

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Promoting Diversification of Ownership in the Broadcasting Services	)	MB Docket No. 07-294
	)	
2006 Quadrennial Regulatory Review – Review of The Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership and Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and to Build On Earlier Studies	)	MB Docket No. 04-228
	)	

To: The Commission

**JOINT COMMENTS OF BEASLEY BROADCAST GROUP INC.,  
CBS CORPORATION, EMMIS COMMUNICATIONS CORPORATION,  
AND ENTERCOM COMMUNICATIONS CORP.**

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## SUMMARY

Joint Commenters strongly urge the Commission not to adopt its proposed expansion of commercial broadcast ownership reporting requirements to encompass non-attributable shareholders in broadcast licensees controlled by single majority shareholders (“SMS Entities”).

The FCC has long recognized the non-attributable status of non-controlling equity interests in SMS Entities due to such interest holders’ inability to influence the management decisions of such entities. Non-attributable investors, in turn, are properly excluded from the FCC’s ownership reporting requirements, including those connected with the revised and expanded FCC Form 323. Now, the Commission proposes to create an arbitrary incongruity by “counting” in the ownership *reporting* context non-attributable equity interests in SMS Entities, while simultaneously *excluding* those same interests from ownership *attribution*. Meanwhile, other non-attributable investors – such as holders of non-voting stock, warrants, and debt instruments (subject to the limitations of the EDP rule), holders of less than 5 percent of a corporation’s voting stock, insulated limited partners, insulated limited liability company members, and investment companies holding less than 20 percent of a corporation’s voting stock – will remain free of the proposed filing burdens. Such an illogical, selective singling out of one class of non-attributable investors violates the longstanding principle that agencies must treat similarly situated parties in a similar manner.

If the Commission adopts this proposal, SMS Entities and their non-attributable shareholders will face substantial and unwarranted information collection burdens, without any discernible countervailing public interest benefits. The information to be collected would not yield useful information on minority and female ownership in the broadcast industry. On the contrary, it holds the potential to taint the existing minority and female ownership database by

including therein a subset of minority and female investors who are utterly bereft of meaningful influence over programming or station operations.

The information that the Commission proposes to collect will be difficult for SMS Entities to obtain. Many publicly traded companies have little or no demographic information about their non-attributable shareholders; attempting to procure such information will require substantial, time consuming and costly inquiries. Furthermore, government-mandated collection of this information – percentage of equity, percentage of votes, percentage of total assets, other media interests, race, ethnic origin and gender data – would be burdensome and intrusive, particularly given the FCC’s pending proposal to require all reporting individuals to obtain CORES FRN numbers (and in turn, to furnish the FCC social security numbers). Privacy issues attendant to the disclosure and collection of such sensitive, private information should be as manifest to the Commission as it will be to investors who can merely opt to avoid investments saddled with such intrusive and unnecessary reporting obligations.

In sum, the Commission should reject the unjustified proposal to collect ownership information from non-attributable investors in SMS Entities.

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Beasley Broadcast Group Inc., CBS Corporation, Emmis Communications Corporation and Entercom Communications Corp. (together, “Joint Commenters”), by their attorneys, hereby submit these comments in response to the *Fifth Further Notice of Proposed Rulemaking* (“*Fifth*

FNPRM”) in the above-captioned proceeding.<sup>1</sup> In the *Fifth FNPRM*, the Commission proposes to expand commercial broadcast ownership reporting requirements to encompass non-attributable shareholders in broadcast licensees controlled by single majority shareholders (“SMS Entities”).<sup>2</sup>

Joint Commenters are SMS Entities, each ultimately controlled by a single party holding a majority voting interest sufficient to ensure *de jure* control over the entity and consequently the management functions of the relevant licensee’s various broadcast stations. Given the dominant positions held by such single majority shareholders, the FCC has properly recognized that equity interests in SMS Entities lack influence over licensee operations and therefore are not attributable.<sup>3</sup> Joint Commenters appreciate the Commission’s effort to collect accurate, comprehensive and useful information with respect to the extent of minority and female ownership in the broadcast industry as a means of assessing the need for and effectiveness of

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<sup>1</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, Memorandum Opinion & Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009) (“*Fifth FNPRM*”). The *Fifth FNPRM* was published in the Federal Register on January 15, 2013. Accordingly, these comments are timely filed.

<sup>2</sup> *Id.* at 13047. Specifically, the proposal looks toward requiring the filing of ownership reports by shareholders with voting interests in SMS Entities that would be attributable but for the single majority shareholder exemption. The *Fifth FNPRM* had also proposed to impose such a filing requirement on parties having interests that would be attributable under the Equity/Debt Plus (“EDP”) rule but for an exemption under that rule for investments in “eligible entities.” *Id.* at 13048. That exemption was subsequently invalidated by the Third Circuit. *See Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011). Joint Commenters focus herein only on the proposed requirement applicable to non-attributable shareholders in SMS Entities.

<sup>3</sup> The single majority shareholder exemption provides that, where a single shareholder holds more than 50 percent of the outstanding voting stock of the corporation in question, minority shareholders’ voting interests will not be attributed. *See* former 47 C.F.R. § 73.3555 note 2(b). There is an EDP rule exception to the SMS rule. Under the EDP rule, an interest is deemed attributable if, aggregating both equity and debt, the interest exceeds 33 percent of the total asset value of the licensee and the interest holder also holds another attributable interest in the same market or is a significant program supplier to another station in the market. *See* 47 C.F.R. § 73.3555 note 2(i).

policies ultimately designed to promote viewpoint diversity. However, Joint Commenters strongly believe that adoption of the *Fifth FNPRM*'s proposal would merely yield information from non-attributable investors that not only is irrelevant to that goal, but holds the potential to distort meaningful minority and female ownership data and undermine the legitimacy of policies premised thereon. Imposing substantial and undue burdens on one group of licensees and their non-attributable shareholders would also be arbitrary and capricious, and run the risk of deterring investment in SMS Entities at a time when the industry can ill afford any financial disincentives.

For these reasons and others set forth herein, Joint Commenters respectfully request that the Commission retain its existing rules, which properly and logically treat *all* non-attributable parties similarly.

**I. The *Fifth FNPRM*'s SMS Entity Proposal Conflicts with Commission Ownership Attribution Policies.**

The FCC has recognized the non-attributable status of non-controlling equity interests in SMS Entities for nearly thirty years due to such interest holders' inability to influence the management functions of such entities. Now the Commission's *Fifth FNPRM* posits that "the balance struck in defining what interests should be counted for purposes of implementing [the] ownership rules *may not* be appropriate for collecting data on interests held by minorities and women."<sup>4</sup> It proposes, on the basis of this speculative rationale, "to expand the [ownership] reporting requirements to include certain nonattributable entities,"<sup>5</sup> including non-attributable shareholders in SMS Entities – i.e., to "count" in the ownership *reporting* context interests that are not "counted" in the ownership *attribution* context. Joint Commenters submit that the

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<sup>4</sup> *Fifth FNPRM* at 13047 (emphasis added).

<sup>5</sup> *Id.*

adoption of such an administrative incongruity would be an illogical, arbitrary and completely unwarranted departure from long-established FCC ownership attribution policies.

Underlying the Commission’s broadcast multiple ownership rules is a premise that “a democratic society cannot function without the clash of divergent views.”<sup>6</sup> Because “ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation”<sup>7</sup> – that is, the ability to affect the “diversity of viewpoints”<sup>8</sup> – the FCC’s broadcast attribution rules are designed to “identify those interests in or relationships to licensees that confer on their holders *a degree of influence or control* such that the holders *have a realistic potential to affect the programming decisions* of licensees or other core operating functions.”<sup>9</sup> Collectively, these policies have resulted in FCC limits on a market-by-market basis (as well as on a nationwide basis for television stations) of the number of broadcast outlets in which any person or entity can hold an attributable interest, designed to promote diversity of ownership, and thereby diversity of programming and viewpoint.

Unlike attributable interest holders, minority shareholders in SMS Entities are utterly bereft of meaningful influence over a station’s programming or other material decisions because *de jure* control of such corporations is totally vested in the single majority shareholder. Recognizing this reality, the Commission correctly has concluded that shareholders other than the single majority shareholder lack an essential characteristic of attribution because “even acting

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<sup>6</sup> *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Report and Order, 97 FCC 2d 997, 1004 (1984) (quoting Second Report and Order in Docket No. 18110, 50 FCC 2d 1046, 1079 (1974)).

<sup>7</sup> *Id.* (quoting Second Report and Order in Docket No. 18110 at 1051).

<sup>8</sup> *Id.* (quoting Second Report and Order in Docket No. 18110 at 1079).

<sup>9</sup> *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12560 (1999) (emphasis added).

collaboratively, [they] would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings.”<sup>10</sup> In light of the indisputable inability of non-attributable investors in SMS Entities to exert meaningful influence over a broadcast station’s programming or other decisions, the collection of racial and gender data from such minority investors plainly serves no administrative or other cognizable purpose.

The Commission’s collection of data on the racial and gender composition of broadcast licensees, part of its longstanding effort to promote broadcast station ownership by minorities and women, is based on the thesis that diversity in broadcast ownership will translate into diversity in programming, because minorities and women holding attributable ownership interests will have the opportunity to participate in and influence station operations.<sup>11</sup> As the Commission’s Minority Ownership Task Force Report concluded more than thirty years ago:

Acute underrepresentation of minorities among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities.<sup>12</sup>

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<sup>10</sup> *Reexamination of the Commission’s Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 97 FCC 2d 997, 1008-1009 (1984). The FCC subsequently held that in certain limited circumstances where a minority investor in an SMS Entity may have the incentive and means to exert influence over a licensee’s core operating functions (for example, where that shareholder holds 33 percent of the entity’s total assets and is a major program supplier or holds an attributable interest in another media outlet in the same market), the EDP rule would serve as an attribution/disclosure safety valve.

<sup>11</sup> *See Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order, 24 FCC Rcd 5896, 5897 (2009).

<sup>12</sup> Federal Communications Commission’s Minority Ownership Task Force, *Minority Ownership Report* (1978).

The FCC relied on this Report in concluding that “[f]ull minority participation in the *ownership and management* of broadcast facilities results in a more diverse selection of programming.”<sup>13</sup>

The FNPRM asserts that collecting ownership information from non-attributable investors in SMS Entities “would make the data set more complete.”<sup>14</sup> Joint Commenters respectfully disagree. While ownership reporting may be justifiable where a link to station programming or other core function can be established, non-attributable investors in SMS Entities plainly fall into a different category. That is, individuals who are sole proprietors and natural persons that comprise a partnership clearly exercise control and/or have substantial influence over the broadcast facilities they operate. Similarly, individuals or entities that hold equity and/or debt interests in excess of the 33 percent EDP threshold at least have the potential to meaningfully influence station operations.<sup>15</sup> However, rationales that underpin the collection of ownership information from sole proprietorships, partnerships comprised of natural persons, and investors that exceed the 33 percent EDP threshold have no application to minority SMS Entity investors, whose ownership interests give them *no influence whatsoever* over station programming or other core operating decisions.

## **II. Adoption of the Proposed Information Collection Requirement Would Impose Undue Burdens on Prospective Respondents.**

In 1998, the FCC required reporting of race, ethnic origin and gender data on Form 323 by individuals and entities *with attributable ownership interests*, based upon the reasonable

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<sup>13</sup> *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) (emphasis added).

<sup>14</sup> *Fifth FNPRM* at 13047 (quoting *Promoting Diversification of Ownership in the Broadcasting Services*, Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896, 5907 (2009) (“*Fourth FNPRM*”)).

<sup>15</sup> “[I]nterests that exceed the 33 percent EDP threshold confer on the interest holder an ability to influence a licensee’s operations.” *Fifth FNPRM* at 13049.

proposition that such a “reporting requirement will [not] impose an *undue burden* on licensees because they will not be required to obtain information *from anyone whose interests are not already reportable.*”<sup>16</sup> Directly contrary to this sound reasoning, the *Fifth FNPRM* proposes selectively to expand ownership reporting obligations to encompass non-attributable investors in SMS Entities, thereby imposing substantial burdens on persons and entities not previously reportable.

As contrasted with attributable interest holders, whose ownership interests and race, gender and ethnicity have historically been disclosed to the Commission, information from non-attributable investors in SMS Entities will be more difficult to obtain. Many publicly traded companies have little or no demographic information about their non-attributable shareholders. Substantial stock positions often are held in “street name” by custodial banks, brokers, or other financial institutions, and licensees generally have only limited information regarding the identity of the underlying beneficial owners without engaging in substantial, time consuming and costly inquiries or surveys. Under the *Fifth FNPRM*’s proposal, for the first time in almost three decades, SMS Entities would be required to conduct additional surveys of their affected non-attributable interest holders to obtain not only race, ethnic origin and gender data, but also the full range of information required by Form 323, including the percentage of equity, percentage of votes, percentage of total assets and the other media interests of those shareholders and their controlling entities.

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<sup>16</sup> *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, 13 FCC Rcd 23056, 23097 (1998) (emphasis added).

Moreover, a pending FCC proposal would add to the intrusiveness of the information collection process by requiring reporting individuals to obtain and provide CORES FRNs.<sup>17</sup> Procuring an FRN entails the furnishing of social security numbers (“SSN”) to the Commission, either by the interest holder or the licensee. This requirement invokes privacy and data security issues – for example, the collection, use, maintenance and disclosure of such sensitive, private information by a licensee triggers application of numerous federal and state privacy and data security laws. In addition, in this era of rampant identity theft, many individuals are highly reluctant to divulge SSNs in circumstances where they may be captured by unintended persons of ill motive.<sup>18</sup> Even assuming the cooperation of many affected, nonattributable investors, SMS

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<sup>17</sup> See *Promoting Diversification of Ownership in the Broadcasting Services*, Sixth Further Notice of Proposed Rulemaking, FCC 12-166, 78 Fed. Reg. 2925 (Jan. 15, 2013). The revised Form 323 had required filers to obtain CORES FRNs for themselves and for individual interests reported on the form, but, in response to criticism over data security and privacy concerns, the Media Bureau has permitted individuals to obtain “Special Use FRNs” without supplying their social security numbers. The FCC now proposes to do away with the “non-SSN based Special Use FRN.” *Id.* at ¶ 2.

<sup>18</sup> This reluctance may be well-founded. A recent GAO Report noted numerous deficiencies in the FCC’s Enhanced Secured Network project, which was implemented at a cost of \$10 million after discovery of a security breach within the FCC’s network. The GAO found that, “[a]s a result of these deficiencies, [the] FCC’s information remain[s] at unnecessary risk of inadvertent or deliberate misuse, improper disclosure, or destruction” and that “sensitive information could be disclosed, modified, or obtained without authorization.” United States Government Accountability Office, *Federal Communications Commission Needs to Strengthen Controls over Enhanced Security Network Project*, GAO-13-155 (Jan. 2013) (“GAO Report”); see also Sean Gallagher, *FCC Invests \$10M in New Network Security but Leaves Backdoor Unlocked*, *Ars Technica*, Feb. 11, 2013, available at <http://arstechnica.com/security/2013/02/fcc-invests-10m-in-new-network-security-but-leaves-backdoor-unlocked/> (“The mishandling of security is being raised as an issue by some who do business with the FCC, especially because news of the original breach was never disclosed to the public – even as the FCC was formulating a proposed a rule that would require people with commercial interests in broadcast stations to submit their social security numbers for an FCC database.”); Josh Hicks, *FCC Botched Cyber-Security Planning After Breach, Report Says*, *WASH. POST*, Feb. 5, 2013, at B4, available at <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/02/05/fcc-botched-cyber-security-planning-after-breach-report-says/> (noting that “properly securing the agency’s networks may now require ‘costly and time-consuming rework’”) (quoting GAO Report).

Entities will be required to devote substantial time and resources to the collection of this sensitive, intrusive information and to explain why this information is needed from investors who are non-cognizable for ownership attribution purposes due to their lack of influence or control over station operations.

The proposed information collection requirement would be even more burdensome on non-attributable non-person investors in SMS Entities. An investor that is a corporation, partnership, limited liability company or other entity must complete an ownership report for itself, and for each entity in its own ownership chain. The Commission estimates that a single Form 323 consumes approximately 8 hours of attorney time.<sup>19</sup> Based on real-world experience, however, Joint Commenters can state confidently that the Commission has dramatically underestimated the time it takes to complete a single Form 323 for all but those entities with the simplest of ownership structures. Given the numerous data fields, the need to enter duplicative information multiple times, the inability to attach exhibits, the processing time to generate new data fields (which increases as more data are added to the report), and various other technical challenges posed by the new Form 323, the time needed to complete a single report is more appropriately measured in days or weeks, not hours.

The ownership reporting burdens on non-attributable investors in SMS Entities become even more pronounced when such investors hold an interest in a broadcast licensee with even a moderately complex ownership structure. The disclosing entity's chain of ownership reports must be re-filed for every broadcast licensee in which the non-attributable SMS Entity investor

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<sup>19</sup> See *FCC Supporting Statement to Ownership Report for Commercial Broadcast Station*, FCC Form 323, submitted to the Office of Management and Budget (Aug. 11, 2009).

has an interest.<sup>20</sup> Moreover, non-attributable minority investors in SMS Entities, who have never had to file ownership reports with the Commission due to their non-cognizable status, are far less likely to be familiar with the FCC's rules, the CDBS electronic filing system, and the Form 323 reporting requirements. Given the complexity of Form 323 and the difficulties associated with its completion, non-attributable minority investors in SMS Entities may need to secure assistance of specialized counsel to comply with these requirements.

As the foregoing demonstrates, expanding ownership reporting obligations to non-attributable investors in SMS Entities will impose costly and substantial undue burdens on this unique class of investor. Because those burdens will not be offset by any discernible public interest benefits, but will instead taint the Commission's ownership information by including therein a subset of minority and female investors who have no control or influence over programming or station operations (while excluding from ownership reporting all other non-attributable interest holders), Joint Commenters urge the Commission to reject the proposal set forth in the *Fifth FNPRM*.

### **III. The FCC's Proposal Promises to Distort Otherwise Meaningful Data and Discriminate Against One Class of Non-Attributable Investor, on the Basis of a Flawed Premise.**

Collecting ownership information from SMS Entity investors that have no meaningful role in station operations will merely serve to aggregate meaningless data. Worse, this new data, divorced from a connection to viewpoint diversity, holds the potential to distort the existing minority and female ownership database. Non-attributable minority and female investors are simply not in a position to influence programming or other decisions of a licensee, and data

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<sup>20</sup> For example, CBS Corporation has 43 licensee entities in its ownership structure. Therefore, a hypothetical non-attributable investor in CBS Corporation with three parent entities will be required to complete and file *172 ownership reports*, one for itself and for each of its parent entities in each of the 43 licensee chains. Obviously, these filing burdens are substantial.

concerning them need not be collected. Rather than making current Form 323 ownership data about *attributable* owners more accurate and reliable (which, as the Commission acknowledges, “the courts will insist upon if the Commission chooses to pursue more race- or gender-based approaches”<sup>21</sup>), data about *non-attributable* owners hold the potential to confuse analysis of viewpoint diversity in the broadcasting industry and thereby undermine the legitimacy of any future Commission policies designed to promote that diversity.

The Commission’s proposal is also discriminatory, in that it would impose reporting burdens on only one class of non-attributable investor. In addition to minority shareholders in SMS Entities, the Commission’s current rules exempt from attribution the holders of non-voting stock, warrants, and debt instruments (subject to the limitations of the EDP rule), holders of less than 5 percent of a corporation’s voting stock, insulated limited partners, insulated members of limited liability companies, and investment companies holding less than 20 percent of a corporation’s voting stock.<sup>22</sup> Like non-majority shareholders in SMS Entities, these non-attributable interest holders exercise no meaningful influence over station operations; yet, incongruously, these non-attributable investors remain free of prospective filing burdens while non-attributable investors in SMS Entities are selectively targeted for ownership reporting. Although the *Fifth FNPRM* posits that “the minority interests that are exempt from attribution under the single majority shareholder exemption can be quite substantial,”<sup>23</sup> it fails to explain how such interests are any more “substantial” or influential than other non-attributable interests. Non-attributable investors in SMS Entities plainly have no more influence than an individual or

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<sup>21</sup> *Fourth FNPRM* at 5897.

<sup>22</sup> 47 C.F.R. § 73.3555, notes 2(b), (e) and (f).

<sup>23</sup> *Fifth FNPRM* at 13047 (quoting *Fourth FNPRM* at 5907).

entity holding a 4.99 percent voting stock interest in either a publicly- or privately-held non-SMS controlled corporation or a 70 percent insulated limited partner in a partnership or a 25 percent insulated member of an LLC. Yet, the Commission illogically would impose reporting obligations only on the non-attributable SMS Entity shareholder, but not on these other, similarly situated, non-attributable investors.<sup>24</sup>

The premise underlying the *Fifth FNPRM*'s hypothesis that requiring licensees to report ownership interests held by shareholders in SMS Entities will “help determine whether nonattributable interests could be a source of attributable minority and female ownership in the future” is flawed.<sup>25</sup> The quoted language suggests that the Commission is seeking to identify certain non-attributable investors that could at some point in the future become attributable. But the vast majority of investors holding non-attributable interests in broadcast stations (in SMS Entities or otherwise) have intentionally and carefully structured their investments to be non-attributable. Investors do so for a host of legitimate business reasons – e.g., they are making a pure investment, and have no interest in playing an active role in station management; they are accommodating multiple ownership rule considerations; or, most relevant here, they want to avoid having to comply with costly, intrusive and time consuming ownership reporting obligations. Consequently, as a general proposition, the pool of non-attributable investors is highly unlikely to contain a meaningful number of potential attributable owners. But, even assuming *arguendo* that some non-attributable minority and female investors could become attributable owners in the future, there is no reason to believe such owners are investing in SMS

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<sup>24</sup> A long established principle of administrative law requires that the agency treat similarly situated parties in a similar manner. See *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

<sup>25</sup> *Fifth FNPRM* at 13047 (quoting *Fourth FNPRM* at 5907).

Entities. As compared with other non-attributable investors (from whom, paradoxically, the FCC is *not* requiring the submission of ownership information) investors in SMS Entities have absolutely *no* way to meaningfully influence station operations. The essence of a non-controlling investment in an SMS Entity is passivity. In sum, if the FCC is looking for “sources of attributable minority and female ownership in the future,” it should not be focusing its attention on imposing inadequately supported, costly new reporting burdens on SMS Entities and their investors.

**IV. The *Fifth FNPRM* Sets Forth No Goal to be Furthered, or Problem to be Redressed, Through the Proposed Collection of Information from Non-Attributable Interest Holders in SMS Entities.**

As the foregoing demonstrates, collection of ownership information from non-attributable investors in SMS Entities will not help the Commission obtain meaningful data on minority and female ownership. Joint Commenters also note that the Commission’s proposal to expand the commercial broadcast ownership reporting requirements for SMS Entities will not address or remedy any identified flaw in the Commission’s prior data collection efforts.

For example, the *Fourth FNPRM* had set forth, in some detail, alleged infirmities of the Commission’s information collection methodology pertaining to the status of minority and female ownership.<sup>26</sup> However, these deficiencies related principally to the *quality* of the data, not its scope. For example, in some instances, reported minority ownership percentages actually exceeded 100 percent, and some filers provided “inconsistent racial classifications from year to year.”<sup>27</sup> Other identified problems included missing and inaccurate information, and missing

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<sup>26</sup> *Fourth FNPRM* at 5900-02.

<sup>27</sup> *Id.* at 5900.

filings.<sup>28</sup> The Commission also noted that prior biennial ownership report filings had been staggered, raising criticism that it was “impossible to obtain a snapshot of broadcast ownership at any one particular moment in time.”<sup>29</sup> A study cited by the *Fourth FNPRM* pointed to “gross omission of reports, possible data entry errors [and] duplicate filings . . . and the fact that the database contains corrected filed [forms] and forms that contain significant errors.”<sup>30</sup> The *Fourth FNPRM* also cited criticism of the practice of including and explaining ownership information via attachments “because the data are not entered into the database.”<sup>31</sup>

Assuming *arguendo* the validity of those observations, *none* of them is addressed, or redressed, by a proposal to impose ownership reporting obligations on non-attributable investors in SMS Entities. Shortcomings of the ownership information collection process have concerned data entry, omission, classification, searchability, and management – i.e., the need for more effective organization and use of information that was then available. But, the *Fourth FNPRM* nowhere suggested that the Commission’s longstanding policy of reporting only attributable ownership interests undermined the reliability of the data. Nor did any complainant or commenter suggest that introducing information into the database about one particular type of non-attributable interest holder would address reliability issues inherent in the database.<sup>32</sup> The

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> C. Anthony Bush, *Minority and Women Broadcast Ownership Data*, attached as Appendix A to Kiran Duwadi, Scott Roberts, and Andrew Wise, *Ownership Structure and Robustness of Media* (cited in *Fourth FNPRM* at 5900 n.18 & n.21).

<sup>31</sup> *Fourth FNPRM* at 5901.

<sup>32</sup> See *Petition for Reconsideration of the National Association of Broadcasters*, MB Docket No. 07-294 (filed June 26, 2009) (“To the best of NAB’s knowledge, no commenter proposed that the Commission gather information on the race and gender of non-attributable interest holders.”).

*Fifth FNPRM's* proposal to impose burdensome reporting obligations on this unique class of non-attributable investor is, therefore, a misguided approach that will not achieve its stated objectives.

#### **V. New Information Collection Burdens Would Deter Investment.**

In formulating its attribution policies, the FCC has acknowledged that it “must tailor . . . rules to permit arrangements in which a particular ownership . . . interest involves *minimal risk of influence*, in order to avoid *unduly restricting the means by which investment capital* may be made available to the broadcast industry.”<sup>33</sup> The longstanding recognition that overly burdensome regulations can have the effect of deterring investment,<sup>34</sup> and that the agency should be careful to refrain from imposing daunting regulatory obligations on capital providers who have no influence on programming decisions, is conspicuously absent from the Commission’s discussion of the proposed requirement. Instead, the *Fourth FNPRM*, without revealing any underlying reasoning or analysis, summarily asserts that “the concern about impeding capital flow does not apply” and that collecting information from this particular class of non-attributable investor will not cause “an adverse effect on capital investment.”<sup>35</sup>

These conclusions are unsupported. Investors evaluating their existing investment portfolios or future opportunities to invest in a smorgasbord of potential investments are less

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<sup>33</sup> *Fourth FNPRM* at 5906 (quoting *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5942 (2008)) (emphasis added).

<sup>34</sup> See, e.g., *Statement of FCC Commissioner Robert M. McDowell before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, 112th Congress* (2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-308297A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308297A1.pdf) (explaining that unnecessary regulation deters investment, and stating that “[r]emoving unneeded rules can liberate capital currently spent on lawyers and filing fees – capital that would be better spent on powerful innovations.”).

<sup>35</sup> *Fourth FNPRM* at 5906.

likely to select an investment that is saddled with burdensome, intrusive and costly reporting obligations.<sup>36</sup> Attributable investors are more likely to be accustomed to such reporting obligations and to accept the fact that disclosure and filing requirements “come with the territory,” given the meaningful influence conferred by attributable investor status. By contrast, non-attributable shareholders in SMS Entities are utterly passive sources of funding, and would regard burdensome filing obligations as an intrusive and unnecessary exercise. Particularly in this challenging economic climate, the Commission should be implementing policies designed to *encourage* investment in the broadcasting industry, not proposing new, unnecessary and illogical reporting obligations that will inevitably *discourage* investor participation.

## **VI. Conclusion.**

The Commission should not adopt the *Fifth FNPRM*'s proposal to impose new reporting obligations on non-attributable investors in SMS Entities. There is no basis for imposing burdensome new regulatory requirements on these passive shareholders while continuing to exclude other classes of non-attributable investors. All non-attributable investors, by definition, do not exert influence over station programming and operations. Adding non-attributable minority and female investors in SMS Entities to the FCC's database will not enhance the quality of the data or provide clarity. Rather, it promises only to distort the minority/female ownership

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<sup>36</sup> See, e.g., Alberto Alesina et al., *Regulation and Investment*, 3 *J. Eur. Econ. Ass'n* 791 (2005) (addressing the impact of regulatory burdens on investment in various economic sectors).

picture. Lastly, the imposition of such reporting obligations might deter investment by non-attributable investors in one particular type of licensee – the SMS Entity – and, therefore would be arbitrary and capricious.

Respectfully submitted,

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