

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
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
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 AND PETITION FOR RULEMAKING OF FOX  
ENTERTAINMENT GROUP, INC., NBC UNIVERSAL, INC., THE WALT  
DISNEY COMPANY AND CBS CORPORATION**

Fox Entertainment Group, Inc. NBC Universal, Inc., The Walt Disney Company and CBS Corporation (collectively, the "Networks"), by their attorneys, submit these Comments in response to the Fourth Report and Order and Further Notice of Proposed Rulemaking ("FNPR") in the above-referenced proceeding. The Networks file these Comments to reiterate their request for uniformity in the attribution rules and standards applicable to cable horizontal and broadcast multiple ownership limits.

On February 19, 2002, the Networks filed Reply Comments and a Petition for Rulemaking in response to the Commission's 2001 Further Notice of Proposed Rulemaking in this proceeding<sup>1</sup> ("Reply Comments"). In their Reply Comments, which are attached hereto as Attachment A, the Networks (1) supported the reinstatement of the single majority shareholder exemption for both cable and broadcast ownership and (2) petitioned the Commission to take the following actions to ensure uniformity of the limited partnership standards:

- Initiate a rulemaking to resolve the disparate treatment of broadcast and cable ownership with respect to insulation criteria for limited partners;
- Issue an immediate order to harmonize the limited partnership insulation criteria for broadcast ownership with that for cable ownership pending the outcome of that rulemaking, so that broadcast limited partnership interests are only attributable if there is material involvement in the "video programming" activities of the broadcast licensee (the standard applied to cable); and
- Eliminate the "no-sale" provision of the insulation criteria in the broadcast context if that provision is not reinstated for cable.

While the Commission is still examining the "no-sale" insulation criterion in the FNPR, it has not responded to or acted on the Networks' first two requests.

For the reasons articulated in their 2002 Reply Comments, the Networks therefore reiterate their request for immediate Commission actions that will eliminate the disparate treatment of broadcasters and cable operators under the Commission's attribution rules. They also reiterate their request for equal treatment for broadcasters if the "no-sale"

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<sup>1</sup> *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312 17320-21 ¶ 7 (2001) ("2001 Further Notice").*

provision is ultimately eliminated for cable.<sup>2</sup>

In 1999 the Commission narrowed the limited partnership insulation criteria for cable, so that a limited partnership interest would be attributed only if there were material involvement by the limited partner in the “video programming-related” activities of a cable operator. No similar change was made in the broadcast context, however, where a limited partnership interest remained attributed if the limited partner is involved in the “media-related” activities of a station – a much broader set of activities. These disparate criteria persist even though the Commission has found that the underlying purposes of the broadcast and cable ownership limits are the same – namely, promoting competition and diversity. Indeed, the Commission repeated the importance of identical application of attribution criteria for different media in the FNPR, noting it is necessary “to promote consistency in the processing of applications.”<sup>3</sup> Nonetheless, it has not yet acted on the Networks’ requests for the commencement of a rulemaking to harmonize the insulation criteria and for an order harmonizing those criteria pending the outcome of any such rulemaking.<sup>4</sup> There is no justification for this ongoing disparity, and the Networks urge the Commission to act promptly on their requests.

Similarly, if the Commission concludes in this proceeding that the “no-sale” rule should be eliminated as an insulation criterion for cable ownership purposes, the

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<sup>2</sup> For the reasons stated in their Reply Comments, the Networks support the Commission’s tentative conclusion that the single majority shareholder exemption should be reinstated for both cable and broadcast.

<sup>3</sup> FNPR at ¶109.

<sup>4</sup> The Commission issued just such an order when it suspended the elimination of the single majority shareholder exemption in the wake of the D.C. Circuit’s decision in *Time Warner Entertainment Co. LP v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). Although the Court only reversed the Commission’s decision to eliminate the exemption in the cable context, the Commission kept the exemption in place for broadcast as well, citing the need for consistent processing of pending and future applications. *A Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interest*, FCC 01-353 (released December 14, 2001), ¶4.

arguments set forth in the Reply Comments make clear that it would no longer be justified for purposes of broadcast ownership attribution either. The restriction should therefore be eliminated for both cable and broadcast.

With respect to the single majority shareholder exemption, it should be reinstated because it is consistent with the purpose of the Commission's attribution rules. A minority shareholder in a corporation with a single majority shareholder does not have the ability, solely as a result of the minority shareholder's ownership interest, "to affect the programming decisions of licensees or other operating functions," or "to measurably affect the outcome of elective or discretionary corporate decisions."<sup>5</sup> And any concern the Commission may have with potential abuse of the exemption -- and there is no evidence whatsoever that there has been any -- is already addressed by the FCC's own equity/debt plus rule. The EDP rule captures otherwise nonattributable interests that give minority shareholders the incentive and means to exert influence or control over licensee decisions regarding core operations.

Broadcasters have been laboring under more restrictive attribution criteria than cable since 1999 without justification. As the Commission has acknowledged, the attribution rules should not unnecessarily impede the free flow of capital to the broadcast industry.<sup>6</sup> Given the nation's financial situation today, this goal is more important than ever for the health and vitality of broadcasting. Moreover, further relaxation or elimination of the cable attribution criteria while the more restrictive criteria remain in

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<sup>5</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12560 (1999) (emphasis added). See also, *BBC Licensee Subsidiary, L.P.*, 10 FCC Rcd 7926 (1995).

<sup>6</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rulemaking*, 10 FCC Rcd 3606, 3610 (1995).

place for broadcasters perpetuates an unfair and unjustified disadvantage in the application of the Commission's ownership rules.

For the reasons stated above and in their Reply Comments, the Networks urge the Commission to (1) reinstate the single majority shareholder exemption for both broadcasting and cable, (2) immediately issue an order harmonizing the limited partnership attribution criteria for cable and broadcast, pending the outcome of a rulemaking proceeding, and (3) initiate a rulemaking to formally modify the broadcast attribution insulation criteria to mirror the comparable provisions in the cable attribution rules, including any ultimate change in the "no-sale" provision.

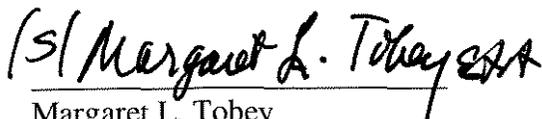
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March 24, 2008

**ATTACHMENT A**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
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Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
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**REPLY COMMENTS AND PETITION FOR RULEMAKING OF  
FOX ENTERTAINMENT GROUP, INC., NATIONAL BROADCASTING  
COMPANY, INC., THE WALT DISNEY COMPANY AND VIACOM, INC.**

Fox Entertainment Group, Inc., National Broadcasting Company, Inc., The Walt Disney Company and Viacom Inc. (collectively, the "Networks"), by their attorneys, hereby submit Reply Comments in the above-referenced proceeding. The Networks file these Reply Comments (1) to support reinstatement of the single majority shareholder exemption in the broadcast ownership context and (2) to urge the Commission to ensure the uniformity

of the attribution rules and standards applicable to cable horizontal ownership and broadcast multiple ownership limits.

This proceeding was prompted by the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*, 240 F.3<sup>rd</sup> 1126 (D.C. Cir. 2001) ("*Time Warner II*"), where the Court vacated and remanded two aspects of the Commission's cable attribution rules: the elimination of the single majority shareholder exemption and the prohibition on sale of programming by an insulated limited partner. The Commission has solicited comments on reinstatement of the single majority shareholder exemption for both cable and broadcast. However, it seeks comments on the so-called "no sale" rule only with respect to the cable limited partnership insulation criteria – criteria that the Commission has already relaxed for cable only. The Networks submit that this disparate approach to cable and broadcast ownership attribution criteria is neither rational nor fair. The Networks therefore petition the Commission to undertake the following actions:

First, the Commission should issue an Order, as it did in the context of the single majority shareholder exemption,<sup>1</sup> harmonizing the limited partnership insulation criteria for broadcast ownership with that for cable ownership pending the outcome of a rulemaking proceeding to resolve the inconsistent treatment. This Order should narrow the broadcast limited partnership insulation criteria as it did for cable in 1999. Limited partnership interests should be attributed only if there is material involvement in the "video programming" activities of the broadcast licensee (the standard applied to cable). And the Order should eliminate the "no-sale" application of the insulation criteria in the broadcast context if that application is not reinstated for cable.

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<sup>1</sup> *A Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interest*, FCC 01-353 (released December 14, 2001).

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Second, the Commission should initiate a rulemaking proceeding that seeks to resolve the disparate treatment of broadcast and cable ownership with respect to insulation criteria for limited partners.

In addition, if the Commission grants the Petition for Rulemaking filed by the National Cable Television Association (“NCTA”) in this proceeding, the Networks urge that the resulting proceeding fully and equally reexamine the ownership attribution rules applicable to both broadcast and cable.

#### The Single Majority Shareholder Exemption

Several parties filing Comments in this proceeding have cogently explained the rationale for reinstatement of the single majority shareholder exemption for both cable and broadcast ownership.<sup>2</sup> Where a single shareholder controls a corporate entity, minority shareholders cannot control or exert meaningful influence over the corporation’s operations. The Commission’s equity/debt plus (“EDP”) benchmark also ensures that a minority shareholder cannot, by a combination of its ownership interest and other relationships, exert undue influence or control over the operations of a broadcast property. For these reasons, the single majority shareholder exemption should be reinstated for both broadcast and cable, and the EDP rule should limit the application of the exemption to cable ownership, just as it does for broadcast ownership.

#### The Limited Partnership Insulation Criteria

The Commission is considering the single majority shareholder exemption as it relates both to broadcast and cable, but its consideration of the “no-sale” rule aspect of the limited partnership insulation criteria is limited to the cable context. Although the Networks

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<sup>2</sup> See, e.g., Comments of Viacom, Inc. and Comments of the National Association of Broadcasters.

recognize the Commission is reacting to the Court's decision in *Time Warner II*, which was limited to cable ownership issues, there is no rational basis for disparate treatment of cable and broadcast in terms of ownership attribution criteria. Nor is it fair to relax the ownership attribution criteria for one distribution medium and not the other.

The Commission has always based its cable ownership attribution benchmarks on the broadcast ownership rules, recognizing that the criteria serve the same policy objective for both distribution media.<sup>3</sup> Recently, the Commission affirmatively concluded that there are no differences in the ownership, financing or management structures between the cable and broadcast industries that warranted creating ownership attribution standards for cable that were different than those used for broadcast ownership.<sup>4</sup> Despite this conclusion, however, in 1999 the Commission narrowed the limited partnership insulation criteria for purposes of the cable horizontal ownership and channel occupancy limits, providing that a limited partner must not be materially involved in the cable operator's "video programming-related" activities, instead of the broader "media-related" activities standard that applied – and continues to apply – to broadcast ownership.<sup>5</sup>

In the same Order in which the Commission relaxed the insulation criteria for cable, it also found that the underlying purposes of the broadcast ownership rules and the cable horizontal limits are the same – namely, promoting competition within the industry and

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<sup>3</sup> *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8580-81, 8591-92.

<sup>4</sup> *Review of the Commission's Cable Attribution Rules*, 14 FCC Rcd 19014, 19020, 19029, pars. 11, 33 (1999) ("1999 Attribution Order").

<sup>5</sup> *Id.* at 19040, pars. 63-64.

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diversity of viewpoints and programming.<sup>6</sup> Yet, the Commission has never considered whether the “media-related” activities insulation criterion should also be narrowed for broadcast multiple ownership, even though the horizontal cable ownership limit and the broadcast national audience cap are directly analogous national ownership limits, and even though the same reasoning that prompted the narrower “video programming-related” activities standard in the cable context applies to broadcasting.<sup>7</sup>

In this proceeding the Commission is responding to the conclusion of the Court in *Time Warner II* that the Commission had not justified its application of the cable insulation criteria to bar programming sales between limited partners and cable operators – the so-called “no-sale” rule. Again, no change in the comparable insulation criteria that apply to broadcast ownership is contemplated, even though the conclusions of the D.C. Circuit with respect to the cable insulation criteria apply with equal force to the comparable provisions in the broadcast attribution rules.

The Networks agree with those Commenters who argue that the “no-sale” rule is irrational and fails to advance the purported goals of the Commission’s horizontal and vertical cable ownership regulations. We will not reiterate those arguments here. However, the same arguments would apply, for example, to the sale of syndicated programming to a broadcast station by a company that also owns a limited partnership or LLC interest in the station. In other words, it is equally unlikely that there is a rational connection between the arm’s length sale of programming by a limited partner to a station and “material

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<sup>6</sup> 1999 Attribution Order, 14 FCC Rcd at 19030, par. 35.

<sup>7</sup> 1999 Attribution Order, 14 FCC Rcd at 19040, pars. 63-64.

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involvement” of the limited partner in the core management and operations of the broadcaster – the nexus the Court found wanting in *Time Warner II*.

Request for Commission Action

The Commission has not noticed for comment any change in its broadcast attribution rules other than the single majority shareholder exemption. In 1999 the Commission narrowed the scope of the limited partnership insulation criteria for cable only. The “no-sale” rule has been vacated by *Time Warner II* for cable only. Thus, broadcasters are already at an unfair and unjustified disadvantage in the application of the Commission’s attribution criteria. In order to redress this inequity, the Networks urge the Commission to:

- (1) Issue an Order that harmonizes the limited partnership insulation criteria for cable and broadcast, as indicated above, pending the outcome of a rulemaking proceeding.
- (2) Initiate a rulemaking to modify the limited partnership insulation criteria in the broadcast ownership attribution rules to mirror the comparable provisions in the cable attribution rules. At a minimum, the criteria should be narrowed to prohibit involvement in “programming-related,” not “media-related” activities. Moreover, if the Commission does not reinstate the “no-sale” rule for cable that was vacated by the D.C. Circuit, it should clarify that broadcast insulation criteria similarly do not prevent arm’s length programming sales by an entity with a limited partnership or LLC interest in the broadcast licensee. Since broadcasters are already playing on a tilted field when it comes to the Commission’s limited partnership insulation criteria, this rulemaking proceeding should be separate from any omnibus proceeding initiated

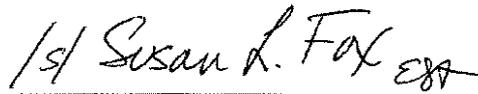
in response to the NCTA's Petition for Rulemaking, and should proceed on an expedited basis.

(3) Broadly address *all* the Commission's ownership attribution regulations and standards for *both* broadcast and cable if the Commission grants the NCTA's Petition for Rulemaking.

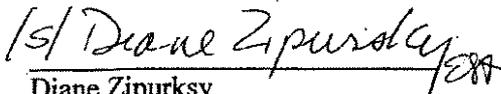
Respectfully submitted,



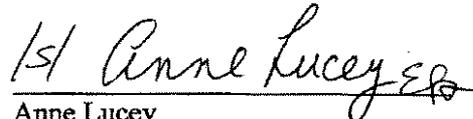
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