

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

In the Matter of)	
)	
The Commission’s Cable Horizontal and Vertical Ownership Limits)	MM Docket No. 92-264
)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992)	CS Docket No. 98-82
)	
Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests)	MM Docket No. 94-150
)	

COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. (“Cox”), by its attorneys, hereby submits these Comments in response to the Commission’s *2008 Further Notice* in the above-captioned rulemaking proceedings.¹ Cox is one of the nation’s leading media companies with interests, through its subsidiaries, in broadcast television, radio, newspapers, and cable television. While much of the *2008 Further Notice* concerns cable television issues, Cox comments herein on one important broadcast issue: the single majority shareholder exemption to the Commission’s broadcast ownership attribution rules. Cox is pleased the Commission has tentatively concluded that the record to date supports reinstating the single majority shareholder exemption to its broadcast

¹ *In the Matter of The Commission’s Cable Horizontal and Vertical Ownership Limits, Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, FCC 07-219 (rel. Feb. 11, 2008) (“*2008 Further Notice*”).

ownership attribution rules. Accordingly, Cox urges the Commission to provide long overdue regulatory certainty by permanently reinstating the exemption without delay.

I. INTRODUCTION

The Commission adopted the single majority shareholder exemption to the broadcast attribution rules during its 1984 comprehensive review of its broadcast ownership attribution policies.² Under the exemption, a minority shareholder's equity interest is not attributable if a single shareholder owns more than 50 percent of the voting stock of the ultimate parent of the licensee.³ Recognizing that the broadcasting industry and the practices of the investment community had evolved dramatically since the attribution rules were first adopted, the Commission sought to "serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities," while at the same time balancing the influence or control a stockholder can exercise over a licensee.⁴ The single majority shareholder exemption reflected the Commission's reasoned determination that, while a minority shareholder in a corporation with a single majority shareholder might be able to exert some influence, a minority shareholder is unlikely to exercise either significant influence or control over a licensee's core responsibilities.⁵

In 1999 and 2001 the Commission eliminated the single majority shareholder exemption

² *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984) ("1984 Order"), *reconsidered in part*, 58 R.R.2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986).

³ Former 47 C.F.R. § 73.3555, Note 2(b) (2000).

⁴ *1984 Order* at ¶¶ 6-7.

⁵ *See id.* at ¶ 21.

from the cable and broadcast attribution rules.⁶ In both cases, the Commission eliminated the exemption because of its belief that a minority shareholder *could* have the potential to influence a licensee's actions and, therefore, such influence should be cognizable for ownership purposes.⁷ In *Time Warner II*, the D.C. Circuit Court of Appeals reversed and remanded the Commission's elimination of the cable exemption, finding the Commission's decision to eliminate the exemption was not supported by evidence in the record.⁸ The Commission subsequently suspended the elimination of the single majority shareholder exemption for broadcast as well, recognizing that its rationale for eliminating the exemption in broadcasting was the same as the cable rationale the court had overturned.⁹

Based on the *Time Warner II* court's remand, the Commission invited comment in 2001 on the single majority shareholder exemption.¹⁰ Numerous parties filed comments supporting retention of the exemption for both cable and broadcast.¹¹ The Commission did not act on those

⁶ See *Implementation of the Cable Television Consumer Protection Act of 1992*, 14 FCC Rcd 19014 ¶ 81 (1999); *Review of the FCC's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the FCC's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the FCC's Cross-Interest Policy*, 16 FCC Rcd 1097 ¶ 41 (2001) ("*Broadcast Ownership Reconsideration Order*"), stayed, 16 FCC Rcd 22310 (2001) ("*Stay Order*").

⁷ *Broadcast Ownership Reconsideration Order* at ¶ 43.

⁸ *Time Warner v. FCC*, 240 F.3d 1126, 1143 (D.C. Cir. 2001) ("*Time Warner II*").

⁹ *Stay Order* at ¶¶ 1-2.

¹⁰ *Review of the FCC's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the FCC's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the FCC's Cross-Interest Policy*, 16 FCC Rcd 17312 ¶¶ 88-92 ("*2001 Further Notice*").

¹¹ See *2008 Further Notice* at ¶ 108.

comments, however, and now seeks to refresh the record.¹²

II. CURRENT ATTRIBUTION RULES SUFFICIENTLY PROTECT THE PUBLIC INTEREST.

As the *2008 Further Notice* properly recognizes, the Commission's broadcast ownership attribution rules attempt to balance the need to prevent significant undue influence over a licensee by a minority shareholder while preserving access by the licensee to funding for acquisitions and station operations.¹³ Bright-line rules are preferable, as they provide for certainty when structuring financial transactions.¹⁴ As a simple-to-apply, bright line rule, the single majority shareholder exemption amply meets the goals of the Commission's attribution rules as it allows significant investment in broadcast entities with minimal risk of significant minority investor influence or control.

Comments on the *2001 Further Notice* have already provided abundant evidence of how basic tenets of corporate law require majority shareholders to act in the best interests of the corporation and prevent majority shareholders from advancing the special interests of any particular minority shareholder.¹⁵ Indeed, as the National Association of Broadcasters explained in 2002, general principles of corporate law such as fiduciary duty and insider trading rules greatly limit a minority shareholder's ability to influence a licensee's major decisions.¹⁶

Although the Commission has repeatedly requested evidence on how minority shareholders may

¹² *Id.* at ¶ 109.

¹³ *Id.*

¹⁴ *Id.* at ¶ 112.

¹⁵ *See, e.g.*, AT&T Comments in CS Docket Nos. 98-82 and 96-85 and MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, at 77-81 (filed Jan. 4, 2002); Viacom Inc., Comments in CS Docket Nos. 98-82 and 96-85 and MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, at 11-20 (filed Jan. 4, 2002).

¹⁶ *See* National Association of Broadcasters, Reply Comments in CS Docket Nos. 98-82 and 96-
Continued . . .

exercise undue influence over broadcast licensees, it has received no evidence that the exemption has led to an unauthorized transfer of control or to the exercise of undue influence.¹⁷ Cox predicts that the instant proceeding will likewise provide no evidence to support repeal of the single majority shareholder exemption.

Further, the Commission's broadcast attribution rules already contain specific provisions that protect against excess influence by a minority shareholder: the "equity/debt plus" attribution rule (the "EDP rule") and the rule treating directors and officers as parties with attributable interests (the "officers/directors rule").¹⁸ For example, the EDP rule limits the availability of the single majority shareholder exemption in cases where the otherwise nonattributable interest confers a means of, or an interest in, controlling the corporation. As the Commission recognized in the *2008 Further Notice*, the EDP rule "was intended to operate 'in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad.'"¹⁹

In short, by adopting the EDP rule, the Commission adopted a targeted remedy to address

85 and MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, at 2-6 (filed Feb. 19, 2002).

¹⁷ See, e.g., *2001 Further Notice* at ¶¶ 89-90, 92; *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 11 FCC Rcd 19895 ¶¶ 4, 19 (1996); *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 10 FCC Rcd 3606 ¶ 51 (1995).

¹⁸ See 47 C.F.R. § 73.3555, Note 2(i). The EDP rule deems attributable an otherwise non-attributable interest if that interest exceeds 33 percent of the total asset value of the corporation and the interest holder is either (1) a "major program supplier" or (2) an owner of a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators, and newspapers).

¹⁹ *Id.* at ¶ 96, citing *Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross Interest Policy*, 14 FCC Rcd 12559 ¶ 27 (1999), *recon. granted in part, Broadcast Ownership Reconsideration Order, stayed, Stay Order*.

concerns about arrangements that confer a means of exercising undue influence over a media outlet when the otherwise nonattributable party either provides programming or has a same-market media interest.²⁰ The EDP rule therefore helps protect against excessive minority shareholder influences, leaving the Commission free to maintain regulatory certainty and efficiency by keeping the single majority shareholder exemption a bright-line rule.

Similarly, the officer/director rule also keeps minority shareholder influence in check by making an interest attributable if a party is an officer or director of the licensee.²¹ This prevents a minority shareholder from sitting on the board, with the power to vote on major licensee policy decisions, or being an officer of the licensee without attribution. As minority shareholders often request and obtain board seats as a means of protecting their investment, the officer/director rule ensures that such minority investments are attributable because of their ability to potentially influence the licensee.

Finally, given the current turmoil in the financial markets, the Commission should be very wary of taking any action that could inhibit legitimate investment in the broadcasting industry. The transition to digital television and the opportunity to transmit multiple streams of over-the-air programming can offer viewers new choices, but only if broadcasters have the funding to make the necessary technological investments. No harm to economic competition or diversity of opinion has been demonstrated in the 25 year history of the single majority shareholder exemption. Other Commission attribution rules, such as the EDP rule and the officer/director rule, protect against excessive minority shareholder influence. Thus, the single

²⁰ *Id.*

²¹ *See* 47 C.F.R. § 73.3555, Note 2(g).

majority shareholder exemption should be permanently retained in the interest of fostering broadcast industry investment.

III. GRANDFATHERED INTERESTS SHOULD BE RETAINED.

Cox has owned a 47.5 percent minority, non-controlling interest in the *Daytona Beach News-Journal* since 1969. *The Daytona Beach News-Journal* is majority-owned by the Davidson family, which has owned and controlled the newspaper since 1928. While Cox has availed itself of standard corporate minority investor protections, Cox is not involved in the newspaper's news gathering or editorial positions or the newspaper's day-to-day business operations. Further, there are no relationships of any kind between the *Daytona Beach News-Journal* and the radio and television stations Cox currently owns in the Orlando/Daytona Beach area.²² Cox thus can attest that significant minority investors, even investors in similar lines of business, often play no material role or, as in Cox's case, no active role at all, in the operation of the majority-owned entity. Indeed, Cox's ability to influence the management and day-to-day affairs of the newspaper has been so minimal that it was necessary for Cox to bring a shareholder derivative action to protect its investment.²³

While the record to date has shown that the single majority shareholder exemption to the broadcast ownership attribution rules serves the public interest, if the Commission reverses course and determines in this proceeding not to permanently reinstate the rule, the Commission should grandfather pre-existing interests. In keeping with the short-lived repeal of the exemption in 2000, minority interests in a company with a single majority shareholder should be

²² Cox acquired WFTV(TV), Orlando, Florida in 1985 and began acquiring radio stations in Orlando/Daytona Beach in 1997.

²³ See *Cox Enterprises v. News-Journal Corp.*, 469 F.Supp.2d 1094 (M.D. Fla. 2006), *aff'd*, 510 F.3d 1350 (11th Cir. 2007).

grandfathered if an interest was acquired before the adoption date of the order issued in response to the *2008 Further Notice*.²⁴ No valid reason exists to upset current investments, especially given the current volatile financial economy. Absent a showing of actual harm from a particular minority investment, current minority interests should be permanently grandfathered until the grandfathered interest is assigned or transferred.²⁵

IV. CONCLUSION

Cox agrees with the Commission's tentative conclusion that the record to date supports reinstating the single majority shareholder exemption to the Commission's broadcast ownership attribution rules.²⁶ The exemption supports continuing investment in media companies at a critical time. The Commission's other attribution rules adequately protect licensees from undue influence. As no public interest is served by eliminating the exemption, Cox respectfully requests that the Commission promptly lay to rest any suggestion that it may repeal the single

²⁴ See, e.g., *Broadcast Ownership Reconsideration Order* at ¶ 44.

²⁵ *Id.*

²⁶ *2008 Further Notice* at ¶ 109.

majority shareholder exemption as to current or future equity investments. The Commission should, therefore, swiftly issue a decision to permanently reinstate the single majority shareholder exemption to the broadcast ownership attribution rules.

Respectfully submitted,

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