopoly and need little or no direct ownership in a cable system in order to exert pressure with their retransmission consent and other contractual rights.[204] 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.[205] Thus, CU supports the equity and debt test and proposes that debt and equity be regarded together under a new attribution rule.[206]

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[197] *Broadcast Attribution Notice*, 10 FCC Rcd at 3631-33, 3649; *Cable Attribution Notice* at para. 12.

[198] *Broadcast Attribution Notice*, 10 FCC Rcd at 3631-33, 3649; *Cable Attribution Notice* at para. 12.

[199] *Broadcast Attribution Further Notice*, 11 FCC Rcd at 19900-02.

[200] *Id.*

[201] *Id.*

[202] *Cable Attribution Notice* at para. 12.

[203] *Id.*

[204] CU Comments at 3.

[205] *Id.*

[206] *Id.* at 5.

CU opposes relaxing the program access standard to permit an exemption where there is a single majority shareholder because vertically "integrated cable programmers . . . can use their assets to force business practices on supposedly dominant partners or shareholders."[207]

77. TCI, Time Warner and NCTA argue that an EDP rule would not be appropriate for the cable industry.[208] Noting that the EDP rule proposed in the *Broadcast Attribution Further Notice* is designed to capture currently unattributable interests by a program supplier in a broadcast station or interests by a media entity in another media entity within the same market, NCTA argues that these two types of interests are not present in the cable context.[209] NCTA states that a cable operator typically does not compete with another operator within the same market.[210] In addition, NCTA, Bresnan and Time Warner argue that a cable programmer is not likely to gain an investment in a cable operator that would enable the programmer to influence the cable operator in the same manner that a network can influence a local television station.[211] Time Warner argues that the investments of the four major broadcast networks in their affiliated television stations do not prove that there is similar conduct in the cable industry.[212]

78. NCTA argues that the Commission should keep the single majority shareholder exception because minority interest holders cannot direct the core operations of the entity. First, NCTA argues that there is no evidence that this exception has harmed competition or diversity. Second, NCTA argues that the exception permits investments in smaller cable operators, which is critical for the small operators' continued financial well being.[213] TCI and Bresnan argue that an EDP rule would severely constrain access to capital when the cable industry needs additional capital for its transition to digital services and where cable is facing increasing competitive pressures.[214] TCI argues that an EDP rule would only serve to capture influential interests, which TCI argues should not be attributable.[215] Time Warner argues that nonvoting stock should remain unattributable because as a matter of corporate law a nonvoting shareholder cannot influence the day-to-day operations of a cable operator.[216]

[207] *Id.*

[208] NCTA Comments at 11-12; Time Warner Comments at 59. TCI argues that there is little or no record evidence demonstrating why debt and nonvoting equity interests should be attributable in the cable context. TCI Comments at 51.

[209] NCTA Comments at 11-12; *see also* MediaOne Reply Comments at 5.

[210] NCTA Comments at 11-12.

[211] NCTA Comments at 11-12; Bresnan Comments at 21 (while an EDP rule might make sense in the broadcast local cross-ownership context to keep one broadcaster from dominating a single local market, an EDP approach would not be appropriate in the horizontal ownership context); Time Warner Comments at 59-60 (unlike a local broadcast station, a local cable system is not beholden to and does not carry one programmer).

[212] Time Warner Comments at 53-54.

[213] NCTA Comments at 16-17.

[214] TCI Comments at 51; TCI Reply Comments at 15 (rule would stifle investment and inhibit technology innovation and programming development).

[215] TCI Comments at 51; TCI Reply Comments at 15.

[216] Time Warner Comments at 53.

79. Time Warner argues the *Cable Attribution Notice* erroneously asked for the identification of "financial" and "other business relationships" that might confer influence or control. Time Warner asserts that those interests are not traditional formulations of an attributable interest.[217] Time Warner states that attributing 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, analogous to JSAs and LMAs in the broadcast context)" would raise the same types of problems that the Commission faced with the cross interest policy.[218] In particular, a cable operator or programmer, Time Warner asserts, would not know whether a proposed business relationship would fall under the rule without going through a burdensome and time-consuming process seeking a FCC ruling.[219] In this regard, Time Warner argues that the cross-interest policy should be eliminated because the interests covered by the policy are not relevant to the cable or programming rules.[220]

80. Time Warner and NCTA argue that current cable industry practices regarding the purchase of programming, technology and equipment do not raise the same concerns that broadcast station agreements do.[221] In addition, Time Warner argues that the Commission does not have the statutory mandate to seek comment on how attributable interests might influence the "technology practices" of an entity.[222] NCTA asserts that there is no record evidence that cable business relationships that may influence technology and equipment purchases harm the marketplace.[223]

3. Discussion

a. Single Majority Shareholder Exemption

81. We will eliminate the single majority shareholder exemption from the general cable attribution rules. None of the parties in this proceeding provided evidence that they are using this exemption or presented credible arguments that it should be retained. Given our concern that a minority shareholder may be able to exert influence over a company even where a single majority shareholder exists, and given the lack of a record in this proceeding that the exemption should be retained, on balance we believe that it is appropriate to eliminate the exemption from the general cable attribution rules.

b. Equity plus Debt Rule

82. The "equity plus debt" proposal discussed in the *Cable Attribution Notice* will be incorporated into both the general and the program access attribution rules. We will tailor the rules to

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[217] *Id.* at 41.

[218] *Id.* at 62-63 (*quoting Cable Attribution Notice* at para. 12).

[219] *Id.* at 63.

[220] *Id.* at 61; *see also* MediaOne Reply Comments at 5.

[221] NCTA Comments at 13; Time Warner Comments at 63.

[222] Time Warner Comments at 42.

[223] NCTA Comments at 13.

address the structure of the cable industry and to serve the particular purposes of each of the substantive cable rules at issue in this proceeding. The rule we adopt will act as an exception to the insulated limited partner, debt and nonvoting stock exemptions as follows: the cable equity and debt rule ("ED rule") will ascribe an attributable interest to an investor that holds an interest that exceeds 33% of the total asset value (equity plus debt) of the applicable entity. As a shorthand, we will use the term "total assets" herein to refer to the total asset value of the entity.[224] We will define equity to include all stock, whether common or preferred and whether voting or nonvoting, and all partnership interests. Debt includes all liabilities, whether short-term or long-term. Total assets, by definition, are equal to the sum of all debt plus all equity.[225]

83. The equity/debt approach is intended to resolve our concerns, expressed in the *Broadcast Attribution Notice*, that multiple nonattributable business interests could be combined to exert influence over entities.[226] As we stated in the *Broadcast Attribution Notice*, we are concerned that our nonvoting stock, debt and insulated limited partner exemptions can permit nonattributable investments that could carry the potential for influence such that they implicate diversity and competition concerns and should be attributed. In adopting the ED rule, we affirm our conclusion in the *Broadcast Attribution Report and Order* that there is the potential for certain substantial investors or creditors to exert significant influence over key decisions, which may undermine the diversity of voices we seek to promote.[227] They may, through their contractual rights and their ongoing right to communicate freely with the entity, exert as much, if not more, influence or control over some corporate decisions as voting equity holders whose interests are attributable.[228] The current attribution rules are thus simply too broad with respect to certain currently nonattributable interests.

84. As we decided in the *Broadcast Attribution Report and Order*, we intend to aggregate the equity and debt interests of an investor (including both non-voting stock in whatever form it is held and voting stock) in the applicable entity for purposes of applying the investment threshold.[229] Thus, when the investor's total investment in an entity, aggregating all debt and equity interests, exceeds 33% of all investment in the entity (the sum of all equity plus debt), that investment would be attributable. In aggregating the different classes of investment, equity and debt, we intend to use total assets (debt plus voting, non-voting, and preferred stock) as a base.[230] We will not apply the percentage threshold separately

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[224] For text of new rule, *see* Appendix A; 47 C.F.R. § 76.501 Note 2(j).

[225] Pursuant to standard financial accounting practices, the left-hand side of the balance sheet (or total assets) equals the right-hand side of the balance sheet (or debt plus equity).

[226] *Broadcast Attribution Notice*, 10 FCC Rcd at 3649-52; *see also Broadcast Attribution Report and Order* at para. 39.

[227] *Broadcast Attribution Report and Order* at para. 48.

[228] *See Broadcast Attribution Further Notice*, 11 FCC Rcd 19904-05.

[229] *See Broadcast Attribution Report and Order* at para. 61.

[230] For example, in the hypothetical case of a company with $100,000 of total assets, and an investor who owns 34 percent of these total assets, the investment may take the form of $30,000 of equity and $4,000 of debt in the company, or alternatively, the investment may take the form of $4,000 of equity and $30,000 of debt in the company. In either case, if the investor owns a total of 34 percent of the total asset value of the company, then the EDP rule will be triggered. In the *Broadcast Attribution Further Notice*, para. 22, we referred to the sum of all equity and all debt of the company as "total capitalization." We now use the term, "total assets," which we believe is a more rigorous accounting

to debt and to equity interests because this could lead to distortions in applying the ED rule, depending on the percentage of total assets that each class of interests comprises. For example, were we to apply the percentage thresholds separately, a company with only 10 percent of its capital from debt would be attributable to a creditor providing only 3.4 percent of the company's total assets, while any equity holder providing 32 percent of the total capital would be nonattributable.

85. We have decided to follow our decision in the *Broadcast Attribution Report and Order* to adopt a 33% investment threshold. In the *Broadcast Attribution* proceeding, some commenters advocated a higher threshold, while others advocated a lower threshold. ABC stated that a 50% threshold, rather than 33%, more realistically identifies the type and level of interest that conveys a realistic potential to control the core operations of a licensee. Paxson argued for a 25% benchmark, but only for the 4 major networks. MAP advocated a 20 percent benchmark. Viacom agreed with 33% in cases where the investor is contractually restricted from influencing budget, hiring and programming decisions, but argued for a 10% benchmark when contractual safeguards are not present. Viacom believed that an investment of even 10% of the capitalization of a station, particularly if coupled with the ability to influence station operations, carries as much influence as a 10% voting stake. CBS stated that the threshold should be set no lower than 33% to avoid prohibiting relationships the Commission has already deemed permissible.[231]

86. In the *Broadcast Attribution* proceeding, we stated that a 50 percent threshold would be inappropriately high.[232] Our goal is not merely to attribute interests with the potential to control but also those with a realistic potential to exert significant influence. On the other hand, we found that the suggested thresholds of 25 percent or 10 percent appeared to be too low.[233] In setting the threshold for attribution of these newly attributable interests, we must be cautious not to set the limit so low as to unduly disrupt capital flow to the cable industry. In addition, we believe that the threshold for attribution of nonvoting interests should be substantially higher than the attribution level for voting interests, which give the holder a ready means to influence the company. The proposed 33% threshold seems to be an appropriate and reasonable attribution threshold. We note that we have discretion to exercise our judgment in setting a percentage threshold in this regard and to draw an appropriate line, a challenging yet inevitable task for government agencies. We have employed a 33 percent benchmark applied in the context of the broadcast cross-interest policy, and that particular benchmark does not appear to have had a disruptive effect.[234] In *Cleveland Television*, the Commission held that a one-third non-voting preferred stock interest by a broadcaster in

term for the aggregate of all equity and all debt and which refers to the total asset value of the company. Our intent, however, remains the same. That is, the sum of all equity and all debt of the company will be used as a base when we aggregate different classes of investment held by an investor for purposes of determining whether the aggregate limit is exceeded. In the *Broadcast Attribution Further Notice*, we sought comment as to whether preferred stock should be treated as equity or as debt for purposes of applying the threshold. *See Broadcast Attribution Further Notice* at para. 22. We believe that this issue will not be significant in most cases since we aggregate equity and debt. However, in an instance where it may be relevant, we will presume that nonvoting stock should be treated as equity, but we reserve the right to treat preferred stock as debt in an appropriate case where the stock has more of the indicia of debt.

[231] *See Broadcast Attribution Report and Order* at para. 63.

[232] *Id.* at para. 64.

[233] *Id.*

[234] *See Cleveland Television Corp.*, 91 FCC 2d 1129, 1132-35 (Rev. Bd. 1982), *review denied*, FCC 83-235 (1983), *aff'd*, *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) ("*Cleveland Television*").

another station in the same market conferred "insufficient incidents of contingent control" to violate the multiple ownership rules or the cross-interest policy, and that the holders, by virtue of ownership of the non-voting preferred stock interest would not retain the means to directly or indirectly control the station.[235] More recently, we have applied *Cleveland Television*'s 33 percent threshold in *Roy M. Speer*, where we limited the non-attributable equity holdings of a same-market television licensee in another local television station to 33 percent.[236] We will use this threshold in applying the ED rule but note that we could adjust the threshold later, if warranted.

87. We recognize that the attributable status of a particular investment could change, based, for example, on a change in the firm's assets, resulting in the investor's interests dropping below the 33 percent threshold, or vice versa.[237] We will require parties to maintain compliance with the attribution criteria as any such changes occur. Where sudden, unforeseeable changes take place, however, we will afford parties a reasonable time, one year,[238] to come into compliance with any ownership restrictions made applicable as a result of the change in attributable status.

88. We note that the broadcast EDP attribution rule has additional prongs that the cable ED rule does not. In order for the broadcast EDP rule to apply, an investor must not only have an interest that exceeds 33% of the total assets of the applicable entity, but must also either (1) provide over 15% of the entity's programming or (2) be a same-market media entity subject to the broadcast cross-ownership rules.[239] These additional prongs were added to identify "those relationships that may trigger situations in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence over the core operations of the licensee."[240] We stated these prongs reflect our "recognition that the category or nature of the interest holder is important to whether an interest should be attributed."[241]

89. In this regard, we explicitly identified two types of interest holders – the major program supplier and the same-market media entity – that would have the incentive and the means to exert influence over the broadcast licensee.[242] The 15% programming prong was designed to capture interests of major television broadcast networks, among other substantial programmers, in local broadcast stations whereby the networks were extending their nationwide programming reach through previously unattributable relationships.[243] Interests captured by the 15% programming EDP rule count toward the broadcast

[235] *Cleveland Television*, 91 FCC 2d at 1132-35.

[236] 11 FCC Rcd 18393, 18442-43 (1996), *on recon.*, 13 FCC Rcd 19911 (1998).

[237] Such a change in the attributable status of an investment is also possible under our current attribution rules.

[238] This approach of permitting one year to come into compliance with the multiple ownership rules tracks our general approach with respect to non-grandfathered interests discussed in Section III.J.

[239] *Broadcast Attribution Report and Order* at para. 36.

[240] *Id.* at para. 47.

[241] *Id.*

[242] *Id.*

[243] *Id.* at para. 50, 56 n.121, 59 (at time of *Broadcast Attribution Report and Order*, based on staff analysis, the 15% standard covered only the four major networks, HSN, Paxnet, Telemundo, Univision, and WB but not UPN).

network's or other programmer's national ownership limit. The same-market entity prong was designed to capture controlling or influential interest in two media entities within the same market that would then trigger the local cross-ownership rules, thereby implicating the Commission's goals of promoting diversity and competition.[244]

90. The cable ED attribution rule implicitly identifies relationships that confer on otherwise unattributable investors significant incentive and ability to exert influence over the core interests of the applicable entity. Thus, we do not find it necessary in the attribution rule to refer explicitly to the nature of the investor. With regard to the cable horizontal ownership limits, the competitive structure of the cable industry differs from that of the broadcast industry. As the cable operators in this proceeding have stated, unlike broadcasters, cable operators generally do not compete in the same markets. This lack of competition permits and encourages cable operators to form combinations with one another across markets, as established in this record,[245] in ways that the broadcast industry does not. These combinations extend the reach of an MSO's influence and control over programming, thereby expanding its power in the national programming marketplace and accordingly triggering the purpose of the horizontal ownership limits. Because cable operators do not compete in the same markets, cable subscribers are limited to the programming selections that a single system chooses. One MSO thus has no incentive to distinguish itself through different programming from another MSO because they do not compete in the same market and likely hold interests in one another across markets.[246] Because of this market structure, if an MSO has a significant ED interest in a system, that interest enables the MSO to significantly influence or control a cable system's core functions, such as programming, the heart of the horizontal ownership rule.[247] Thus, the ED interest by itself implicates the concerns of the rules without the addition of an additional prong. We also believe that the ED attribution rule should be applied to the program access type attribution standard, for the reasons set forth in Section H below.

91. Finally, with regard to the same-market media entity cross-ownership prohibition rules at issue in this proceeding (47 C.F.R. §§ 76.501(d) (cable/SMATV cross-ownership), 76.505 (cable-telco buy-out prohibitions), and 76.905(b)(2) (effective competition), we will apply the broadcast EDP attribution test applied to the broadcast/cable cross-ownership prohibition rule for the reasons set forth in the *Broadcast Attribution Report and Order* because they serve the same purpose, promoting competition and diversity within a local media market.[248]

92. We decline at this time to examine contract language on a case-by-case basis to determine whether the contract gives one of the parties thereto an attributable interest. We believe that a bright-line ED test is superior to a case-by-case analysis because it permits the planning of financial transactions and minimizes regulatory costs. Nevertheless, we retain discretion to review cases that present unique issues

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244 *Id.* at para. 51.

245 *See* Appendix C.

246 *See id.*

247 One transaction in particular demonstrates the potential influence that a debt holder may have over an entity: Comcast loaned $735,000,000 to Prime in exchange for a ten-year note that is convertible into 90% of Prime's equity.

248 *See Broadcast Attribution Report and Order* at paras. 51-53. The broadcast EDP attribution rule applies to the broadcast/cable and cable/MDS cross-ownership rules, 47 C.F.R. §§ 76.501(a), 21.912.

where the public interest requires such a review. Such cases might occur, for example, when there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence such that the Commission's multiple ownership rules should be implicated, notwithstanding the fact that these combined interests do not come within the parameters of the ED rule. We do not intend for this type of review to replace the cross-interest policy that we abolished in the *Broadcast Attribution Report and Order*.[249] We reserve the discretion to examine in the future whether contractual relations between cable entities that enable them to purchase programming, technology or equipment on common terms implicates the diversity and competition concerns of the cable rules.

H. The Program Access Attribution Standard

1. Background

93. The discussion above relates to attribution criteria that are common to both the "general" and "program access" attribution rules. There are important areas, however, where these two sets of rules differ. More particularly, the rules differ in that the program access attribution rules attribute nonvoting stock interests, attribute all partnership interests above 5%, and do not exempt what would otherwise be attributable interests because of the presence of a single majority shareholder.

94. We also asked for comment on whether and how we should re-evaluate the program access attribution standard. In particular, we sought comment on (1) whether the program access attribution standard serves the purposes for which it was intended; (2) whether the program access standard is over- or under-inclusive; (3) whether the program access attribution standard should be revised in relation to the broadcast attribution standard; (4) whether these two attribution standards should be treated as completely separate and independent formulations; and (5) whether, in view of the purposes it serves, we should require a more compelling showing before modifying the program access standard.[250]

2. Comments

95. CU and DIRECTV argue generally that the program access rules should not be relaxed.[251] WCA seeks clarification as to whether the "program access" attribution rules apply to all entities subject to the program access rule. WCA argues that there is currently a "gap" in the program access rules' definition of an attributable interest. WCA states that, although the program access rules are designed to address problems created by the common ownership of a cable company and a satellite cable programming vendor, the rules appear to apply only where a cable company has an attributable interest in a programming vendor and not vice versa.[252] Section 76.1001 of our rules covers a "cable operator, [a] satellite programming vendor in which a cable operator has an attributable interest, [and] a satellite broadcast programming vendor."[253] Because this language does not specifically state that the rule applies to an entity that holds an attributable interest in both a cable operator and a cable programmer, WCA states that some parties have

[249] *Broadcast Attribution Report and Order* at para. 112.

[250] *Cable Attribution Notice* at para. 14.

[251] CU Comments at 2, DIRECTV Comments at 2-8.

[252] WCA Comments at 7-9.

[253] 47 C.F.R. § 76.1001.

asserted that the program access rules do not apply where a cable programmer holds an ownership interest in a cable operator.

96. For example, Microsoft Corporation maintains a 50% equity interest in the cable programmer MSNBC and an 11.5% non-voting stock interest in Comcast. According to WCA, Microsoft has argued that the program access rules' definition of attributable interest does not explicitly state that the definition applies to interests in cable companies; thus Microsoft has argued that its interest in Comcast is not attributable and that MSNBC is not covered by the program access rules.[254] Based on this argument, Microsoft has never made MSNBC available to wireless cable operators or other alternative MVPDs.[255]

97. WCA argues that Microsoft's argument defies common sense. Under Microsoft's interpretation, it would not hold an attributable interest in Comcast even if it held a sizable minority voting stock interest in that company. WCA also notes that Time Warner holds its cable systems and its cable programmers in separate subsidiaries, Time Warner Entertainment ("TWE") and Turner Broadcasting respectively. In addition, after the proposed AT&T and TCI merger, WCA states that AT&T will hold Liberty cable networks and the TCI systems in separate subsidiaries.[256] WCA states that Time Warner and AT&T should not be able to argue that the Turner cable networks and the Liberty cable networks are exempt from the program access rules because Time Warner's 100% ownership of TWE and AT&T's 100% ownership of the TCI systems are not attributable.[257]

98. WCA requests that the Commission amend Section 76.1000(b) to make it clear that common ownership of, or an attributable interest in, both a cable operator and a cable programmer will trigger the rules.[258] WCA states that this was the intent of Congress[259] and that the Commission has recognized that vertical integration also occurs where a cable programmer holds an ownership interest in a cable operator.[260]

99. As a preliminary objection, MediaOne states that WCA should file a program access complaint to resolve this issue.[261] Comcast and TCI argue that the Commission should not amend the program access rules because Section 628 of the Communications Act, which authorized the implementation of the rules, specifically addresses only situations where a cable operator has an attributable interest in a satellite cable programming vendor. Paragraphs (b) and (c)(2)(B) of Section 628 refer to a "satellite cable programming vendor[s] in which a cable operator has an attributable interest."[262] Section

254 WCA Comments at 9-10.

255 WCA Comments at 14.

256 WCA Reply Comments at 13.

257 WCA Comments at 12; WCA Reply Comments at 13-14.

258 WCA Comments at 7.

259 WCA Comments at 7-8 n.16.

260 WCA Comments at 11 (*citing Fourth Annual Report*, 13 FCC Rcd at 1122 n.550).

261 MediaOne Reply Comments at 12.

262 Comcast Reply Comments at 9 (*quoting* 47 U.S.C. § 548(b)); TCI Reply Comments at 17).

682(c)(2)(A) refers to a "cable operator which has an attributable interest in a satellite cable programming vendor."[263] TCI and Comcast thus argue that the plain language of Section 628 cannot be read to apply to a third party noncable entity that holds simultaneous ownership interests in a cable operator and a satellite cable programming vendor.[264] Moreover, TCI argues that, even if Section 628 could be read as WCA requests, the Commission should decline to grant WCA's request because the potential anticompetitive effects associated with vertical concerns do not warrant stringent Commission regulation.[265]

100. WCA also requests that the Commission initiate a process to examine on a case-by-case basis whether unique and substantial non-ownership relationships between a cable operator and a nonvertically integrated cable programmer should be classified as *de facto* "attributable interests."[266] WCA states that the consolidation of cable systems and new joint ventures between cable companies and cable programmers is further tightening the MSOs stranglehold over cable programming.[267] Ameritech and WCA state that as a result, a number of nonaffiliated cable networks such as Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television and TV Land act like vertically-integrated programmers and refuse to sell their products to alternative MVPDs.[268] WCA proposes that the Commission develop procedural and proof requirements for a case-by-case approach that would capture these harmful relationships while preventing frivolous complaints against cable programmers.[269]

101. Comcast argues that the Commission should deny this request because the program access rules already encompass non-ownership relationships that confer "actual working" control over cable operators.[270] Comcast also argues that WCA has not presented any evidence that WCA has been denied video programming due to a joint venture that is not covered by Section 76.1000(b).[271] TCI argues that the Commission should adopt TCI's control "certification proposal" as a less costly approach.[272]

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[263] TCI Reply Comments at 17 (*quoting* 47 U.S.C. § 548(c)(2)(A)).

[264] *Id.*; TCI Reply Comments at 17 (WCA's interpretation is contrary to the plain language of the statute).

[265] *Id.* at 19.

[266] WCA Comments at 17.

[267] WCA Comments at 15-16.

[268] WCA Comments at 16.

[269] WCA Comments at 18.

[270] Comcast Reply Comments at 11 n.25 (*citing* 47 C.F.R. § 76.501, Note 1).

[271] *Id.* at 11.

[272] TCI Reply Comments at 20.

3. Discussion

a. Changes to the Standard

102. The proceeding before us raises the general question of whether the different attribution standards employed can be justified based on the underlying purposes of the different cable rules; whether for one set of rules it is justifiable to attribute any stock interest above the 5% level, even if it is non-voting stock, whereas other rules do not attribute nonvoting stock or other financial interests even if they represent a very significant portion of the total value of the entity involved. Because different rules address different economic interests and different policy objectives it is not illogical that different attribution criteria might be more appropriate for one set of rules than another. The rules derived from the broadcast attribution rules, including for example the horizontal ownership and channel occupancy rules, were discussed in terms of promoting competition and diversity and focused on the influence one entity was likely to have over another. When the program access attribution criteria, which are used, for example, in the program access, program carriage rules, and for certain rate regulation purposes, were adopted it was thought desirable to attribute more interests because these rules were designed not only to promote competition and diversity but to deter specific discriminatory or improper conduct by specific cable operators, programmers, or other entities. Having reviewed the rules in question we continue to believe that the program access attribution rules appropriately take into account the relevant considerations but that an ED rule should be added to capture debt interests. In addition, given the purposes of the various rules subject to this proceeding, we find it appropriate to switch the SMATV/cable cross-ownership rule from the program access attribution standard to the general attribution standard.

103. As discussed above, the rules covered by the "program access" attribution standard are designed to address specific misconduct that adversely affects competition and to focus on economic incentives to discriminate. These rules are triggered only where there have been allegations of specific misconduct based on a relationship between two specific parties. At that point, we examine the relationship between the parties, and because specific misconduct has been alleged, the relationship warrants stricter scrutiny. By contrast, the ownership rules, such as the horizontal limits and cable/broadcast cross-ownership, are not designed to identify misconduct *per se*, but rather are designed to act as structural safeguards against potential anticompetitive conduct.

104. Moreover, we note that, unlike the horizontal ownership and broadcast/cable cross-ownership prohibition, the program access type rules are not designed to limit ownership in entities covered by those rules. Rather, the program access type rules simply provide that if an investor holds an interest in an entity covered by the rules, that investor will be subject to the behavioral constraints of the program access type rules. Thus, attributing nonvoting equity and not permitting a single majority shareholder or insulated limited partner exemptions for these rules in no way deters investment in entities covered by these rules. In other words, the program access attribution standard's broader sweep does not raise the capital and investment concerns that the general attribution standard raises.

105. It is appropriate to attribute nonvoting equity and to not allow the insulated limited partnership and single majority shareholder exceptions to the "program access" type rules. By virtue of a significant nonvoting equity interest, one party has the incentive to influence or favor the other party, and all of the "program access" type rules are designed to prevent the harm caused by this type of influence or favoritism. For example, the program access rules identify investments where a cable operator has an incentive to influence a programmer to deny access to a cable competitor and the programmer has an

incentive to favor the cable operator to keep its investor satisfied.[273] The program carriage rules identify situations where an investor has a financial incentive to influence a cable operator not to carry unaffiliated programming so that the investor's interest in a favored affiliate is not harmed.[274] Likewise, the leased access and open video systems rules identify situations where investors have incentives to favor programmers in which they have investments over other programmers.[275] Finally, the rules governing asset transfers between a cable operator and an affiliate[276] and rate pass-throughs for the programming services of an affiliated programmer[277] target behavior favoring an investment. Thus, for the "program access" type rules, even if there is a single majority shareholder or the investor does own voting stock in a company, the investor has the incentive to influence the company, and the company has the incentive to keep its investor satisfied.

106. Allowing a limited partnership exception here would shield from the scope of these "program access" type rules the very kinds of relationships they are intended to address. A cable operator cannot insulate itself from its investment in a programmer when it is charged with denying carriage to unaffiliated programmers, vertical foreclosure that denies program access to another cable operator, or asset transfers or rate pass-throughs between the cable operator and the programmer. Moreover, to be covered by most of these rules, the parties would have had to enter into a contractual relationship, such as an affiliation agreement. Thus, the exemption for insulated limited partners could not apply because insulated limited partners are limited in terms of the contracts they may enter into with the partnership and still be exempt from attribution.

107. We also believe that it is appropriate to adopt an ED rule for the "program access" type rules. As discussed above, these rules are designed to identify specific misconduct between two parties, and their attribution rules are designed to identify interests that would confer on their holder the incentive to influence or favor the other party. A 33% ED interest would provide such an incentive. In addition, while the program access type attribution rules count nonvoting equity, they do not recognize debt. We find that the types of investors covered by the program access rules that hold over 33% of the total assets of an entity in the form of debt and equity would have the incentive to influence that entity.

108. Given the different purposes of the general and program access type attribution rules, it is appropriate to realign one of the cable rules. The program access type rules currently apply to the SMATV/cable cross-ownership prohibition.[278] However, because the SMATV/cable cross-ownership prohibition is a structural safeguard against anticompetitive conduct, we will now apply the general attribution standard to the SMATV/cable cross-ownership rule.

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[273] *See* 47 C.F.R. § 76.1001.

[274] *See* 47 C.F.R. § 76.1300.

[275] *See* 47 C.F.R. § 76.970(b); 47 C.F.R. § 76.1503(c).

[276] *See* 47 C.F.R. § 76.924(i).

[277] *See* 47 C.F.R. § 76.922(f)(6).

[278] *See* 47 C.F.R. § 76.501(d).

b. WCA's Proposal

109. We specifically asked for comment on whether the program access attribution standard was under-inclusive; thus, we disagree with MediaOne that WCA's request is not within the purview of the *Cable Attribution Notice*. Although the program access rule clearly sets forth in its provisions a program access attribution standard, we agree with WCA that it is not clear as to which entities are covered by the program access attribution standard with respect to the program access rule. We find that the program access attribution standard should be applied to all entities covered by the program access rule, including cable operators. Moreover, to the extent there is a lack of clarity with respect to the remainder of the "program access" type rules, we clarify that the program access attribution standard should be applied to all entities covered by the "program access" type rules.

110. For purposes of the program access rule, the issue is what person or entity constitutes a "cable operator" that holds an attributable interest in a programmer such that the program access rule is triggered.[279] Congress defined the term "cable operator" in Section 602 of the Communication's Act as follows:

> [T]he term "cable operator" means any person or group of persons . . . who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system. . . .[280]

The Commission established the attribution rules to determine what constitutes a "significant interest."[281]

111. The program access attribution rules define what constitutes a "significant interest." The purpose of the program access rule, as well as all of the other rules covered by the program access attribution standard, is to deter discriminatory or improper conduct.[282] These rules are designed to deter misconduct by all parties covered by the applicable rules, including cable operators. To the extent that there is any confusion regarding the definition of cable operator for purposes of these rules, we will amend these rules to make it clear that any party with an attributable interest in a cable operator under the program access attribution standard shall be treated as a cable operator for purposes of these rules.[283] Thus, if a third party has an attributable interest in a cable operator under the program access attribution standard, it shall be treated as a cable operator for purpose of the program access type rules.

112. We decline to adopt WCA's proposal that we examine on a case-by-case basis whether the relationship between a cable operator and an unaffiliated cable programmer suggests that they are *de facto* affiliated. As noted above, we favor a bright line test in order to promote regulatory certainty.

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[279] *See* 47 C.F.R. § 76.1001.

[280] 47 U.S.C. § 522((5)(A) (emphasis added); *see* 47 C.F.R. §76.5(cc).

[281] *See* 47 C.F.R. §76.5(bb).

[282] *See id.* at paras. 5-8.

[283] *See* Appendix; 47 C.F.R. § 76.1001; 47 C.F.R. § 76.1300; 47 C.F.R. § 76.924; 47 C.F.R. § 76.922; 47 C.F.R. § 76.970; 47 C.F.R. § 76.1500.

I. *Cable Reform* Issues

1. Effective Competition

a. Background

113. In this section, we establish rules for the definitions of affiliate for purposes of the "LEC test" and the "competing provider test" of the effective competition rules. Under Section 623 of the Communications Act, a cable operator is not subject to rate regulation if it is subject to effective competition in its franchise area.[284] Section 623(l) as amended by the 1992 Cable Act provides three tests for determining effective competition.[285] A cable system is exempt from rate regulation if any of the following three tests is met:

> (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system [the "low penetration test"];
> (B) the franchise area is-
> (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
> (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area [the "competing provider test"]; or
> (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area [the "municipal provider test"].[286]

The 1996 Act adds a fourth test to Section 623(l).[287] Under the new test, a cable operator will be subject to effective competition if comparable video programming is offered to subscribers within the cable operator's franchise area by, or over the facilities of, a LEC or its affiliate.[288] Section 623(l)(1)(D)[289] (the "LEC test") provides that effective competition exists when:

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[284] 47 U.S.C. § 543(2).

[285] 47 U.S.C. § 543(l)(1)(A)-(C).

[286] *Id.* These tests were implemented in the Commission's rules at 47 C.F.R. § 76.905(b)(1)-(3).

[287] 1996 Act § 301(b)(3), 110 Stat. 115; 47 U.S.C. § 543(l)(1)(D); *see* 47 C.F.R. § 76.905(b)(4).

[288] 47 U.S.C. § 153(26) defines a LEC as:

> any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

> (D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

114. In the *Cable Reform Notice,* seeking comment on rules to implement this statutory change, the Commission sought comment on the definition of "affiliate" for purposes of the LEC test.[290] Resolution of this issue was then transferred to this proceeding.[291]

115. Although not specifically related to the effective competition test, the 1996 Act amended Title I, Section 3 of the Communications Act by adding a definition of "affiliate:"

> The Term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.[292]

In the *Cable Reform Notice*, we noted that this definition applies to our rules "unless the context otherwise requires,"[293] and that the definition of "affiliate" in Title VI of the Communications Act concerning cable television was not changed by Congress.[294] As noted above, Title VI provides:

> [T]he term "affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.[295]

116. Given that Title VI does not set a percentage threshold as to ownership, we found that we have discretion to establish an ownership threshold other than 10% for purposes of Title VI.[296] However, as an interim rule, we decided that it was reasonable to adopt the 10% threshold until this rulemaking was

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[289]4 7 U.S.C. § 543(l)(1)(D).

[290] *Cable Reform Notice* at para. 77.

[291] *Cable Reform Report and Order* at para. 25.

[292] 1996 Act § 3(a) § 3(a), 110 Stat. 58, *codified at* 47 U.S.C. § 153(1).

[293] 47 U.S.C. § 153.

[294] *Cable Reform Notice* at paras. 15-16.

[295] 47 U.S.C. § 522(2); *see also* 47 C.F.R. § 76.5(z).

[296] *Id.* at para. 16.

completed.[297] We decided that active or passive equity interests of 10%, or the equivalent thereof, would constitute an affiliation. In addition, we concluded that affiliation could be established through de facto control and that we would determine on a "case-by-case" basis whether other interests besides equity would be "the equivalent" of an equity interest."[298]

117. We tentatively concluded that, although the Title I definition was not mandated for use for purposes of Title VI, we found it reasonable to use this test for purposes of the LEC effective competition rule.[299] We asked for comment on this proposal as well as whether passive ownership interests and beneficial interests should be included.[300]

118. In addition, in the *Cable Attribution Notice*, we stated that we intended to review how and whether any changes in our cable attribution rules should affect our various definitions of "affiliate."[301] In reviewing the effective competition rules, we ascertained that the "competing provider test" does not have its own specific definition of affiliate.[302] The competing provider test provides that there is effective competition in certain circumstances where there are at least two "unaffiliated multichannel video programming distributors" in the franchise area.[303] As discussed below, we will amend this rule to clarify its definition of the term "affiliate" to bring it into alignment with our other same market cross-ownership rules.

b. Comments

119. Cable operators argue that the Commission should adopt the Title I 10% threshold or a lesser threshold for purposes of defining a LEC affiliate.[304] They argue that both active and passive equity interests should be deemed attributable.[305] They also argue that beneficial interests, options, warrants, and convertible debentures should be attributable as the "equivalents" of equity interests.[306] Time Warner argues that the Commission should define the term "beneficial interest" in the same broad manner as the

[297] *Id.*

[298] *Id.*

[299] *Id.* at para. 77.

[300] *Id.*

[301] *Cable Attribution Notice* at para. 15.

[302] 47 C.F.R. § 76.905(b)(2).

[303] *Id.*

[304] *See, e.g.*, Cole Raywid Cable Reform ("CR") Comments at 7; New Jersey CR Comments at 10; MCTC CR Comments at 6; SCBA CR Reply Comments at 15.

[305] Cole Raywid CR Comments at 7; ICTA CR Comments at 3; New Jersey CR Comments at 10; MCTC CR Comments at 6; SCBA CR Reply Comments at 15; Cox CR Comments at 13-14; Comcast CR Comments at 13-14; Fleischman CR Comments at 10-15; Time Warner CR Comments at 4.

[306] Cox CR Comments at 13-14; Comcast CR Comments at 13-14; Time Warner Comments at 4; Fleischman CR Comments at 10-15.

SEC in its Rule 13d-3 under the Securities and Exchange Act of 1934.[307] The cable operators argue that these types of "equivalent" interests should be attributable based on the Commission's policy of assessing ownership based on economic realities.[308]

120. Some parties argue that the Commission should adopt a 5% threshold for the effective competition test.[309] CCTA argues that LECs are using video service businesses as a defensive strategy to keep capital out of the hands of cable operators who seek to compete with LECs in telephony.[310]

121. Time Warner proposes that the Commission modify FCC Form 430 to require wireless cable licensees to certify: (1) whether the licensee is LEC-affiliated; and (2) whether the entity offering service over the wireless facilities is LEC-affiliated.[311] This certification requirement, according to Time Warner, would save public and private resources by eliminating the need to investigate the relationships for compliance with the Commission's rules.[312]

122. LECs and public interest groups argue that the Title VI definition of affiliate should continue to govern the implementation of Title VI provisions, including the effective competition test.[313] BellSouth states that the definition in Title VI is unambiguous and should be followed.[314] GTE argues that the application of a 10% benchmark is arbitrary and does not comport with realities of telecommunications marketplace.[315] Bell Atlantic argues that Commission should use Title VI definition because the use of specific thresholds are overly intrusive and burdensome.[316] ICTA favors retaining the Title VI definition of "affiliate" in determining when effective competition exists, and urges the Commission to exclude beneficial or passive interests in this context.[317]

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[307] Time Warner CR Comments at 8-9 (*citing* 17 C.F.R. § 240.13d-3; 15 U.S.C. § 78(l)-(n)).

[308] Cox CR Comments at 15; Comcast CR Comments at 15; *see also* Fleischman Comments at 11.

[309] CCTA CR Comments at 9-11; Cole Raywid CR Comments at 6; NECTA CR Comments at 7.

[310] CCTA CR Comments at 9-10.

[311] Time Warner Comments at 10.

[312] *Id.*

[313] Bell Atlantic CR Comments at 2 (rejecting mechanical application of 10% rule); BellSouth CR Comments at 3-4; GTE CR Comments at 4-5; Alliance for Community Media, The Consumer Project on Technology, and The Alliance for Communications Democracy ("Alliance") CR Comments 2-3; ICTA CR Reply Comments at 2-3.

[314] BellSouth CR Comments at 4.

[315] *Id.* at 4.

[316] Bell Atlantic CR Comments at 2.

[317] ICTA CR Comments at 2.

123. RCN contends that the application of the Title I 10% benchmark to rules arising under Title VI would create a disparity in the regulatory treatment of cable affiliates and LEC affiliates.[318] Under the Title I definition, RCN argues that the presence of any competitive MVPD in which a LEC has a passive, non-controlling 10% or greater equity investment would establish a basis for a cable operator to claim that effective competition exists in the market. Cable operators, on the other hand, would be unfairly advantaged because, RCN asserts, they would be considered "affiliated" with other entities only if actual control is established under the broader Title VI definition of "affiliate."[319] Accordingly, RCN argues that cable operators would be entitled to deregulation while maintaining a much higher ownership interest in a purported "unaffiliated" competing provider.[320]

124. USTA opposes the application of the Title I benchmark in the Title VI context.[321] USTA argues that the Commission has developed expertise in applying the Title VI definition of "affiliate" in attribution cases, and should continue to do so.[322] USTA contends that Congress' decision not to extend the Title I benchmark to the definition of "affiliate" contained in Title VI means that Congress did not intend to extend a benchmark to Title VI situations.[323]

125. While SBC did not take a position on whether the Commission should adopt the Title I definition, SBC argues that the term "beneficial interests" is not commonly understood to constitute an ownership interest and therefore should not be deemed an "equivalent interest" under the Title I definition.[324]

C. Discussion

i. LEC Test

126. We reaffirm our decision in the *Cable Reform Notice* that, given that Congress left Title VI's definition of affiliate unaltered, Title VI's definition continues to govern rules promulgated thereunder.[325] In our discretion under Title VI, we believe it reasonable to adopt, with some modifications, the 10% threshold proposed in the *Cable Reform Notice* because we believe 10% will reasonably capture active LEC participation in a MVPD that may give the MVPD access to the resources of the LEC that Congress envisioned would be necessary to provide effective competition to cable.

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[318] RCN CR Comments at 4-8; *see also* USTA CR Reply Comments at 7-8.

[319] RCN CR Comments at 4.

[320] *Id.*

[321] USTA Comments at 9.

[322] *Id.*

[323] *Id.* at 10.

[324] SBC CR Comments at 4. Time Warner observes, however, that SBC cites no authority for the contention that beneficial ownership is not ownership. Time Warner Reply Comments at 8.

[325] *Cable Reform Notice* at para. 16.

127. Congress expected that the LECs would be robust competitors of cable operators because of their financial and technical resources.[326] Congress also expected that the LECs would be effective competitors because their presence would be ubiquitous. [327] Congress did not envision deregulation until competition was in place.[328]

128. Thus, unlike the other cable attribution rules at issue in this order, which are designed to promote competition by ascertaining the minimum interest necessary for one entity to potentially influence another, the LEC test is designed to promote competition where a LEC participates in the ownership and operation of a MVPD to such an extent that the MVPD may truly enjoy the financial and technical resources of the LEC in order to compete with cable. Based on the distinct purpose here involved – to identify not the potential for influence but the existence of significant involvement – we believe a higher attribution standard is in order for the LEC test.

129. More specifically, it is appropriate to set the equity threshold higher than the standard 5% threshold in order to serve this different purpose and to require greater LEC involvement in MVPDs before deregulation takes place based on this test. We set the equity threshold at 10% threshold to reflect when a LEC has become a MVPD competitor in the relevant market. Given our relatively limited experience with the LEC test to date, we hesitate to set the threshold higher than 10% at this time. Nevertheless, we reserve the option to raise the 10% threshold in the future if we determine that 10% does not accurately capture the entrance of LEC competition in the marketplace. The 10% threshold will apply to corporate voting stock and partnership interests. The 10% threshold will apply only to active LEC investors. An MVPD competitor cannot be effectively a LEC competitor by virtue of its affiliation with a LEC that is a passive investor only, unless the LEC has an ED interest in the MVPD. We believe that an ED investment, given its size, by a LEC gives an MVPD significant access to the resources of a LEC such that it can be presumed that there is effective LEC competition.[329] The LEC effective competition test presumes, without any

[326] *See* 141 Cong. Rec. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler) ("Looming large on the fringes of the [video programming services] market are the telephone companies. The telephone companies pose a very highly credible competitive threat because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and, last but by no means least, their financial strength and staying power.").

[327] *See* 142 Cong. Rec. S699 (daily ed. Feb. 1, 1996) (statement of Sen. Lott) ("[T]he people will get a choice in how they get their services."); Cong. Rec. H1149 (daily ed. Feb. 1, 1996) (statement of Cong. Fields) (looking for head-to-head competition from cable and telephone competitors); 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Cong. Dingell) ("No longer will consumers have just one company to choose from for the provision of local telephone or cable television service.").

[328] 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) ("[C]ompetition is the best regulator of the marketplace. Until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage. Timing is everything. Telecommunications services should be deregulated after, not before, markets become competitive.").

[329] We disagree with Time Warner that options, warrants, and convertible debentures should generally be treated as beneficial interests under our rules creating an attribution simply because the SEC defines them to be beneficial interests if their owner can obtain voting stock through these securities within 60 days. *See* Time Warner CR Comments at 8-9 (*citing* 17 C.F.R. § 240.13d-3; 15 U.S.C. § 78(l)-(n)). We do not believe that these types of securities demonstrate the type of current, active participation by a LEC envisioned by the LEC test, unless the amount of these securities that an investor holds is more than 33% of the total assets of a company. Therefore, subject to the ED rule, we will exclude these types of securities as well as any other types of nonvoting interests from attribution for purposes of the LEC test.

market share or market penetration test, that the presence of a LEC competitor or use of a LEC's facilities, given the LEC's identity, resources, and functions, has significance beyond that of other competitors. Consistent with this rationale we will not treat positional interests (officers and directors) or insulated limited partnership interests as creating attributable interests that would result in a finding of LEC effective competition because these interests would not give the MVPD access to the LEC's significant resources. Given that we have not adopted the Title I definition of affiliate, we need not determine what constitutes an interest "equivalent" to an equity interest.

130. We also decline to adopt Time Warner's proposal that we require wireless cable licensees to certify with the Commission whether they are LEC-affiliates and whether any entity offering services over their facilities is LEC affiliated. In the *Cable Reform Report and Order*, we adopted a mechanism for cable operators to obtain evidence from their competitors in order to establish effective competition.[330]

ii. Competing Provider Test

131. As discussed above, in reviewing the effective competition rules, we ascertained that the "competing provider test" does not have its own specific definition of the term "affiliate."[331] The competing provider test provides that there is effective competition in certain circumstances where there are at least two "unaffiliated multichannel video programming distributors" in the franchise area.[332] Because the competing provider test provides the same function as our cross-ownership prohibitions, we will apply cable/SMATV cross-ownership attribution rules to determine whether two MVPDs serving the same market are "affiliated."

132. Given that the competing provider test does not have its own definition, the default definition in Part 76's definition section applies:

> When used in relation to any person, [the term affiliate means] another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.[333]

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[330] *Cable Reform Report and Order* at para. 30; *see* 47 C.F.R. § 76.911(c) ("If the evidence establishing effective competition is not otherwise available[, when considering] petitions filed seeking to demonstrate the presence of effective competition pursuant to § 76.905(b)(4) [the LEC test], the Commission may issue an order directing one or more persons to produce information relevant to the petition's disposition.").

[331] 47 C.F.R. § 76.905(b)(2).

[332] *Id.*

[333] 47 C.F.R. § 76.5(z). The attribution rules determine what constitutes ownership and control for purposes of this section. However, our review of the cable rules' various definitions of the term "affiliate" reveals that they omit a reference to Section 76.5(z). Therefore, we will amend the appropriate cable rules to include a single definition of the term "affiliate" in order to incorporate the cable attribution rules into Section 76.5(z). This rule will provide, "Parties are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities." *See* Appendix A; 47 C.F.R. § 76.1300; 47 C.F.R. § 76.924; 47 C.F.R. § 76.922; 47 C.F.R. § 76.970; 47 C.F.R. § 76.1500.

In addition, in reviewing our rules for this proceeding, we ascertained that, although we had decided in previous orders that the restrictive attribution standard should apply to our programming pass-though rule and rule regarding transfers between affiliates, those rules omitted a reference to the applicable attribution standard. *See Cable Attribution Notice* at para. 8; *see* 47 C.F.R. §§ 76.922(f)(6), 76.924(i). Therefore, we will amend these rules to clarify the attribution standards for them. *See* Appendix A; 47 C.F.R. §§ 76.922(f)(6), 76.924(i).

Our rules then define cognizable ownership and control interests under this rule through our attribution rules.[334] However, our rules do not specify which attribution rules apply to the competing provider test. Although, in the *Cable Attribution Notice*, we initiated a review of our various definitions of "affiliate" in light of our attribution rules,[335] no party filed comments on the competing provider rule.

133. We find it appropriate to apply the general attribution rules to the competing provider test because it is designed to act as a structural safeguard in order to promote competition.[336] Certainly we could not find that a cable operator faced effective competition in its franchise area if the "competing" MVPD was partially owned by the cable operator. The cable/SMATV cross-ownership attribution standards will capture interests that would enable their holders to engage in anticompetitive behavior. We will accordingly amend the competing provider rule to clarify its attribution standard.[337]

2. Cable-Telco Buy-Outs

a. Background

134. Section 302 of the 1996 Act added Section 652 to the Communications Act. Section 652 provides in relevant part:

> (a) Acquisitions By Carriers. No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.
>
> (b) Acquisitions By Cable Operators. No cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area.[338]

135. In the *Cable Reform Notice*, we implemented Section 652 by adopting its terms into our rules. We solicited comment regarding the definition of "affiliate" as that term is used in the context of the cable-telco buy-out provision.[339]

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[334] 47 C.F.R. § 76.5(bb); 47 C.F.R. § 76.501 Notes.

[335] *Cable Attribution Notice* at para. 15.

[336] *See Cable Reform Notice* at para. 9.

[337] *See* Appendix A; 47 C.F.R. § 76.905(h).

[338] 47 U.S.C. § 572.

[339] *Cable Reform Notice*, 11 FCC Rcd at 5970

b. Comments

136. Alliance argues that the Commission should interpret the term "affiliate" as broadly as possible in order to protect programming choices.[340] BellSouth and USTA argue that the definition should capture only controlling interests pursuant to Title VI's definition of affiliate.[341] Time Warner argues that the context of the cable-telco buyout prohibitions requires the same affiliation rules as the other cable cross-ownership rules.[342]

c. Discussion

137. We agree with Time Warner that the cable-telco buyout prohibition rules should have the same affiliation rules as the other cable cross-ownership rules in this proceeding and therefore adopt these rules.[343] Both the cable-telco buyout prohibition rules, adopted in the 1996 Act, and general rules are designed to promote competition in the market place for telecommunications services.[344] We find nothing in the record to persuade us that the cable-telco rules should be any more broad or narrow that the other general cable cross-ownership rules.

J. Transition Issues

138. For the rules setting limits on ownership – the horizontal ownership rule, the cable/SMATV cross-ownership prohibition rule, the cable-telco buyout prohibition, and the effective competition test, any interests acquired on or after June 26, 1998, the date that the *Cable Attribution Notice* was issued, will be subject to the new attribution rules adopted in this *Report and Order.* We believe this cutoff date is reasonable and appropriate since parties were on notice that the attribution rules were subject to change once the *Cable Attribution Notice* was adopted, and that any interests acquired on or after that date could be subject to any rule changes. Interests acquired before June 26, 1998 will be subject to the rules in existence on that date.

139. The grandfathering of interests under the ownership rules shall be permanent so long as the interest is not transferred. If the grandfathered interest is later assigned or transferred, the grandfathering will not transfer to the assignee or transferee.[345] New owners cannot demonstrate the same equitable considerations that prompt us to grandfather existing owners whose current interests are now unavoidably placed in violation of the multiple ownership rules based on adoption of the new attribution rules. For non-grandfathered ownership interests that are now attributable, *i.e.*, those acquired on or after June 26, 1998,

[340] Alliance CR Comments at 2-3; Alliance CR Reply Comments at 1-2.

[341] BellSouth CR Comments at 3-4; USTA CR Reply Comments at 9-11.

[342] Time Warner Comments at 31-32.

[343] For text of new rule, *see* Appendix A; 47 C.F.R. § 76.505.

[344] *See Cable Reform Notice* at para. 9; *Cable Attribution Notice* at paras. 4-6.

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

and which must be divested to comply with our ownership rules, we believe that a twelve-month period should be sufficient for parties to identify buyers.[346]

140. For the remaining rules at issue in this proceeding, all interests acquired at any time will be subject to the rules adopted in this *Report and Order*. These remaining rules, such as the vertical channel occupancy limits and the program access rules, do not require that an investor divest any interests in order to comply with an ownership limit. Rather these rules prescribe that a cable operator behave in certain ways. There will be no grandfathering of interests covered by these remaining rules.

141. To the extent that compliance with our rules as a result of this Order poses a threat to a cable system's Y2K preparedness, the Commission will consider, on a case by case basis, petitions for forbearance of these rules until after the Year 2000 date rollover period.[347]

IV. Final Regulatory Flexibility Analysis

142. As required by the Regulatory Flexibility Act ("FRA"),[348] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* in CS Docket No. 98-82, FCC 98-112. The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[349]

A. Need for, and Objectives of, this Report and Order

143. The cable attribution rules define what constitutes a "cognizable interest" that triggers application of various Commission rules relating to the provision of cable television services. This *Report and Order* amends the attribution rules in order to better effectuate their intended goals as well as to make them more effective.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

144. The cable operators argue generally that the attribution rules restrict the availability of capital.[350] NCTA argues that passive investments in small cable operators should not be attributable in

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

[347] *See* Federal Communications Commission *Year 2000 Network Stabilization Policy Statement* (Oct. 4, 1999).

[348] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[349] *See* 5 U.S.C. § 604.

[350] *See, e.g.*, Time Warner Comments at 51-52 (arguing that Commission should raise the threshold to 10 to 20%); Cablevision Reply Comments at 15 (recommending raising the voting equity benchmark to 10%); Comcast Reply Comments at 3 (same); TCI Comments at 51; TCI Reply Comments at 15 (arguing that ED rule would stifle investment).

order to give these operators more access to capital.[351] In addition, NCTA argues that the ED exception to the single majority shareholder exception will limit investments in small cable operators.[352] None of the parties in this proceeding filed comments on how other issues raised in the *Notice* would impact small entities. Nevertheless, we discuss below how we considered the impact on small entities.

C. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

145. The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction" and "the same meaning as the term 'small business concern' under the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities.[353] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[354] The Small Business Enforcement Fairness Act of 1996 (SBREFA) provision of the RFA also applies to nonprofit organizations and to governmental organizations such as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.[355] Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

Local Franchising Authorities

146. There are 85,006 governmental entities in the United States.[356] This number includes such entities as states, counties, cities, utility districts and school districts. We note that any official actions with respect to cable systems will typically be undertaken by local franchising authorities ("LFAs"), which primarily consist of counties, cities and towns. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states, which typically are not LFAs. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000. Thus, approximately 37,500 "small governmental jurisdictions" may be affected by the rules proposed in this *Notice*.

[351] NCTA Comments at 19.

[352] NCTA Comments at 16-17.

[353] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

[354] 15 U.S.C. § 632.

[355] 5 U.S.C. § 601(5).

[356] United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

Cable Services or Systems

147. The SBA has developed a definition of small entities for cable and other pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services, which includes all such companies with annual gross revenues of $11 million or less.[357] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,423 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[358]

148. The Commission has developed its own definition of a "small cable company" and "small system" for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[359] Based on our most recent information, we estimate that there were 1,439 cable companies that qualified as small cable companies at the end of 1995.[360] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable companies. Consequently, we estimate that there are fewer than 1,439 small entity cable companies that may be affected by the proposal adopted in this *Notice*. The Commission's rules also define a "small system," for the purposes of cable rate regulation, as a cable system with 15,000 or fewer subscribers.[361] We do not request nor do we collect information concerning cable systems serving 15,000 or fewer subscribers and thus are unable to estimate at this time the number of small cable systems nationwide.

149. The Communications Act also contains a definition of a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[362] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers is deemed a small operator, if its annual revenues, when combined with the total annual

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[357] 13 C.F.R. §121.201.

[358] 1992 Census, *supra*, at Firm Size 1-123. *See Memorandum Opinion and Order and Notice of Proposed Rule Making, Implementation of Sections of the Cable Telecommunications Consumer Protection and Competition Act of 1992, Rate Regulation and Cable Pricing Flexibility*, MM Docket No. 92-266 and CS Docket No. 96-157, 11 FCC Rcd 9517, 9531 (1996).

[359] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable company is one with annual revenues of $100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration, Implementation of Sections of the 1992 Cable Act: Rate Regulation*, MM Docket Nos. 92-266 & 93-215, 10 FCC Rcd 7393 (1995).

[360] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[361] 47 C.F.R. § 76.901(c).

[362] 47 U.S.C. § 543(m)(2).

revenues of all of its affiliates, do not exceed $250 million in the aggregate.[363] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[364] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Satellite Master Antennae Television ("SMATV") Operators

150. Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.[365] Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996.[366] The ten largest SMATV operators together pass 815,740 units.[367] If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

Local Exchange Carriers ("LECs")

151. Neither the Commission nor the SBA has developed a definition for small LECs. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[368] The most reliable source of information regarding the number of LECs nationwide is the data that we collect annually in connection with the TRS Worksheet.[369] According to our most recent data, 1,410 companies reported that they were engaged in the provision of local exchange services.[370] We do not have information on the number of carriers that are not independently owned and operated, nor what carriers have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs.

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[363] 47 C.F.R. § 76.1403(b).

[364] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[365] *Id.* at para. 81.

[366] *Id.*

[367] *Id.*

[368] 47 C.F.R. § 121.201; SIC Code 4813.

[369] *Trends In Telephone Service*, Table 19.3 (Feb. 19, 1999)

[370] *Id.*

Cable Programmers

152. The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),[371] and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).[372] These SBA definitions provide that a small entity in the cable television programming industry is an entity with $21.5 million or less in annual receipts for SIC 7812, and $5 million or less in annual receipts for SIC 7922.[373] Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (SIC 7812), and that 6,987 of these firms had $16.999 million or less in annual receipts and 7,002 of these firms had $24.999 million or less in annual receipts;[374] and (b) there were 5,671 firms in the United States classified as Theatrical Producers and Services (SIC 7922), and that 5627 of these firms had $4.999 million or less in annual receipts.[375]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

153. This *Report and Order* permits investors in limited liability companies and registered limited liability partnerships to insulate their interests from attribution. In order to insulate their interests, investors must file a certification pursuant to 47 C.F.R. § 76.501(f). Directors and officers may petition the Commission for a waiver of attribution under 47 C.F.R. § 76.501(f); 47 C.F.R. § 76.503; 47 C.F.R. § 76.504. This *Report and Order* sets ownership and investment thresholds in entities covered by the Commission's cable rules, Section 76, that subject their investors to the cable rules. *See* Appendix A.

[371] "Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Producers of live radio and television programs are classified in Industry 7922." *Standard Industrial Classification Manual*, SIC 7812, Executive Office of the President, Office of Management and Budget (1987) ("OMB SIC Manual").

[372] "Establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters. . . . Also included in this industry are producers of . . . live television programs." OMB SIC Manual, SIC 7922.

[373] 13 C.F.R. § 121.201.

[374] U.S. Small Business Administration, *1992 Economic Census Industry and Enterprise Report*, Table 2D, SIC 7812, (U.S. Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) ("SBA 1992 Census Report"). Because the Census data do not include a category for $21.5 million, we have reported the closest increment below and above the $21.5 million threshold. There is a difference of 15 firms between the $16,999 and $24,999 million annual receipt categories. It is possible that these 15 firms could have annual receipts of $21.5 million or less and would therefore be classified as small businesses.

[375] SBA 1992 Census Report, SIC 7922.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

154. We find that there are no significant alternatives to the rules and policies set forth in this *Report and Order* that would minimize the impact on small entities, and we note that no commenter proffered alternatives to these rules and policies that would address the concerns of the rules.

155. The *Report and Order* retains the current 5 percent active voting stock attribution benchmark. We believe that our original decision to set a 5 percent benchmark to capture influential interests remains valid and will not unduly restrict capital availability. Further, we note cable capital expenditures have doubled in the past 7 years. To the extent that there are still concerns about not impeding capital flow to broadcasting, we believe that they will be adequately addressed since the *Report and Order* increases the passive investor benchmark.[376]

156. The *Report and Order* increases the voting stock benchmark from 10 percent to 20 percent for passive investors. We believe that increasing the passive investor benchmark to 20 percent will give cable operators increased access to investment capital, while preserving the Commission's ability to effectively enforce its ownership rules. This decision takes into account the special nature of the passive investor category, in terms of the legal and fiduciary requirements that constrain passive investors' involvement in the management and operational affairs of the firms in which they invest. In addition, passive investors have become an increasingly important source of investment capital to the corporate sector.[377]

157. Further, we note that the record in the *Broadcast Attribution* proceeding strongly supports an increase in the passive investor benchmark and supports our belief that such an increase will help assure that the attribution changes adopted herein will reinforce the trends in cable investment. We believe that increasing the passive investor benchmark is a relatively safe way to increase capital flows, without compromising the ability of our attribution rules to capture influential interests. The *Report and Order* retains the current definition of "passive investors," which is limited to bank trust departments, insurance companies and mutual funds.[378]

158. The *Report and Order* eliminates the single majority shareholder exemption and adopts an equity plus debt ("ED") attribution proposal, as a new rule that will function in addition to the other attribution rules. Under this new ED rule, where the investor's interest exceeds 33% of an entity's total asset value of the entity (equity plus debt), the interest will be attributable. The *Report and Order* refers to total asset value as "total assets."[379]

159. The ED rule reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease

[376] *See* Section III.B above.

[377] *See* Section III.C above.

[378] *See id.*

[379] *See* Section III.G above.

of administrative processing and reasonable certainty to regulatees in planning their transactions. The bright-line ED test will provide more regulatory certainty than a case-by-case approach that requires review of contract language. Thus, the ED rule will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs.[380]

160. We have no basis to conclude or reason to believe that the ED rule would unduly deter investment. The equity/debt proposal does not preclude investment by any entity; rather, it caps nonattributable investment levels for entities that have the potential to influence their investments. Additionally, to help assure that our actions today do not unduly impede capital flow to cable, we have raised the passive investor benchmark. As discussed above, we believe that because of the nature of passive investors, we may raise that benchmark consistent with our goal of maximizing the precision of the attribution rules.[381]

161. While some commenters argued that applying the ED rule to program suppliers would curb investment, they do not provide empirical evidence to support this argument. We also note that the rule does not preclude investment, but merely provides that investments over a certain level will be deemed presumptively attributable.[382]

162. Some commenters suggested that the insulated limited partnership criteria be modified to eliminate conflicts with state law. However, state and federal law provisions may fail to provide sufficient assurance that the limited partner will lack the ability to significantly influence or control the partnership's media activities.[383]

163. We will not create exceptions for widely held limited partnerships, such as Business Development Companies, from the current insulation criteria applicable to limited partnerships or otherwise revise those insulation criteria. The essential character of these new business forms for determining attributable interests is the contractual flexibility they allow in setting up and managing the association. Therefore, we believe that the insulation criteria are needed for these business forms to insure the "lack of material involvement" on the part of investors. This would imply that in some limited number of cases, interests may not be insulated because of state laws that require investor rights that conflict with the insulation criterion. However, commenters have not provided sufficient evidence concerning the number or importance of such instances that would compel the Commission to create specialized exemptions for these specialized business forms. Since these entities are allowed greater contractual flexibility under state law than are limited partnerships, we believe that greater caution is warranted in dealing with these novel forms. Further, we have not been presented with evidence to demonstrate that the current insulation criteria are no longer valid or effective in achieving their goals.[384]

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[380] *See id.*

[381] *See id.*

[382] *See id.*

[383] *See* Section III.D above.

[384] *See id.*

164. Nevertheless, for the horizontal ownership and channel occupancy limits rules,[385] we will amend the insulation criteria 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. 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. 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.[386]

165. We disagreed 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. Likewise, if two entities share common directors or officers, or have employees that serve as directors or officers of the other entity, the directors and officers render the entities attributable because of the influence that directors and officers have over an entity.[387]

166. As a general matter, we believe that the recusal standard for directors and officers of a parent company is appropriate. In addition to the guidance provided by the rule, 47 C.F.R. § 76.503(h) (officer or director's duties must be "wholly unrelated to the broadcast licensee or cable television system subsidiary"), the Commission has provided interpretative guidance in a series of decisions. We have stated that parties must take steps to prevent "the recused director from exercising authority or influence in areas that will affect" the subsidiary. For example, we have approved steps where the recused director is not involved in decisions or discussions regarding the particular subsidiary, financial reports are aggregated so that the subsidiary's performance figures are not separately displayed for the director, and reports to the director are redacted to remove information regarding the subsidiary.[388]

167. For purposes of the horizontal ownership and channel occupancy rules, we will amend the matters for which a director or officer must recuse himself or herself in order to achieve the purpose of those rules. As discussed in Section III.D above, the horizontal ownership and channel occupancy rules are designed to place limits on a cable operator's programming power. As long as directors and officers appointed by a partial owner of a cable operator are not involved in the video-programming activities of the partially owned cable operator, the concerns of Section 613 that an MSO's programming power will be extended by its ownership interest are not implicated. Permitting directors or officers who have knowledge and expertise in areas other than video programming, such as telephony or Internet, to serve with a cable

[385] 47 C.F.R. §§ 76.503, 76.504.

[386] *See* Section III.D above.

[387] *See* Section III.E above.

[388] *See* Section III.E above.

company will benefit the cable company as technologies converge. Therefore, to achieve these objectives for the horizontal ownership and channel occupancy limits rules, appointed or common directors and officers, and the partnership equivalent thereof, shall not be attributable if they do not participate in the video programming activities of either entity. To demonstrate that the officer or director meets the above-stated criteria, the relevant entity shall petition the Commission for a waiver as set forth in the rule.[389]

168. We will treat LLCs and RLLPs under the same attribution rules that currently apply to limited partnerships. The insulation criteria that currently apply to limited partnerships would apply without modification to these new business forms. Therefore, LLC or RLLP owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations of the media-related activities of the LLC or RLLP. We will not distinguish among LLCs based on whether they adopt a more centralized or decentralized form. We believe that this decision is justified for the reasons discussed in the *Broadcast Attribution Notice*, which were also supported in the record and fully discussed in the *Broadcast Report and Order*.[390]

169. We will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will require the same "non-involvement" statement for LLC members who are attempting to insulate themselves. We will also require LLC members who submit the foregoing statement to submit a statement that the relevant state enabling statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Broadcast Attribution Notice*, which may arise if we require filing of organizational documents.[391]

170. The *Report and Order* clarifies that the program access attribution standard applies to all entities covered by the program access type rules. The clarification will not restrict investment in entities covered by the program access type rules. Rather, investors in such entities will be subject to the behavioral guidelines of these rules. The *Order* also applies the general attribution standard to the cable/SMATV cross-ownership rule and applies the program access attribution standard to the vertical channel occupancy limits. In addition, the ED attribution rule is added to the program access attribution standard for the same reasons that it is added to the general attribution standard.[392]

171. The *Report and Order* adopts the general attribution standard for the effective competition competing provider rule and the cable-telco buy-out prohibition. These two rules have the same purpose as the cable/SMATV cross-ownership rules and therefore warrant the same standard.[393]

172. The *Report and Order* adopts a 10% voting equity and an ED interest attribution standard for the LEC prong of the effective competition test. The *Order* reasons that the LEC test warrants a

[389] *See id.*

[390] *See* Section III.F above.

[391] *See id.*

[392] *See* Section III.H above.

[393] *See* Section III.I above.

different standard because it serves a different purpose than the other cable rules at issue. The effective competition test is designed to trigger when a LEC is actively involved in an MVPD. Thus, the LEC attribution standard is set higher than the broadcast attribution standard in order to encourage LEC involvement in an MVPD and to capture when a LEC is truly involved in the MVPD.[394]

173. The *Report and Order* adopts grandfathering and transition measures for interests that become newly attributable pursuant to the new rules adopted.[395]

Report to Congress: The Commission will send a copy of this *Report and Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this *Report and Order* and FRFA (or summary thereof) will also be published in the Federal Register, pursuant to 5 U.S.C.A. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paper Work Reduction Act

174. The requirements adopted in this *Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose new or modified information collection requirements on the public. Implementation of any new or modified information collection requirements will be subject to approval by the Office of Management and Budget ("OMB"). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the information collection requirements contained in this *Report and Order*, as required by the 1995 Act. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

175. Written comments by the public on the information collection requirements are due 60 days from date of publication of this *Report and Order* in the Federal Register. Comments should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information on the information collection requirements, contact Judy Boley at (202) 418-0214 or via the Internet at the above address.

VI. Ordering Clauses

176. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303 and 612, 613(f)(1)(A)&(B), 616, 623, 628 and 652 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 532, 533(f)(1)(A)&(B), 536(a), 543, 548(b), 572 and 573, that the amendments to discussed in this *Report and Order* and set forth in Attachment A ARE ADOPTED. These amendments shall become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

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[394] *See id.*

[395] *See* Section III.K above.

177. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C.A. § 601 *et seq*.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary