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March 15, 2001

Via Hand Delivery

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for Reconsideration
MM Docket Nos. 94-150, 92-51 and 87-154

Dear Ms. Salas:

Viacom Inc., by its attorneys, hereby submits an original and eleven (11) copies of its Petition for Reconsideration of the Commission's Memorandum Opinion and Order on Reconsideration in MM Docket Nos. 94-150, 92-51 and 87-154.

Please date-stamp the enclosed "Return Copy" of this Petition for Reconsideration and return it to the courier delivering the package.

Should there be any questions concerning this matter, please contact the undersigned.

Respectfully yours,

John D. Poutasse

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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MAR 15 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

PETITION FOR RECONSIDERATION

Viacom Inc. ("Viacom"), by its attorneys and pursuant to Section 1.429(d) of the Commission's Rules, hereby petitions the Commission for reconsideration of the Memorandum Opinion and Order on Reconsideration in the above-captioned proceeding (FCC 00-438, released January 19, 2001) (the "*Reconsideration Order*"). Viacom requests that the Commission reconsider its decision to eliminate the single majority shareholder exception to the broadcast attribution rules in light of the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Time Warner Entertainment Co., L.P. v. FCC*, 2001 U.S. App. LEXIS 3102 (D.C. Cir. March 2, 2001) ("*Time Warner II*").

Standing and Timeliness

Viacom is an "interested person" under Section 1.429(a) of the FCC's Rules, because Viacom, through direct or indirect wholly-owned subsidiaries, is the licensee of numerous radio and television broadcast stations, and because Viacom is controlled by a single majority shareholder, NAIRI, Inc. Viacom is aggrieved because the repeal may unduly limit the universe of potential investors in the company.

This Petition is timely filed. A summary of the *Reconsideration Order* was published in the Federal Register on February 13, 2001. Therefore, the deadline for petitions for reconsideration is March 15, 2001.

Background

Owners of 5% or more (20% in the case of "passive" investors) of the voting stock of a licensee (or parent of a licensee) are generally "attributed" for purposes of the FCC's broadcast ownership rules. An exception to this general principle applies where the licensee has a single majority voting shareholder.

Under the single majority shareholder exception, the Commission does not attribute a 5% or greater minority voting stock interest in a corporation in which one stockholder holds more than 50% of the outstanding voting stock, unless the minority interest is otherwise attributable under the equity/debt plus ("EDP") rule. *See* 47 C.F.R. § 73.3555, Notes 2(b) and 2(f). In originally adopting the exemption, the Commission reasoned that minority shareholders in a licensee corporation having a single majority shareholder, "even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings."

Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 F.C.C. 2d 997, 1008-1009 (1984). In August 1999, the Commission reaffirmed the single majority shareholder exception in its initial Report and Order in this broadcast attribution proceeding. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (*the "*Broadcast Attribution Order*"), 14 FCC Rcd 12559, 12579 (1999). The Commission explained that the new EDP rule adequately addressed its previously expressed concerns that some minority shareholders eligible for the exception might exert sufficient influence over the licensee to justify attribution. *Id.* The Commission made clear that a minority investor whose interest is attributable under the EDP rule would be unable to take advantage of the single majority shareholder exception. *Id.*

In the *Reconsideration Order*, the Commission reconsidered its August 1999 decision not to eliminate the single majority shareholder exception and repealed it for purposes of the broadcast ownership attribution rules. *Reconsideration Order* at ¶¶ 41-44. The Commission justified its decision to repeal the exception on the basis of its earlier decision to eliminate the single majority shareholder exception for purposes of the cable ownership attribution rules, but made no reference to its previous conclusion that the EDP rule adequately addressed concerns about the single majority shareholder exception. *Reconsideration Order* at ¶ 41.

In *Time Warner II*, the Court of Appeals reversed and remanded the Commission's decision to eliminate the single majority shareholder exception for purposes of the cable television horizontal ownership and vertically integrated programming rules. The court faulted the Commission for failing to justify its removal of the exception. *Time Warner II,* 2001 U.S. App.

LEXIS 3102 at *55-*56.

Argument

The Commission's rationale for eliminating the single majority shareholder exemption for broadcast ownership attribution purposes is as thin as it was in the cable ownership attribution proceeding. As the court held in *Time Warner II*, the "[r]emoval of the exemption is a tightening of the regulatory screws, if perhaps a minor one. It requires some affirmative justification . . .". *Id.* at *55. Yet in the *Reconsideration Order*, as in its previous cable ownership attribution order, the Commission offers no such justification. Instead, the Commission offers only the unsubstantiated conclusion that minority shareholders in a company with a single majority shareholder "have the potential to influence a licensee's actions." *Reconsideration* Order at ¶ 43. The Commission does not explain what has changed since 1984 when it concluded that minority shareholders in a corporation with a single majority shareholder, "even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings."

Moreover, the Commission appears to have reversed the burden of demonstrating that repeal is justified. In the *Reconsideration Order*, the Commission stated that "[a]lthough the influence of a minority shareholder may be diminished somewhat where a single majority shareholder controls the licensee, we have *no reason to believe* that the minority shareholder's influence is eliminated or so attenuated in such circumstances that we should ignore its ownership interest for purposes of our ownership rules." *Id.* (emphasis added). The Commission is required to provide support for its conclusion that the rule should be repealed, and the support must be

based on "some finding grounded in experience or reason ...." *Time Warner* II, 2001 U.S. App. LEXIS 3102 at *55-*56. The Commission's statement that it has "*no reason to believe* that the minority shareholder's influence is eliminated or so attenuated in such circumstances" does not satisfy this requirement. The Commission is obligated to provide an affirmative justification for repeal. But the Commission in essence concedes that it has no evidence one way or the other. The decision in *Time Warner II* makes clear that the Commission may not impose regulatory restrictions where it has "no reason to believe" that the factual assumptions underlying the restriction exist or do not exist.

In the *Reconsideration Order*, the Commission also ignores its previous conclusion that the new EDP rule itself will result in the attribution of those otherwise nonattributable interests that afford the minority stockholders the incentive and means to exert influence or control over licensee decisions regarding core licensee operations of broadcast stations.[1] As indicated above, in the initial Report and Order in this proceeding, the Commission adopted the EDP rule essentially to act as a safety valve that would attribute the interests of minority shareholders who may have the ability to exert significant influence over a broadcast licensee. *Broadcast Attribution Order* at 12579. The Commission has failed to explain why the limits imposed on the availability of the single majority shareholder exception by the application of

1 Under the EDP rule, a non-attributable interest in a broadcast licensee, including a licensee with a single majority shareholder, will be attributed if the interest holder (a) holds equity or debt that constitutes more than 33% of the "total asset value" of the licensee, and (b) the interest holder either: (i) supplies over 15% of the total weekly broadcast programming hours of the station in which the interest is held or (ii) holds an attributable interest in another broadcast station, cable television system or daily English-language newspaper in the same market. 47 C.F.R. §73.3555, Note 2(b).

the EDP rule are now somehow inadequate to achieve what had been one of that rule's principal goals -- improving the effectiveness of the Commission's attribution rules with respect to minority stockholder interests.[2]

Conclusion

The decision in *Time Warner II* undercuts the Commission's primary rationale for repealing the single majority shareholder exception under the broadcast ownership attribution rules, which was that the Commission had eliminated the exception for purposes of the cable ownership attribution rules. The Commission offers no further finding grounded in the Commission's experience or reason for its conclusion that the exception should be eliminated.

2 The Court of Appeals in *Time Warner II* upheld the EDP rule for purposes of the cable ownership attribution rules. *Time Warner II,* 2001 U.S. App. LEXIS 3102 at *53.

Accordingly, Viacom respectfully requests that the Commission reconsider its decision in the *Reconsideration Order* and reinstate the single majority shareholder exception to the broadcast attribution rules.

Respectfully submitted,

VIACOM INC.

By: _____

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March 15, 2001

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