

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

In the Matter of)	
)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992)	CS Docket No. 98-82
)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act Of 1996)	CS Docket No. 96-85
)	
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules)	MM Docket No. 92-264
)	
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
)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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EXECUTIVE SUMMARY

In the *Further Notice*, the Commission seeks comment on revising its horizontal and vertical cable ownership limits given the rejection of those rules by the United States Court of Appeals for the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*.¹ The court also reviewed the Commission's regulations governing the attribution of ownership for purposes of the horizontal and vertical limits, and upheld certain aspects of these policies while vacating others.² In these comments, NAB focuses on the Commission's vacated decision to eliminate the single majority shareholder exemption.³

NAB recognizes that the Commission recently suspended its elimination of the exemption pending resolution of the issues outlined in the *Further Notice*,⁴ and for the reasons stated herein, believes that this should remain the permanent policy. Specifically, NAB asserts that the Commission acted without sufficient legal or economic justification when it eliminated the exemption because it has never received any record evidence that demonstrates abuses of the exemption or that otherwise contradicts the Commission's original conclusion that the exemption represented sound policy.

Moreover, the Commission has not properly considered the positive effects of the exemption. For example, some broadcasters have found that prospective investors view non-attribution of their shareholder interests as an appealing feature of investing in broadcast stations. NAB contends that striking the exemption could raise additional obstacles to attracting investment during these already challenging economic circumstances.

¹ *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner*").

² *Id.* at 1140 – 1143.

³ See former 47 C.F.R. § 73.3555, Note 2(b).

⁴ *Order* in MM Docket No. 94-150 *et al.*, FCC 01-353 (*rel.* Dec. 14, 2001).

Finally, the Commission made clear on multiple occasions that creation of the “equity-debt plus” (“EDP”) rule was intended to allay its concerns that certain shareholders with significant minority interests possibly could influence a corporation’s operations. The Commission explicitly stated it intended for the EDP rule to work in conjunction with single majority shareholder exemption. However, with the elimination of the exemption, the Commission has undermined its own stated goals of “precision” and “balance” for the ownership limits.

Thus, NAB urges the Commission herein to reinstate the exemption because it was sound policy when created in 1984, and remains sound policy to this day.

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY.....	i
I. Background.....	2
II. Argument.....	4
A. The Single Majority Shareholder Exemption Remains Sound Policy	5
B. The Exemption and the EDP Rule Together Fulfill the Commission's Goals	7
III. Conclusion.....	10

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The National Association of Broadcasters (“NAB”)⁵ hereby submits its comments in the above-captioned proceeding.⁶

⁵ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

⁶ *Further Notice of Proposed Rulemaking* in CS Docket No. 98-82 *et al.*, FCC 01-263 (*rel. Sep. 21, 2001*) (“*Further Notice*”).

I. BACKGROUND

As a preliminary matter, only the interests of shareholders holding at least 5% of the voting stock of a corporate broadcasting licensee (or the licensee's parent), cable television system or daily newspaper are attributable for purposes of the Commission's ownership limits.⁷ The single majority shareholder exemption provides one exception to this general tenet. Under the exemption, the ownership interests of any minority shareholders are not cognizable when there is a single holder of more than 50% of the outstanding voting stock of a corporation.⁸

Upon adopting the exemption in 1984, the Commission stated that it was "neither necessary nor appropriate" to attribute a minority shareholder interests in a corporation with a single majority voting stockholder because "the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings."⁹

In 1995, the Commission launched a comprehensive review of its broadcast media attribution rules, including the specific question whether to restrict or eliminate the single majority shareholder exemption. The Commission expressed concerns that certain minority shareholders, eligible for the single majority shareholder exemption, might wield enough influence over corporate licensees to warrant attribution of their ownership interests.¹⁰ In August 1999, following an exhaustive, four-year long examination, the Commission decided to retain the exemption. To address any concerns over the potential influence of certain minority

⁷ 47 C.F.R. § 73.3555, Note 2(a).

⁸ See *supra* note 5.

⁹ *Report and Order* in MM Docket No. 83-46 *et al.*, 97 F.C.C. 2nd 997, 1008-09 (1984) ("1984 Broadcast Ownership Order").

¹⁰ *Notice of Proposed Rulemaking* in MM Docket No. 94-150 *et al.*, 10 FCC Rcd 3606, 3631-3632 ("1995 Attribution Notice"); see also *Further Notice of Proposed Rulemaking* in MM Docket No. 94-150 *et al.*, 11 FCC Rcd 19895 (1996 Attribution Further Notice").

shareholders, the Commission adopted a new “equity/debt plus” (“EDP”) attribution rule.¹¹ Generally, under the EDP rule, a shareholder’s minority interest is attributable if it exceeds 33% of the corporation’s total asset value, and the shareholder either (1) holds an attributable interest in another media outlet operating in the same market or (2) supplies over 15% of the licensee’s weekly broadcast schedule.¹²

However, in an order on cable system ownership released only two months later, the Commission took a different course and eliminated the single majority shareholder exemption from its cable attribution rules.¹³ In a very brief discussion, and against the wishes of commenting cable operators,¹⁴ the Commission relied merely on a “lack of a record” favoring retention of the exemption and its concerns, previously stated in the *1995 Attribution Notice*, that it may be possible for “a minority shareholder . . . to exert influence over a company even where a single majority shareholder exists.”¹⁵ The Commission did not point to any actual instances of minority shareholder influence over a corporation’s operations.

Subsequently, on reconsideration of the *1999 Broadcast Attribution Order*, the Commission similarly reversed itself and eliminated the single majority shareholder exemption for purposes of the broadcast ownership limits,¹⁶ despite the fact that the petition for reconsideration it granted offered only bald assertions and speculations instead of any examples

¹¹ *Report and Order* in MM Docket No. 94-150 *et al.*, 14 FCC Rcd 12559, 12579-12591 (1999) (“*1999 Broadcast Attribution Order*”); 47 C.F.R. § 73.3555 Note 2(j).

¹² 47 C.F.R. § 73.3555 Note 2(j)

¹³ *Report and Order* in CS Docket Nos. 98-82 and 96-85, 14 FCC Rcd 19014, 19046 (1999) (“*1999 Cable Attribution Order*”).

¹⁴ *See, e.g.*, Comments of the National Cable Television Association, CS Docket No. 98-82 (filed Aug. 14, 1998) at pp. 16-17; Comments of Tele-Communications, Inc., CS Docket No. 98-82 (filed Aug. 14, 1998), at pp. 25-28.

¹⁵ *1999 Cable Attribution Order*, 14 FCC Rcd at 19046. The Commission also applied an EDP rule to cable, based largely on the broadcast EDP rule. *Id.* at 19046-19051.

¹⁶ *Memorandum Opinion and Order on Reconsideration* in MM Docket No. 94-150, *et al.*, 16 FCC Rcd 1097, 1115-1117 (2001) (“*2001 Broadcast Attribution Recon Order*”).

of abuse of the exemption or financial data supporting its elimination.¹⁷ The Commission simply found “no rational basis to distinguish between cable and broadcasting that would justify eliminating the exemption for the cable ownership rules while retaining it for the broadcast ownership rules.”¹⁸ Again, it pointed to no evidence of actual abuse of the exemption.

Only six weeks later, however, the *Time Warner* court held unconstitutional the Commission’s elimination of the single majority shareholder exemption in the *1999 Cable Attribution Order*, on which the Commission based its deletion of the exemption for the broadcasting industry. The court held that the Commission failed to provide sufficient justification for striking the exemption:

Removal of the exemption is a tightening of the regulatory screws, if perhaps a minor one. It requires some affirmative justification . . . yet the Commission effectively offers none. Its “concern” about the possibility of influence would be a basis, if supported by some finding grounded in experience or reason, but the Commission made no finding at all.¹⁹

In the *Further Notice*, the Commission noted that the *Time Warner* court, *inter alia*, upheld the 33% EDP rule but found that the Commission had failed to justify its elimination of the single majority shareholder exemption.²⁰ The Commission thus requests comment on whether it should reinstate the exemption.

II. ARGUMENT

In the *1995 Attribution Notice*, where the Commission first raised the possibility of restricting the single majority shareholder exemption, the Commission recognized the tension inherent in the attribution rules:

¹⁷ Petition for Reconsideration of the Office of Communications, Inc. of United Church of Christ *et al.*, MM Docket No. 94-150 *et al.* (filed Oct. 18, 1999) at pp. 11-13.

¹⁸ *2001 Broadcast Attribution Recon Order*, 16 FCC Rcd at 1116.

¹⁹ *Time Warner*, 240 F.3d at 1143.

²⁰ *Further Notice* at ¶ 87, *citing Time Warner*, 240 F.3d at 1139-1140.

[A]ny specific . . . limit that we adopt will not include every influential interest that might be limited by the multiple ownership rules. . . . On the other hand, a rule of general applicability drawn so strictly as to include every possible influential interest would ensnare innumerable interests that have no ability to impart influence or control over a licensee’s core decision-making processes to their holders.²¹

The Commission’s wobbly treatment of the single majority shareholder exemption exemplifies this tension. In striking the exemption, the Commission acted without sufficient legal or economic justification, while at the same time undermining its self-professed goals for the attribution rules. NAB urges the Commission to heed the record evidence as well as its own previous conclusions and permanently reinstate the single majority shareholder exemption.

A. The Single Majority Shareholder Exemption Remains Sound Policy

In 1984, the Commission concluded that it was “neither necessary nor appropriate” to attribute the interests of a corporation’s minority shareholders when there existed a single majority shareholder because these shareholders, even acting collectively, could not direct the corporation’s activities.²² That finding is no less true today, and notwithstanding its elimination of the exemption in 1999, the Commission has never received any record evidence to the contrary. In fact, the only instance when the Commission did take action based on a sufficient record,²³ it chose to maintain the exemption in the *1999 Broadcast Attribution Order*.²⁴

Yet, only two months later, the Commission abruptly deleted the exemption from the cable rules because “[n]one of the parties . . . presented credible arguments that it should be

²¹ *1995 Attribution Notice*, 10 FCC Rcd at 3615.

²² *1984 Attribution Order*, 97 FCC2d at 1008-09.

²³ *See, e.g.*, Comments of EZ Communications, MM Docket No. 94-150 *et al.* (filed May 17, 1995) (non-attribution of minority interests facilitates the attraction of investors); Comments of Tribune Broadcasting Company, MM Docket No. 94-150 *et al.* (filed May 17, 1995) (the exemption enables innovative investment vehicles and the Commission has not shown any abuses of the exemption).

²⁴ *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579.

retained,”²⁵ a decision deemed unjustified by the *Time Warner* court. Little more than a year thereafter, the Commission also deleted it for the broadcast/MDS industries. Again the Commission acted based on a lack of record instead of any affirmative legal or financial support for eliminating the exemption. In this case, the Commission cited an alleged lack of evidence of differences between the cable and broadcast industries that warranted disparate application of the single majority shareholder exemption.²⁶ Neither of these latter decisions to strike the exemption should stand, given the Supreme Court’s mandate that, in order to pass the arbitrary and capricious standard, an agency must reveal “a rational connection between the facts found and choice made.”²⁷

Apart from the unjustified nature of the Commission’s elimination of the single majority shareholder exemption, the exemption should be reinstated because it is sound policy. First, contrary to the Commission’s naked claims that minority interests covered by the exemption could negatively skew a licensee’s behavior, NAB believes that the exemption more likely empowers a broadcaster’s management by expanding opportunities for them to attract capital from “silent” investors. For example, some broadcasters have found that prospective investors in broadcasting entities view non-attribution of their interests as an attractive feature. Many such parties seek to invest for the very opportunity to rely on management’s judgment for a monetary return, and have no interest in influencing management.

In fact, many of the investment vehicles commonly used by corporations to attract investment are designed for the expressed purpose of not imparting influence or control.

²⁵ *1999 Cable Attribution Order*, 14 FCC Rcd at 19046.

²⁶ *2001 Broadcast Attribution Recon Order*, 16 FCC Rcd at 1107.

²⁷ *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Preferred stock, convertible debt and the like are used widely in all industries, and are quite separate and distinct from any corporate influence.²⁸

The Commission should not inhibit such creative investment in media entities by eliminating the single majority shareholder exemption. Permanent reinstatement of the exemption would benefit all broadcasters, especially those entities that often need capital investment the most, namely, small broadcasters and minority and women entrepreneurs. Any Commission step that impedes investment in the broadcasting industry as a whole will even more acutely affect these broadcasters because they typically have less collateral to offer potential lenders and have less of a track record to attract other investments.

The U.S. economy is bordering on a recession, capital markets are tight, and broadcasters already face an uphill battle for investment because they must compete for funds with many unregulated media and communications firms. Advertising revenue was down before the terrorist attacks on September 11, 2001, and worsened thereafter. Simply put, it is the exact wrong time for the Commission to inhibit investment in the broadcasting industry by eliminating the single majority shareholder exemption.

B. The Exemption and the EDP Rule Together Fulfill the Commission's Goals

As noted above, the Commission first raised the possibility of restricting the single majority shareholder exemption in the *1995 Attribution Notice*, where it conceived that a minority voting shareholder, with significant equity and a large portion of nonvoting shares or debt financing, potentially could influence the corporation's activities, thereby warranting attribution.²⁹ In the *1996 Attribution Further Notice*, the Commission explained that, although

²⁸ See, e.g., Comments of Tribune Broadcasting Company, MM Docket No. 94-150 *et al.* (filed May 17, 1995) at p. 17.

²⁹ *1995 Attribution Notice*, 10 FCC Rcd at 3632.

most commenters urged it to retain the exemption, certain network affiliates argued that the exemption enabled networks to expand their nationwide coverage by reaching arrangements in which a network's interest was not attributable but nevertheless it exerted substantial influence over corporate licensees.³⁰

The Commission thus made clear that its primary concern with the single majority shareholder exemption centered on situations where a minority shareholder could combine a significant voting stake with other factors to possibly exert influence over a licensee. Ultimately, the Commission crafted the “equity-debt plus” (“EDP”) rule to capture these types of minority interests in the *1999 Broadcast Attribution Order*.³¹

The Commission's overriding goals for its attribution rules are “balance” and “precision.” In grafting the EDP rule onto the single majority shareholder exemption, the Commission stated that this approach “reflects our current judgment as to the appropriate *balance* between our goal of maximizing the *precision* of our attribution rules by attributing all interests that are of concern . . . and our equally significant goals of not unduly disrupting capital flow . . . to regulatees in planning their transactions.”³²

To achieve these dual goals, the Commission intended that the EDP rule to work in conjunction with the single majority shareholder exemption, and definitely not in its place. In

³⁰ *1996 Attribution Further Notice*, 11 FCC Rcd at 19900 *citing* Consolidated Comments of AFLAC Broadcast Group in MM Docket No. 94-150 *et al.*, at pp. 15-19.

³¹ *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579. NAB opposed the adoption of the EDP rule as an unwarranted obstacle to investment in new broadcasting entrants, including women and minorities, and because its treatment of corporate debt would result in erratic application. Petition for Reconsideration and Clarification of the Revised Broadcast Local Ownership and Attribution Rules of NAB in MM Docket No. 91-221 *et al.*, (filed Oct. 18, 1999) at pp. 21-25. NAB continues to oppose the EDP rule, and we discuss it here only to demonstrate that, according to the Commission's own pronouncements, the EDP rule only can function as intended if applied in conjunction with the single majority shareholder.

³² *Id.* at 12581.

the *1999 Broadcast Attribution Order*, the Commission said it would “not eliminate the single majority shareholder exemption . . . but, rather, to address the concerns raised in the [1995] *Attribution Notice* and [1996] *Further Attribution Notice*, we will adopt our equity/debt plus attribution proposal . . . as a new rule that would function in addition to the other attribution rules.”³³ The Commission thus attempted to target those shareholder interests with the potential to exert corporate licenses, such as the networks discussed above.

Even the Media Access Project, which favors stringent attribution rules, supported the Commission’s decision in the *1999 Broadcast Attribution Order* to adopt the EDP rule while retaining the single majority exemption: “This approach is narrower than the proposal discussed in the . . . [1995 *Broadcast Attribution Notice*], which would have eliminated the nonvoting stock and single majority shareholder exceptions altogether. To that extent, Commenters applaud the Commission for protecting the interests of viewers, while not adopting a rule which is overbroad and unduly discouraging passive capital investments”³⁴

In the Commission’s view, the EDP rule acted as a safety valve for the single majority shareholder exemption. According to the Commission’s own reasoning, the EDP rule captures those minority shareholders with the potential to influence the activities of a corporation, while the single majority shareholder exemption excused those minority interests without such potential. However, in the *1999 Cable Attribution Order*, the Commission ignored its own previous conclusions and took the unjustified step of eliminating the exemption, so that shareholder interests that should not be captured suddenly became attributable. As a result, the

³³ *Id.* at 12579.

³⁴ Comments of Media Access Project, *et al.* in MM Docket No. 94-150, *et al.* (filed Feb. 7, 1997) at n.2.

Commission upended the balance it sought in grafting the EDP rule onto the single majority shareholder exemption, and in turn, diminished the precision of the attribution rules in general.

The instant proceeding provides the Commission with one last opportunity to rectify these miscalculations, and facilitate investment in the broadcasting industry, by restoring the single majority shareholder exemption.

III. CONCLUSION

For the reasons set forth above, NAB respectfully requests that the Commission reinstate the single majority shareholder exemption for purposes of its broadcast/MDS regulations.

Respectfully submitted,

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