

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

<b>In the Matter of</b>	)	
	)	
<b>Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992</b>	)	<b>CS Docket No. 98-82</b>
	)	
<b>Implementation of Cable Act Reform Provisions of the Telecommunications Act Of 1996</b>	)	<b>CS Docket No. 96-85</b>
	)	
<b>The Commission’s Cable Horizontal and Vertical Ownership Limits and Attribution Rules</b>	)	<b>MM Docket No. 92-264</b>
	)	
<b>Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests</b>	)	<b>MM Docket No. 94-150</b>
	)	
<b>Review of the Commission’s Regulations and Policies Affecting Investment in the Broadcast Industry</b>	)	<b>MM Docket No. 92-51</b>
	)	
<b>Reexamination of the Commission’s Cross-Interest Policy</b>	)	<b>MM Docket No. 87-154</b>
	)	

**REPLY COMMENTS  
AND COMMENTS IN SUPPORT OF NCTA’S PETITION FOR RULEMAKING  
OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits its reply comments in the above-captioned proceeding,<sup>2</sup> and initial comments in support of the petition for rulemaking of the National Cable & Telecommunications Association.<sup>3</sup>

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<sup>1</sup> NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

<sup>2</sup> *Further Notice of Proposed Rulemaking* in CS Docket No. 98-82 *et al.*, FCC 01-263 (*rel.* Sep. 21, 2001) (“*Further Notice*”).

## REPLY COMMENTS

In the *Further Notice*, the Commission sought comment on amending its horizontal and vertical cable ownership limits in response to the D.C. Circuit Court of Appeals' rejection of those rules in *Time Warner Entertainment Co. v. FCC*.<sup>4</sup> The *Time Warner* court also examined the Commission's ownership attribution policies, including the Commission's decision to eliminate the single majority shareholder exemption.<sup>5</sup> Below, NAB urges the Commission to heed the recommendations of most parties commenting on the matter and restore the single majority exemption for broadcast services.

In its initial comments, NAB noted that the Commission has suspended its elimination of the single majority shareholder exemption pending resolution of the *Further Notice*,<sup>6</sup> and stated that this should remain the permanent rule because the exemption was sound policy when the Commission adopted it in 1984, and remains so today. NAB argued that: (1) the Commission did not have legal or economic justification for deleting the exemption; (2) the Commission never properly weighed the positive effects of the exemption; and (3) the Commission failed to consider its expressed goal for the "equity-debt plus" ("EDP") to capture and attribute the minority shareholder interests of most concern to the Commission.<sup>7</sup>

The record filed in response to the *Further Notice* overwhelmingly supports reinstatement of the single majority shareholder exemption. Examination of the comments reveals that most of the parties in favor of the exemption grounded their positions in the actual

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<sup>3</sup> Comments and Petition for Rulemaking of National Cable & Telecommunications Association in CS Docket No. 98-82 *et al.*, filed January 4, 2002 ("NCTA Comments").

<sup>4</sup> *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner*").

<sup>5</sup> *Id.* at 1139 – 1143; *see* former 47 C.F.R. § 73.3555, Note 2(b)

<sup>6</sup> *Order* in MM Docket No. 94-150 *et al.*, FCC 01-353 (*rel.* Dec. 14, 2001).

<sup>7</sup> Comments of National Association of Broadcasters in MM Docket No. 98-82, *et al.*, filed Jan. 4, 2002 ("NAB Comments").

functioning of the relationships among corporate shareholders or the real-world implementation of corporate law principles,<sup>8</sup> while the only opposing commenter, CFA, offers little more than speculation.<sup>9</sup>

CFA first argues that the single majority shareholder exemption should be eliminated because “parties with joint interests have the potential to influence one another’s behavior and better coordinate their behavior.”<sup>10</sup> CFA apparently believes that a minority shareholder can affect a corporation’s activities merely because of his joint interest in the corporation with the majority shareholder. However, as AT&T explains, it is black-letter law that a majority shareholder has the exclusive right to “manage and control” the firm, and is constrained only by the broad boundaries of the business judgment rule.<sup>11</sup> Under this rule, a majority shareholder fulfills her fiduciary duty of care and loyalty to the corporation by making good faith, informed business decisions.<sup>12</sup> Any action by a majority shareholder designed to benefit a particular minority shareholder could be characterized as bad faith, and thus a violation of her fiduciary duties.

Moreover, the majority shareholder would not be permitted to respond to the entreaties of a minority shareholder, even if she so desired. As Viacom describes, corporate law dictates that a majority shareholder would breach her fiduciary duties if she were to take actions designed to

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<sup>8</sup> See, e.g., Comments of Viacom, Inc. in CS Docket No. 98-82 *et al.*, filed January 4, 2002 at 11-19 (“Viacom Comments”); NCTA Comments at 5-6; Comments of AT&T Corp. in CS Docket No. 98-82 *et al.*, filed January 4, 2002 at 77-81 (“AT&T Comments”).

<sup>9</sup> Comments of Consumer Federation of America, *et al.*, in CS Docket No. 98-82 *et al.*, filed January 4, 2002 at 43-44 (“CFA Comments”).

<sup>10</sup> *Id.* at 43.

<sup>11</sup> AT&T Comments at 78.

<sup>12</sup> Viacom Comments at 13, *citing Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985).

advantage, or for that matter, disadvantage, a particular minority shareholder.<sup>13</sup> A majority shareholder is required to put the best interests of the corporation over any personal or individual interests. Thus, even the best efforts of a minority shareholder to influence corporate behavior will be rebuffed or ignored, given the legal constraints on the majority shareholder's activities.

The business judgment rule also renders the rights a minority shareholder reactive rather than affirmative. That is, a minority shareholder's only formal feasible way of influencing a corporation's actions is to sue the majority shareholder in court for breaching her fiduciary duties through alleged fraudulent or unfair corporate acts.<sup>14</sup> A minority shareholder's position is not invested with an ability to positively affect the corporation's behavior before the fact. Simply put, regardless of a minority shareholder's efforts to influence a corporate licensee's activities, the final decisions on the core operations of the licensee rest squarely and solely with the majority shareholder. The Commission for many years has properly regarded that authority as full control over a license.

Second, CFA contends that a minority shareholder may influence a corporation's behavior because the shareholder will possess rights of "access and inspection."<sup>15</sup> Presumably, CFA is referring to a shareholder's access and inspection of a firm's confidential documents, such as notes of a private board of directors meeting. However, as Viacom states, no shareholder -- minority or otherwise -- has an automatic right to inspect a corporation's confidential or sensitive information.<sup>16</sup> Pursuant to corporate law, a shareholder must demonstrate and

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<sup>13</sup> *Id.* at 12 citing Julian Javier Garza, *Rethinking Corporate Governance: The Role of Minority Shareholders – A Comparative Study*, 31 St. Mary's L. J. 613, 625-26 (1995).

<sup>14</sup> *Id.* at 13 citing Fletcher Cyc. Corp. § 5813.

<sup>15</sup> CFA Comments at 44.

<sup>16</sup> Viacom Comments at 15.

document a proper purpose for reviewing such material.<sup>17</sup> In addition, any minority shareholder who surmounts this hurdle and is able to obtain confidential or sensitive information would be subject to strict federal rules regarding the disclosure or use of this type of information.<sup>18</sup> Any such knowledge would be rendered relatively useless for most any purpose of concern to CFA, including a minority shareholder somehow pressuring the majority shareholder to take a particular action on behalf of the corporation. Therefore, it should be apparent that a minority shareholder's position or authority within a corporation is quite limited, and does not approach a legitimate ability to actually influence or control a firm's behavior.

Finally, and more broadly, CFA's position would leave the Commission and licensees in an untenable situation because it would open the door to potentially unlimited attribution of shareholder and other interests. Under CFA's view, the interests of basically any entity with the potential to influence a corporation's activities would be cognizable. However, the Commission has correctly concluded that the interests of most entities with the potential to influence a corporation should not be attributed. For example, employees, vendors, and lenders often may influence a licensee. Similarly, many corporations even take actions in response to the views of Wall Street analysts. Yet, none of the interests of these parties are cognizable under the Commission's rules.

In crafting its attribution rules, the Commission has attempted to target those entities whose interests, in the Commission's view, truly warrant recognition. It has set the current threshold for attribution equal to a five percent shareholder voting interest in a corporation. Furthermore, the Commission has established the equity plus debt rule to capture the otherwise non-attributable interests of program suppliers and same-market media outlets. However, CFA's

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<sup>17</sup> *Id.* at 16 *citing* Del. Code Ann. Tit. 8, § 220(a) (2000).

<sup>18</sup> *Id.* at 16.

interpretation could make these policies and exemptions moot if, as it states, the interest of any party possessing “joint interests” with a corporation must be attributed. Although NAB certainly does not agree with all of the Commission’s attribution policies, it does appreciate their clarity and predictability. Changing the rules as CFA wishes, on the other hand, would only blur the lines already established by the Commission, and thereby undermine the certainty of the Commission’s rules. In turn, investment in the broadcasting industry could suffer because, more than anything, the investment community requires regulatory certainty.

### **Comments in Support of NCTA’s Petition for Rulemaking**

NCTA urges the Commission to initiate a review of its attribution policies to ensure that only appropriate minority interests in a cable or broadcast company are attributed to shareholders. NCTA states that the current rule, which attributes any entity with at least five percent of a company’s voting stock, is over-inclusive.<sup>19</sup> NCTA describes an example where a company has five distinct owners: three with 25% shares, one with a 20% share, and one with a five percent share. Under the Commission’s rules, it is assumed that the five percent shareholder’s interest in this company could affect the core decisions of a cable operator, and therefore must be attributed.<sup>20</sup> NCTA asserts that, given the actual, real-world relationships and decision-making authority among such shareholders, it would be more realistic for the Commission to assume that the five percent stakeholder could not possibly influence the corporation’s behavior, and not recognize this shareholder’s interest. NCTA also notes that a corporation’s board of directors, presumably appointed by the majority shareholders, has a fiduciary duty to put the corporation’s best interests over those of any particular minority

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<sup>19</sup> NCTA Comments at 23-24.

<sup>20</sup> *Id.*

shareholder.<sup>21</sup> Thus, the majority shareholders could not respond to any entreaties from the five percent shareholder even if they so desired. In addition, apart from any fiduciary duties, NCTA states that it cannot identify any economic incentives for a board of directors to advantage or disadvantage a particular vendor or other party merely because the minority shareholder may benefit. NCTA contends that there are always negative financial repercussions when leaders fail to act in the best interests of a corporation, and invariably the corporation will reap all of the penalties, but none of the rewards, of such arrangements.<sup>22</sup>

NAB believes that the five percent attribution benchmark also is over-broad in the context of the broadcasting industry. The purpose of the broadcast attribution rules is to identify those interests in broadcast licensees that potentially enable their holders to influence the programming decisions or other core operating functions of broadcast licensees.<sup>23</sup> NAB previously has demonstrated that raising the threshold, for example, to ten percent, would not adversely affect the Commission's regulatory interests in monitoring the effective ownership of stations.<sup>24</sup> NAB stated that it could find no reason to believe that increasing the benchmark would allow entities to acquire effective, yet unrecognized control of broadcast stations.<sup>25</sup>

Nevertheless, in 1999, the Commission elected to retain the five percent threshold for attribution of ownership interests. In doing so, the Commission largely relied on a lack of

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<sup>21</sup> *Id.* at 24-25.

<sup>22</sup> *Id.* at 25-26.

<sup>23</sup> Report and Order in MM Docket No. 94-150 *et al.*, 14 FCC Rcd 12559, 12560 (1999) (“1999 *Broadcast Attribution Order*”) (citations omitted).

<sup>24</sup> Comments of the National Association of Broadcasters in MM Docket No. 94-150 *et al.*, filed Feb. 7, 1997, at 4.

<sup>25</sup> *Id.*

empirical evidence in the record sufficient to rebut its earlier conclusion that a shareholder with a five percent voting share possessed a realistic potential for influencing or controlling a licensee.<sup>26</sup>

NAB renews its objections to the five percent attribution threshold, and urges the Commission to reconsider this rule as part of the comprehensive review of its attribution policies requested by NCTA. In addition to NCTA's well-considered arguments, it should be readily apparent that raising the five percent benchmark would make it easier for broadcast stations to attract investment by expanding the investment opportunities for passive investors, without subjecting such investors to the reporting and other burdens of attributed ownership.<sup>27</sup> The current economic climate presents difficult challenges to the broadcast industry. Advertising revenues have been down for some time, and the events of September 11, 2001 only exacerbated the situation. In light of these developments, which have evolved since the Commission last addressed the attribution rules in 1999, NAB believes that it is imperative that the Commission remove any unjustified, unnecessary barriers to investment in the broadcast industry, such as the five percent attribution threshold.

Therefore, NAB supports NCTA's petition for rulemaking, and urges the Commission to commence a rulemaking proceeding to review its attribution regulations.

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<sup>26</sup> *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12566-67.

<sup>27</sup> *Id.*

## 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, and grant NCTA's petition for rulemaking regarding the Commission's attribution policies

Respectfully submitted,

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