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

In the Matter of	)	
	)	
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

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 14, 2000 **Released:** January 19, 2001

By the Commission: Chairman Kennard approving in part, concurring in part and issuing a statement; Commissioners Ness and Tristani approving in part, dissenting in part, and issuing separate statements; Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION AND BACKGROUND

1. In this Order, we grant, in part, and deny, in part, five petitions seeking reconsideration of the *Report and Order* released in this proceeding on August 6, 1999.[1] In response to one petition, we provide clarification on certain issues related to the newly adopted attribution rules. In the *Report and Order*, the Commission modified its attribution rules, which define what constitutes a "cognizable interest" in applying the broadcast multiple ownership rules,[2] the broadcast/cable cross-ownership rule,[3]

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[1] In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; and Reexamination of the Commission's Cross-Interest Policy, *Report and Order*, 14 FCC Rcd 12559 (1999) (*Report and Order*). On the same day, the Commission released its related order on local television ownership rules, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221 and 87-8, *Report and Order*, 14 FCC Rcd 12903 (1999) (*Local Television Ownership Report and Order*), *on recon.*, FCC 00-431 (rel. Jan. 19, 2001); and its order on national television ownership rules, In the Matter of Broadcast Television National Ownership Rules; Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 96-222, 91-221, and 87-8, *Report and Order*, FCC 99-208 (Aug. 6, 1999) (*National Television Ownership Report and Order*), *recon. denied*, FCC 00-406 (rel. Jan. 19, 2001).

[2] 47 C.F.R. § 73.3555.

and the cable/Multipoint Distribution Service cross-ownership rule.[4] The Commission amended its attribution rules to improve the precision of the rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees and markets, and facilitate application processing.

2. In the *Report and Order*, the Commission, in relevant part, eliminated its cross-interest policy and adopted the new equity/debt plus (EDP) rule, retained the single majority shareholder exemption, adopted rules that make interests in certain television local marketing agreements (LMAs) or time brokerage agreements attributable for purposes of the ownership rules, and established policies for grandfathering certain newly attributable interests. The Minority Media Telecommunications Council (MMTC), the National Association of Broadcasters (NAB), Sinclair Broadcast Group, Inc. (Sinclair), the Office of Communications, Inc. of United Church of Christ *et al*. (UCC),[5] and Wells Fargo Communications Finance, Division of Norwest Bank MN, NA (Wells Fargo) seek reconsideration of issues related to these actions. In addition, on our own motion, we provide guidance on several issues that the petitioners did not raise, but that pertain to application of the EDP rule. In accordance with the scope of the proceeding, we note that the rule amendments contained in this *Memorandum Opinion and Order* apply to the broadcast multiple ownership rules, the broadcast/cable cross-ownership rule, and the cable/Multipoint Distribution Service cross-ownership rule.

II. DISCUSSION

A. The Equity/Debt Plus Rule

1. Scope of the Rule

3. **Background**. We adopted the EDP rule to address the concerns raised in the *Notice* and *Further Notice* and in the record that our attribution rules did not address some interests, including multiple business and financial relationships that conveyed significant influence such that they should be attributed.[6] For example, network affiliates had expressed concerns that attribution exemptions had permitted networks to extend their nationwide reach by structuring nonattributable deals in which the networks effectively exert significant influence, if not control, over licensees.[7] The EDP rule is a targeted

(Continued from previous page)

[3] 47 C.F.R. § 76.501(a).

[4] 47 C.F.R. § 21.912 Note 1.

[5] UCC *et al*. includes the Office of Communications, Inc. of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Civil Rights Forum, League of United Latin American Citizens, Philadelphia Lesbian and Gay Task Force, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and the Women's Institute for Freedom of the Press.

[6] In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; and Reexamination of the Commission's Cross-Interest Policy, *Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19895, 19900, ¶ 9 (1996) (*Further Notice*); In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; and Reexamination of the Commission's Cross-Interest Policy, *Notice of Proposed Rulemaking*, 10 FCC Rcd 3606, 3652, ¶¶ 99 (1995) (*Notice*).

[7] *Further Notice*, 11 FCC Rcd at 19900, ¶ 10.

approach that balances our goal of maximizing the precision of the attribution rules by attributing only interests that are of concern, and our goals of not unduly disrupting capital flow, affording ease of administration, and providing certainty to regulatees.[8] Specifically, we apply a two-pronged test to determine whether an interest is attributable under the EDP rule. Under the first prong, we ask whether the investor is either a major program supplier or a same-market media entity subject to the broadcast ownership rules. A program supplier that supplies over 15 percent of a station's total weekly broadcast programming hours is a "major program supplier" under the rule.[9] An interest holder is considered a "same-market media entity" where it has an existing attributable interest under our attribution rules, other than the EDP rule, in a broadcast station, newspaper, or cable system, in a given market.[10] The second prong looks at the extent of the financial interest. Any interest the major program supplier has in a station, to which it supplies programming, will be attributable under the EDP rule if the interest, aggregating both equity and debt, exceeds 33 percent of the total asset value of the station.[11] Similarly, any interest the media entity has in another media entity in the same market will be attributable under the EDP rule if the interest, aggregating both equity and debt holdings, exceeds 33 percent of the total asset value of the additional media entity.[12]

4. **Discussion**. NAB, Sinclair, and UCC challenge the scope of the EDP rule, while MMTC and Wells Fargo seek exemptions from the rule. We reaffirm the EDP rule as adopted in the *Report and Order* and decline, at this time, to allow any general exemptions to the rule. NAB first contends that the Commission should apply the rule only to investors that are also major program suppliers, or should not attribute investments of pure debt.[13] Because debt is attributable under the EDP rule, NAB argues that the rule will discourage investment in new entrants, including minorities and women.[14] NAB also expresses its concern that EDP restrictions on investment will adversely affect small and new broadcasters during the transition to digital television and the rule will likely inhibit the "spin off" of

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8 *Report and Order*, 14 FCC Rcd at 12581, ¶ 43.

9 Major program suppliers include all programming entities, including broadcast networks and inter-market time brokers that meet the percentage of programming test. *Report and Order*, 14 FCC Rcd at 12579, ¶ 36, 12585, ¶¶ 55 and 56, 12587, ¶ 59. In addition, where a person or entity has an attributable interest in a major program supplier, that person or entity will be deemed to be a major program supplier for purposes of applying the EDP rule. *Id*. at 12585, ¶ 55.

10 *Report and Order*, 14 FCC Rcd at 12579, ¶ 36.

11 *Report and Order*, 14 FCC Rcd at 12579, ¶ 36, 12580, ¶41, 12585, ¶ 55.

12 *Report and Order*, 14 FCC Rcd at 12579, ¶ 36, 12581, ¶ 42, 12584, ¶ 52.

13 Petition for Partial Reconsideration and Clarification of the Revised Broadcast Local Ownership and Attribution Rules Submitted by the National Association of Broadcasters (NAB Petition) at 3, 10 (Oct. 18, 1999); Opposition of the National Association of Broadcasters to Petitions for Reconsideration (NAB Opposition) at 10 (Dec. 2, 1999); Reply of the National Association of Broadcasters to Oppositions to Petition for Reconsideration (NAB Reply) at 8-9 (Dec. 13, 1999).

14 NAB Petition at 23; NAB Opposition at 8-9. Sinclair states that the rule will undercut the objective of increasing minority ownership because the more ownership in a broadcast entity is fractionalized, the less security there is to satisfy creditors. Petition of Sinclair Group, Inc. for Reconsideration (Sinclair Petition) at 22 (Oct. 18, 1999).

broadcast stations to new entrants as part of station mergers.[15] UCC, however, supports including debt under the EDP rule, stating that the Commission correctly recognized that debt is a powerful form of "contingent control" over a licensee.[16] UCC further contends that the EDP rule affects only investors with ownership interests in multiple broadcast licensees, leaving "plenty of opportunity for investment, unhindered by attribution, in the general market."[17]

5. We will neither limit the scope of the EDP rule to major program suppliers, nor will we limit the interests attributable under the EDP rule to equity investments only. As we have stated, the intent of our local broadcast ownership rules is to protect competition and program diversity in local broadcast markets. The smaller audiences and fewer advertising dollars available in small broadcast markets limit the number of viable local broadcast stations in those markets. The need to protect incumbents' broadcast signal quality from interference from nearby stations limits the number of stations in all broadcast markets. These limitations on the entry of new broadcast stations make the protection of competition and diversity in local broadcast markets particularly important objectives of our ownership rules.

6. The function of our attribution rules is to define which interests will be counted in applying our ownership rules. The equity/debt approach is intended to resolve our concerns that multiple nonattributable business interests could be combined to exert influence over licensees.[18] As a result, rather than applying our EDP rule to all investments in broadcasters in a single market, the rule is limited only to those relationships that afford the interest holder the incentive and means to exert influence or control over decisions regarding the core operations of broadcast stations. As we stated in the *Report and Order*, this targeted approach balances our goal of maximizing the precision of the attribution rules by attributing only those interests that are of concern, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions.[19]

7. Applying the EDP rule to same-market media entities is based, in part, on economic studies that have shown that the partial co-ownership of otherwise competing local business entities can lead to a decrease in competition between those local businesses. For example, the owner of a broadcast station that also has a significant financial interest in another local broadcast station has an incentive and may have the opportunity to decrease the level of competition between the two stations by controlling or

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15 NAB Petition at 24-25; NAB Reply at 8.

16 Opposition and Response to Petitions for Reconsideration of UCC *et al*. (UCC Opposition) at 15 (Dec. 2, 1999) (citing the *Report and Order* at ¶¶ 37-38); Reply of UCC *et al*. to Oppositions (UCC Reply) at 9-10.

17 UCC Opposition at 13-14.

18 *Report and Order*, 14 FCC Rcd at 12580, ¶ 39; *see* In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; and Review of the Commission's Attribution Rules, CS Docket Nos. 98-82 and 96-85, *Report and Order*, FCC 99-288, ¶ 83 (rel. Oct. 20, 1999) (*Cable Attribution Report and Order*).

19 *Report and Order*, 14 FCC Rcd at 12581, ¶ 43.

influencing management decisionmaking of the stations' operations.[20] In the *Report and Order*, we noted that a same-market media entity relationship affords the interest holder the incentive and means to exert this type of influence over licensees.[21] Specifically, we found that entities with existing local media interests may have an incentive and the means to use financing or contractual arrangements to obtain a degree of horizontal integration, within a particular market, that raises concerns because of our goal of protecting local diversity and competition.[22] NAB provides no evidence that would lead us to conclude otherwise. We therefore reaffirm our decision to include both same-market media entities and major program suppliers as the relationships that trigger the EDP rule. Accordingly, we deny NAB's request to limit the rule only to major program suppliers.

8. Similarly, we included debt under the EDP rule because the potential for certain creditors to exert significant influence over the core operations of a licensee, even though the creditors do not hold a direct voting or other equity interest, may undermine the diversity of voices we seek to promote.[23] We have found that, in many cases, it is no longer possible to classify investments strictly as "equity" or "debt,"[24] and we have recognized the complexity of distinguishing debt from equity in cases where alleged debt obligations were found to be more properly characterized as equity.[25] In the *Report and Order*, we concluded that creditors may, through contractual rights and their ongoing right to communicate freely with the licensee, exert as much, if not more, influence or control over some

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20 *See* Joseph Farrell & Carl Shapiro, *Asset Ownership and Market Structure in Oligopoly*, 21 RAND JOURNAL OF ECONOMICS 275 (1990) (stating that "[a]s firm 1 increases its stake in firm 2, firm 1 behaves less aggressively and total output falls, although all firms other than firm 1 increase their outputs").

21 *Report and Order*, 14 FCC Rcd at 12582, ¶ 47.

22 *Report and Order*, 14 FCC Rcd at 12583-84, ¶ 51; *see Cable Attribution Report and Order* at ¶ 89 (stating that the same-market entity prong was designed to capture controlling or influential interests in two media entities within the same market that would then trigger the local cross-ownership rules, thereby implicating the Commission's goals of promoting diversity and competition).

23 *Report and Order*, 14 FCC Rcd at 12582-83, ¶ 48; *see Cable Attribution Report and Order* at ¶ 84.

24 *See Report and Order*, 14 FCC Rcd at 12589, ¶ 62 (stating that, based on academic literature, nonvoting stock and debt may now be used to control or influence a licensee in a significant manner, especially when coupled with another meaningful relationship or when held by someone that has the incentive to influence the station or media entity); In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 12 FCC Rcd 12541, 12544, ¶ 7 (1999) (citing legal, financial, and academic literature that supports focusing on debt and nonvoting stock, as well as voting stock, when examining the ability of substantial investors to influence broadcast applicants and licensees).

25 *See* Fox Television Stations, Inc., *Report and Order*, 11 FCC Rcd 5714, 5719-21 (1995) (concluding that debt interest at issue in determining compliance with foreign ownership benchmark was more properly characterized as equity capital contribution); NextWave Personal Communications, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 2030, 2049-51 (WTB 1997) (treating two classes of debt instruments as equity); Applications of GWI PCS, Inc. for Authority to Construct and Operate Broadband PCS Systems Operating on Frequency Block C, *Memorandum Opinion and Order*, 12 FCC Rcd 6441, 6449-50, ¶ 21 (WTB 1997) (describing advances to thinly capitalized companies as generally indicative of venture capital rather than traditional *bona fide* debt because of the substantial degree of risk to the lender).

corporate decisions as voting equity holders whose interests are attributable.[26] Based on these same concerns, we have found that debt interests are attributable both under our cable equity plus debt attribution rule,[27] and also in determining eligibility for the New Entrant Bidding Credit under our competitive bidding procedures for commercial broadcast licenses.[28] We have not found that traditional *bona fide* debt by itself is attributable under our rules. We do find, however, that significant debt relationships combined with other attributable interests in the same market, or a major program supplier's holding of significant debt in a licensee to which it supplies substantial amounts of programming, provide an incentive to influence or control key decisions concerning the debtor-station's operations. Again, NAB provides no evidence that would lead us to conclude otherwise.

9. Moreover, based upon the record in the *Report and Order*, we found no reason to believe that the EDP rule would unduly curb investment in smaller, minority stations,[29] and NAB presents no new arguments or evidence in its petition for reconsideration that would lead us to change that finding. The EDP rule does not preclude investment in any media entity, including minority and women-owned entities. In fact, the 33 percent threshold allows an investor to own up to one-third of a station's total assets without triggering the EDP rule. Moreover, to help ensure that our actions do not unduly impede capital flow to broadcasting, we raised the passive investor voting stock benchmark from 10 to 20 percent. We also note that UCC supports the inclusion of debt in the EDP rule, agreeing that debt is a "powerful form of contingent control"[30] and contending that there is "plenty of opportunity for investment, unhindered by attribution, in the general market."[31] As we stated in the *Report and Order*, the function of our attribution rules is not to limit investment, but to identify influential interests over the core operations of a licensee that should be counted in applying the multiple ownership rules. Our

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26 *Report and Order*, 14 FCC Rcd at 12582-83, ¶ 48; *see id*. at 12583, ¶¶ 49-50 (explaining in detail how this conclusion is strongly supported by the record); *Cable Attribution Report and Order* at ¶ 84.

27 *See Cable Attribution Report and Order* at ¶¶ 82, 83 (adopting, for purposes of horizontal ownership limits, the equity plus debt rule that ascribes an attributable interest to an investor holding an interest that exceeds 33 percent of the total asset value (equity plus debt) of the applicable cable entity).

28 *See* In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 14 FCC Rcd 12541, 12544-45, ¶ 7 (1999) (finding that it would be contrary to the new entrant bidding credit's diversification goals if the Commission failed to consider the media interests held by very substantial investors in, and creditors of, auction applicants seeking new entrant status).

29 *Report and Order*, 14 FCC Rcd 12581-82, ¶ 45, 12586-87, ¶ 58.

30 UCC Opposition at 13-15; UCC Reply at 9-10. UCC explains that "[t]he essence of the debtor-creditor relationship is control" and "[t]he need to stay current on a debt necessarily impacts the licensee's daily decisions concerning how to use its resources." UCC Opposition at 15.

31 UCC Opposition at 13. In support of its opposition to petitioners' assertions that the EDP rule will discourage investment in new entrants, UCC notes that broadcasters have created an investment fund, the Prism Fund, devoted to providing $1 billion to media businesses owned by minorities and women. UCC Opposition at 15-16. NAB replies, however, that the EDP rule could adversely affect the operation of the Prism Fund if a director in the fund has an attributable interest in a media entity in a certain community and the fund makes a separate investment in another media entity in that same community. NAB Reply at 8. We clarify below how we will treat officers' and directors' investments under the EDP rule.

ownership rules, in turn, limit the extent of combined ownership based on our core policies of diversity and competition. Thus, if relaxation of ownership limits is warranted, those issues should be addressed through revision of the multiple and cross-ownership rules, not through redefinition of an attributable interest.[32]

10. Finally, NAB neither explains how the EDP rule will affect the transition to digital television or the "spin off" of broadcast stations, nor presents any evidence to support its concerns. Moreover, in the *Report and Order*, we stated that we would consider individual rule waivers in particular cases where substantial evidence is presented that the conversion to digital television would otherwise be unduly impeded or that a waiver would significantly expedite DTV implementation in that particular case.[33] We therefore deny NAB's request and reaffirm our decision to include debt interests in applying the EDP rule.

11. NAB also asserts that the EDP rule will have inconsistent regulatory effects depending on the capitalization of broadcast companies.[34] NAB notes that an investor with 34 percent of the equity in a company that is 100 percent equity-financed would exceed the 33 percent threshold while an investor with 49 percent of the equity in a company that is primarily debt-financed (*e.g.*, 20 percent equity and 80 percent debt) would not be exceed the benchmark (its investment would be approximately 10 percent of the total assets). NAB concludes that "because equity investments in more highly leveraged companies are less likely to be attributable under the EDP rule, this rule may operate to the advantage of less conservatively financed and highly leveraged entities."[35] Thus, NAB would quarrel with our focus on total assets. We focused on total assets rather than looking at equity and debt separately because separate consideration could lead to distortions in applying the EDP rule depending on the percentage of total assets that each class of interests comprises.[36] That the rule may advantage equity holders in entities with large debt interests does not undermine the basis of the EDP rule. As we have explained, the EDP rule examines both equity and debt interests that are otherwise nonattributable to limit the ability of same market media entities and major program suppliers to circumvent the attribution rules by using those interests to gain significant influence over the licensee.[37]

12. NAB further argues that the rule is vague and overly broad. Specifically, NAB contends that the EDP rule could result in an attributable interest where no likelihood of control would exist, producing a lack of clarity in the rule that will cause problems both for licensees attempting to discern

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32 *Report and Order*, 14 FCC Rcd 12582, ¶ 46.

33 *Report and Order*, 14 FCC Rcd 12582, ¶ 45.

34 NAB Petition at 24-25.

35 NAB Petition at 25.

36 *Report and Order*, 14 FCC Rcd 12589, ¶ 61. As we explained in the *Report and Order*, were we to apply the percentage thresholds separately, a company with only 10 percent of its capital from debt would be attributable to a creditor providing only 3.4 percent of the company's total assets, while any equity holder providing 32 percent of the total capital would be nonattributable. *Id*.

37 *See Report and Order*, 14 FCC Rcd 12589, ¶ 62.

attributable interests and for the Commission attempting to administer the rule.[38] Sinclair states that the Commission has not explained how an investment that is less than controlling can harm the public interest or competition in the marketplace.[39] Sinclair further asserts that the Commission has not demonstrated that the 33 percent threshold is appropriate,[40] while UCC opposes adopting a more lenient threshold.[41]

13. We reiterate that attribution extends to relationships that permit significant influence over the core operations of a licensee, not just to investments that constitute controlling interests or that exceed 50 percent of the ownership of an entity.[42] Shareholders with voting stock interests amounting to 5 percent or more may not have actual control over the management and operations of a licensee, but we have set the voting equity benchmark at 5 percent or more because those shareholders have a realistic potential to exert significant influence or control over the licensees in which they invest. For example, a shareholder with voting stock interests that exceed the benchmark can influence the selection of board members through mechanisms such as proxy fights and, therefore, exert influence on the management of a licensee's operations.

14. In addition, as we explained in the *Report and Order*, debt-holders or preferred stockholders, which do not have voting rights, might exert significant influence through contractual rights or other methods of access to a licensee.[43] For example, an agreement entered into in conjunction with preferred stock might grant the holder the right to select the persons who will run for the board of directors. Finally, based on our concern that multiple, substantial business interests could be combined to exert influence over licensees, we determined that nonattributable interests held by major program suppliers and same-market media entities should be subject to limitation by the multiple ownership rules.[44] Thus, our attribution rules are applicable where an interest holder has a realistic potential to affect the programming decisions or other core operating functions of a licensee.

15. We also reaffirm the 33 percent investment threshold under the EDP rule for the reasons stated in the *Report and Order*. Sinclair questions the propriety of the 33 percent threshold, but presents no new arguments or evidence in its petition for reconsideration that would lead us to change the threshold. We adopted the 33 percent benchmark, in part, based on our previous experience of using a 33

38 NAB Opposition at 9.

39 Sinclair Petition at 22.

40 Sinclair Petition at 22.

41 UCC Opposition at 14. UCC asserts that a more lenient threshold would "counter the very purpose of the revised attribution rules" and "recent press reports demonstrate [that] the 33 percent threshold will not prevent market actors from innovating new ways to seeding money to new entrants." *Id*.

42 *Report and Order*, 14 FCC Rcd at 12579, ¶ 38. In fact, our attribution rules expressly define "control" to include "any actual working control in whatever manner exercised." 47 C.F.R. § 73.3555 Note 1.

43 *Report and Order*, 14 FCC Rcd at 12582-83, ¶ 48.

44 *Report and Order*, 14 FCC Rcd at 12580, ¶¶ 39 and 40.

percent threshold in the context of applying the cross-interest policy.[45] We found it an appropriate and reasonable threshold to use in applying the EDP rule and noted that applying a 33 percent threshold had not had a disruptive effect in the context of the cross-interest policy.[46] We found that a 50 percent threshold would be inappropriately high and that the thresholds of 25 percent or 10 percent would be too low.[47] In exercising our broad discretion to set the threshold,[48] we were guided by our goal of attributing not only interests with the potential to control, but also those interests that convey a realistic potential to exert significant influence.[49] We reiterate, however, that while we will use this threshold in applying the EDP rule now, we may adjust the benchmark in the future, if evidence is provided that would warrant an adjustment.[50]

16. In contrast to the arguments of NAB and Sinclair, UCC asks the Commission effectively to review cases individually under the EDP rule. Specifically, UCC asks the Commission to expand the EDP rule to attribute any relationship that permits an entity to exert significant influence or control over the programming, management, or budgetary decisions of a licensee. UCC argues that the Commission should look to three factors to determine whether an investor's interest in a licensee should be attributed: (1) participation in programming selection; (2) influence in hiring personnel who make programming or core management decisions; and (3) substantial control over the licensee's budget.[51] Initially, we note that our rules already address many of UCC's concerns. The EDP rule takes into consideration an entity's participation in programming and is designed to make attributable debt or nonvoting equity interests that have the ability to influence a station's core management decisions. We note that the EDP rule may also result in attribution of interests that would otherwise be nonattributable by limiting the availability of the insulated limited partner, *bona fide* debt, and nonvoting stock attribution exemptions.

17. Moreover, we note that in the *Notice* in this proceeding, we invited comment on whether to adopt a case-by-case review of applications to address our concerns about whether the combination of nonattributable interests and business relationships in a particular case could create significant influence so as to warrant attribution. We sought comment as to whether the burdens and uncertainty created by individual case review would be outweighed by the benefits of addressing our concerns in this area in the

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45 *See*, *e.g.*, *Roy M. Speer*, 11 FCC Rcd 18393, 18442-43 (1996), *on recon.*, 13 FCC Rcd 19911 (1998) (limiting the non-attributable equity holdings of a same-market television licensee in another local television station to 33 percent).

46 *Report and Order*, 14 FCC Rcd at 12590, ¶ 64.

47 *Report and Order*, 14 FCC Rcd at 12590, ¶ 64; *see Cable Attribution Report and Order* at ¶ 86.

48 47 U.S.C § 303(r); *see Cable Attribution Report and Order* at ¶ 86.

49 *Report and Order*, 14 FCC Rcd at 12590, ¶ 64; *see Cable Attribution Report and Order* at ¶ 86.

50 *Report and Order*, 14 FCC Rcd at 12590, ¶ 64.

51 Petition for Reconsideration of UCC *et al*. (UCC Petition) at 8-11; *see* UCC Opposition at 16. According to UCC, the Commission should use the following analysis to determine if an entity's interest is attributable: (1) does the interest fall within any of the revised attribution rules; (2) if not, could the investor exert influence or control over the licensee with respect to programming, management, or budget; and (3) if so, presume the interest attributable, placing the burden on the investor to rebut the presumption of attribution. UCC Petition at 11, n.7.

context of specific factual situations.[52] Based on our review of the comments filed in response to the *Notice*, and in response to individual cases at that time, we rejected the case-by-case approach in the *Further Notice*. Instead, we proposed the EDP rule as a "balanced, specifically tailored approach that would focus the rules more precisely on those relationships that potentially permit significant influence such that they should be attributed."[53]

18. In ultimately rejecting case-by-case review and adopting the EDP rule in the *Report and Order*, we found that the benefits of applying a rule that provides, to the greatest extent possible, regulatory certainty and eases application processing, outweighed the arguably increased accuracy that a case-by-case approach might afford. Indeed, a case-by-case approach might lead to lengthy fact-specific decisions of limited applicability and substantial processing difficulties and delays, impeding our goal of rapidly reviewing transactions and speeding new service to the public. Such a result would disserve the public interest. We therefore believe that the bright-line EDP rule is superior to a case-by-case approach, and UCC has not dissuaded us of that belief. Accordingly, we deny UCC's request that we adopt a routine case-by-case approach to attribution. As we stated in the *Report and Order*, however, we retain the discretion to review individual cases that present unusual issues and apply attribution on a case-by-case basis where it would serve the public interest to do so.[54] We find that such discretion ensures a sufficient safety valve for unusual issues or cases that may arise.

19. Finally, two petitioners seek general exemptions from the EDP rule. Wells Fargo asks the Commission to amend the EDP rule to make an exception for banks and other lending institutions. Wells Fargo asserts that the EDP rule will detrimentally affect a lending institution's ability to invest in media companies because various arms of any big bank operate independently, and these independent groups may finance different broadcasters in the same market.[55] As an example, Wells Fargo notes that in its case, a venture capital subsidiary has an existing voting equity interest in a company that plans to acquire stations in a market in which another client of the bank, through the bank's lending division, also has stations.[56] Wells Fargo believes the EDP rule will hinder investment in broadcast companies by: (1) restricting the amounts lending institutions are able to invest in the same market; (2) forcing banks to establish burdensome tracking programs to ensure compliance;[57] (3) making it more difficult for lenders to secure their loans to broadcasters, thereby limiting remedies on foreclosure;[58] and (4) forcing lending

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[52] *Notice*, 10 FCC Rcd at 3652, ¶¶ 99-100.

[53] *Further Notice*, 11 FCC Rcd at 19901, ¶ 11.

[54] *Report and Order*, 14 FCC Rcd at 12581, ¶ 44. For example, we may need to review an application using a case-by-case approach where there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence such that the Commission's multiple ownership rules should be implicated, even though the combined interests do not come within the scope of the EDP rule. *Id*.

[55] Petition for Reconsideration of Wells Fargo Communications Finance, Division of Norwest Bank MN, NA (Wells Fargo Petition) at 3 (Oct. 18, 1999).

[56] Well Fargo Petition at 5.

[57] Wells Fargo Petition at 5-6.

[58] Wells Fargo Petition at 6-7. Wells Fargo explains that in a typical broadcast transaction, a lender in most cases takes a pledge of the licensee's stock or other ownership interest because the Commission forbids taking a (continued….)

institutions to disclose private borrower information in violation of financial privacy laws.[59]

20. As we stated in the *Report and Order*, we believe the EDP rule will not significantly curb investment in broadcast stations[60] and Wells Fargo provides no new evidence that would lead us to change that belief. Moreover, we find no basis on which to distinguish banks or other lending institutions from other investors in media entities under the EDP rule. Under our attribution rules, commercial banks, including their venture capital subsidiaries, are treated as active investors.[61] We treat only the trust departments of banks as passive investors under our voting stock benchmark.[62] In its own example, Wells Fargo describes its venture capital subsidiary as having a voting equity interest in a company that owns stations in a particular market, but provides no reason to distinguish venture capital subsidiaries from other active investors in the marketplace. Indeed, the EDP rule places no more restrictions on lending institutions, with respect to investment or foreclosure, than on any other type of entity interested

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security interest directly in the license. Wells Fargo therefore asserts that a bank could not foreclose on the stock pledge of a defaulting company if the bank's interest in another company in the same market exceeded 33 percent. *Id*. at 6-7. We note that we allow passive investors that acquire stock involuntarily, including as a result of the prudent and necessary exercise of foreclosure, to exceed the 20 percent standard without deeming the interest to be attributable for a period of not more than one year. *See* In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensee; Amendment of Section 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations; Amendment of Section 73.35, 73.240, 73.636 and 76.501 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems; and Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, MM Docket Nos. 20521, 20548, 78-239, and 83-46, *Report and Order*, 97 F.C.C. 2d 997, 1017, ¶ 39 (1984) (*1984 Attribution of Ownership Interests Report and Order*), *clarified upon reconsideration*, 58 Rad. Reg. 2d (P&F) 604, 612, ¶ 23 (1985).

59 Wells Fargo Petition at 6.

60 *See Report and Order*, 14 FCC Rcd at 12586-87, ¶ 58 (stating that commenters provided no empirical evidence to support the argument that the EDP rule would curb investment in broadcast stations by program suppliers and that because the EDP rule does not affect investments by entities other than major program suppliers or same-market media entities, we believe the EDP rule will not curb investment, deter new entry, or curb the conversion to DTV). We also explained in the *Report and Order* that holding debt, or other nonvoting interests in one entity in a market that exceeds 33 percent of the total assets of that entity does not, by itself, trigger the EDP rule. Similarly, debt, or other nonvoting interests in, for example, 34 percent of the total assets of several stations in the same market will not result in attribution of any of the stations as long as the investor is not a major program supplier or same-market media entity. *See id*. at 12584, ¶ 52. *See also supra* at ¶ 9 (explaining that the EDP rule does not preclude investment in any media entity).

61 *See* In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 12 FCC Rcd 4358, 4373, ¶ 30 (1997) (describing private equity financing to include venture capital firms); In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, *Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19895, 19934 (1996) (stating that institutional investors not considered to be passive investors include commercial banks (excluding trust departments), investment banks, brokerage firms and pension funds).

62 47 C.F.R. § 73.3555 Note 2(c).

in investing in a media entity. Similarly, Wells Fargo has not provided evidence that a large bank's obligation to track its investments for purposes of attribution differs from any other investor's obligation to do the same.

21. Wells Fargo cites the Right to Financial Privacy Act (RFPA)[63] to suggest that the EDP rule might force lending institutions to disclose private borrower information in violation of financial privacy laws. Specifically, Wells Fargo asserts that the EDP rule may place lending institutions in conflict with the RFPA, or with their ethical obligations to their customers, by requiring them to disclose the names and amounts of loans, and the financial structure of customers considering an acquisition in the same market.[64]

22. Congress enacted the RFPA to provide individuals with some privacy rights in financial records that are in the hands of third parties.[65] Among other things, the RFPA defines the conditions under which financial institutions may disclose an individual's financial records and the conditions under which government officials may access an individual's financial records. The RFPA also provides a civil cause of action for anyone injured by a violation of the act's substantive provisions.[66] Applications for construction permits, applications for consent to assignments, as well as applications for consent to transfers of control of broadcast stations must list: (1) each party to the application whose ownership or positional interest in the applicant is attributable; (2) that party's citizenship; (3) the basis on which the interest is considered attributable, *e.g.*, positional interest or investor attributable under the EDP rule; (4) the party's percentage of votes; and (5) the party's percentage of total assets in the station.[67] The applications require information about the corporate or partnership structure of parties holding attributable interests and information on which the interests are deemed attributable. The applications do not inquire into the party's financial structure or amounts of loans involved in station acquisitions. Similarly, ownership reports do not require any information regarding financing or loan amounts.[68] Wells Fargo does not explain how the information required in applications, or other forms, much less how the EDP rule itself, might cause lending institutions to violate privacy rights under the RFPA or any other law. In any event, if it is shown that materials filed with the Commission contain financial data that would customarily be guarded from competitors, our rules provide that the materials will not be made

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[63] 12 U.S.C. §§ 3401 *et seq.*

[64] Wells Fargo Petition at 6.

[65] *First Union Nat'l Bank of Fla. v. Bankaltantic Bancorp., Inc.*, 129 F.3d 1186, 1190 (11th Cir. 1997).

[66] *Id*.

[67] Application for Consent to Assignment of Broadcast Station Construction Permit or License (Sept. 1999); FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License (Sept. 1999). In an application for consent to transfers of control, the transferor must also provide the voting and equity plus debt percentages held both before and after consummation of the transaction. FCC Form 315 at 4. *See* FCC Form 301, Application for Construction Permit for Commercial Broadcast Station; FCC Form 314 (May 1999); FCC Form 316, Application for Consent to Assign Broadcast Station Construction Permit or License or Transfer of Control of Entity Holding Broadcast Station Construction Permit or License (Mar. 1999). FCC Forms 301 and 316 are currently being updated to require the same attribution information required in FCC Forms 314 and 315.

[68] FCC Form 323, Ownership Report (Sept. 2000).

routinely available for public inspection.[69] Accordingly, we deny Wells Fargo's request to exempt banks or other lending institutions from the EDP rule.

23. MMTC asks the Commission to make certain exceptions to the EDP rule where the interest is held in a socially and economically disadvantaged small business concern (SDB).[70] Arguing that most broadcasters would not provide investments to SDBs because broadcasters find it disadvantageous, in this time of consolidation, to hold small, potentially attributable interests in markets not critical to their growth strategies, MMTC seeks three exemptions. First, MMTC asks the Commission to exempt from attribution any existing interest in an SDB that would trigger the EDP rule if the interest holder acquired another media entity in the same market at a later date.[71] Second, MMTC seeks an exemption from our attribution rules for any interest otherwise attributable under the EDP rule that would allow an SDB to build out, or acquire and build out, an unbuilt permit. In conjunction with this exemption, MMTC asks the Commission to vest the interest holder with the right to the processing of any other of the interest holder's applications regardless of the duopoly or cross-ownership rules.[72] In essence, MMTC seeks a waiver of the EDP rule and applicable ownership rules. Finally, MMTC seeks an additional six months – 18 months total – for a licensee to divest an attributable interest to an SDB, where the SDB is trying to raise capital to complete the divestiture.[73]

24. The governing statute for the Small Business Administration defines SDBs as businesses where the majority owners' race or ethnicity has impaired the owners' ability to obtain capital or credit for their businesses, and therefore impaired the businesses' ability to compete.[74] At this time, we shall

[69] *See* 47 C.F.R. § 0.457; In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, *Report and Order*, 13 FCC Rcd 24816 (1998). Section 0.459 of the Commission's rules set forth the requirements for filing a request that information submitted to the Commission not be made routinely available for public inspection. 47 C.F.R. § 0.459.

[70] Petition of the Minority Media and Telecommunications Council for Partial Reconsideration and Clarification (MMTC Petition) at 1 (Oct. 18, 1999).

[71] MMTC Petition at 3. MMTC asks the Commission to exempt these interests where four conditions are met: (1) the interest holder in the SDB merges with, acquires, or is acquired by a company unrelated to the interest holder; (2) the merger or acquisition occurs at least one year after the interest in the SDB is formed; (3) the merger or acquisition would cause the interest in the SDB to become attributable under the EDP rule; and (4) the interest holder in the SDB and the SDB make an affirmative showing that the interest holder does not exercise undue influence over the SDB. *Id*.

[72] MMTC Petition at 4-5. MMTC states that the right would vest on the date the contract with the SDB is filed with the Commission. MMTC argues that the vested right would provide the large broadcaster investing in the SDB with the "the secure knowledge that its public spiritedness in making an especially risky investment in an SDB will be rewarded with a guaranteed opportunity to acquire a full complement of local properties." *Id*. at 4. MMTC filed this identical proposal in its petition for reconsideration of the *Local Television Ownership Report and Order*. Petition of the Minority Media Telecommunications Council for Partial Reconsideration and Clarification of MM Docket Nos. 91-221 and 87-8 at 17-18 (Oct. 18, 1999).

[73] MMTC Petition at 5.

[74] 15 U.S.C. § 637(a)(4)-(6)(A). Section 637 defines a "socially and economically disadvantaged business" as a small business that is at least 51 percent owned by (1) one or more socially and economically disadvantaged (continued….)

defer consideration of MMTC's request to create certain exemptions for SDBs. The Commission has sponsored fact-finding studies as to whether preferences based on minority status may be justified consistent with the Supreme Court's decision in *Adarand Constructors v. Pena*.[75] When the results of these studies have been evaluated, we may initiate future proceedings in this area, as warranted.[76]

2. Clarification of the Definition of "Total Assets" and the Requirement of Continuing Compliance

25. **Background**. The EDP rule examines whether an interest holder has more than 33 percent of the total assets of a licensee or other media entity. In the *Report and Order*, we defined total assets as the sum of all debt plus all equity. We defined debt under the EDP rule to include all liabilities, whether short-term or long-term. Equity includes common or preferred stock, whether voting or nonvoting, as well as equity held by insulated limited partners in limited partnerships.[77] We also stated that we would require parties to maintain compliance with the attribution criteria as any changes in a firm's assets occur. Where sudden, unforeseeable changes take place, we stated that we would afford parties a reasonable time, generally one year, to come into compliance with any ownership restrictions made applicable as a result of the change in attributable status.[78]

26. **Discussion**. Wells Fargo asks the Commission to clarify what is included in the definition of "total assets" under the EDP rule. For example, Wells Fargo contends that "equity," as defined in the *Report and Order,* includes only paid-in capital and not the existing assets of a company.

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individuals; (2) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe); or (3) an economically disadvantaged Native Hawaiian organization. *Id*. The statute defines socially disadvantaged individuals as "individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," and economically disadvantaged individuals as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired because of diminished capital or credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id*.

[75] 515 U.S. 200 (1995). These studies include: Christine Bechen, Allen Hammond, and Laurie Mason, *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?* (Dec. 1999); William H. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* (Dec. 5, 2000); Ernst & Young LLP, *FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions* (Dec. 5, 2000); Ivy Planning Group LLC, *Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present* (Dec. 2000); KPMG LLP Economic Consulting Servs., *Study of the Broadcast Licensing Process* (Nov. 2000); KPMG LLP Economic Consulting Services, *Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC* (Nov. 2000). The studies are available at the Commission's website at the following location: <www.fcc.gov/opportunity/meb_study>.

[76] *See* In the Matter of Creation of Low Power Radio Service, 15 FCC Rcd 2205, 2262 at ¶ 146 (Jan. 27, 2000), *recon. denied*, MM Docket No. 99-25, FCC 00-349 at ¶¶ 92-94 (rel. Sept. 28, 2000) (deferring a decision on whether to adopt minority control as a point system factor in processing applications for low power radio FM stations based on the outcome of the same studies).

[77] *Report and Order*, 14 FCC Rcd at 12579, ¶ 37, 12588, ¶ 61.

[78] *Report and Order*, 14 FCC Rcd at 12590-91, ¶ 65.

Wells Fargo asserts that excluding appreciated assets would result in attributing more entities than necessary to avoid concerns about the exercise of control through a debt relationship.[79]

27. Initially, we clarify that we will include all equity, in whatever manner or amount the debt or equity is held, in computing whether an interest exceeds the EDP rule's 33 percent benchmark. For example, we will include stock, non-stock, partnership or any other form of equity in the calculation. We will also include all short-term and long-term debt liabilities, in whatever manner or amount the debt is held, in computing whether an interest exceeds the EDP rule's 33 percent benchmark.

28. Rather than itemizing what is included in the definition of "total assets," we clarify that, for purposes of the EDP rule, an applicant may base the valuation of a station on either the book value as defined under standard financial accounting practices, or some other value, including the fair market value, provided the valuation is reasonable. In relying upon the book value, fair market value, or other reasonable value of a station, the applicant must use the valuation relevant at the time the application or ownership report is filed. If the issue arises in connection with a transfer or assignment application or an ownership report filed after consummation of a transfer or assignment, the applicant must use the sales price of that transfer or assignment as the total asset value.[80] We find that clarifying the definition of total assets to include the foregoing reasonable methods of valuing a station's total assets for purposes of the EDP rule will provide applicants flexibility to use the most accurate valuation of the station at the time an application or ownership report is filed. We may need to review an applicant's basis for computing its valuation where petitions are filed against the application. As a result, an applicant should retain the documentation on which it computes the value of the station so that it can produce the documentation as needed.

29. Finally, Wells Fargo asks the Commission to clarify when equity and debt interests that change over time should be evaluated for purposes of the EDP rule. Wells Fargo explains that as debt is repaid, the amount of an entity's loans as a percentage of the total capital of a company may change, and an entity may end up with an interest exceeding the benchmark, where no violation existed at the time the loan was made.[81] We reaffirm that parties must maintain compliance with the attribution criteria as any

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[79] Wells Fargo Petition at 10-11. For example, Wells Fargo explains that a broadcaster may start a company with a single station initially capitalizing the company by putting in minimal paid-in capital and providing most of the personal financing to the company through personal loans, which are paid off over time. Several years later, the broadcaster obtains a bank loan for a second station using the first station as part of the collateral. Wells Fargo claims that, under the Commission's definition, the appreciated value of the first station (which Wells Fargo apparently argues should be treated as equity) does not appear to be counted in determining whether the loan on the second station exceeds 33 percent of the total assets of that station. *Id*. Our clarification of acceptable means of valuing "total assets" resolves this matter.

[80] We note that Commission staff no longer routinely reviews sales contracts and agreements and that applicants for consent to assignments or transfers of control now only need to certify that their sales agreements comply with Commission rules and policies. Applicants, however, must still file the sales contracts and agreements with the Commission for the purpose of making the documents available to the public in the Commission's public reference room. In the Matter of 1998 Biennial Review – Streamlining of Mass Media Applications, Rules, and Processes, MM Docket No. 98-43, *Report and Order*, 13 FCC Rcd 23056, 23074-76, ¶¶ 39-42 (1998).

[81] Wells Fargo Petition at 11. Wells Fargo also notes that various convertible debt and equity interests, or equity interests with preferred returns that accumulate before being paid, or even the accumulated interest on a (continued….)

changes in a firm's assets occur. As noted in the *Report and Order*, where sudden, unforeseeable changes take place, we will afford parties a reasonable time, but no more than 12 months from the time the unforeseen change occurred, to come into compliance with any ownership restrictions made applicable as a result of the change in attributable status. We further note that the scheduled repayment of loans is clearly not an "unforeseeable" or sudden event.

3. Clarification of Other EDP Issues

30. In addition to the issues that the petitioners raise in their petitions for reconsideration, we note that certain other issues have arisen with respect to the application of the newly adopted EDP rule. While none of the petitioners formally sought clarification on these particular issues, we determine that it is in the public interest and serves our goals of promoting clarity and certainty under our regulations to provide guidance, on our own motion, on (1) how we apply the EDP rule to options, warrants, and loan guarantees; (2) whether the multiplier rule will be applied to the EDP rule; (3) whether an attributable interest in one station owned by a multiple-station owner is applied under the EDP rule to all of the stations owned by the multiple-station owner; and (4) whether a company's interest is applied to its officers and directors or an officer's or director's interest is applied to its company under the EDP rule.

a. Options, Warrants, and Loan Guarantees

31. Initially, we consider how to apply the EDP rule to options, warrants, and loan guarantees. *Bona fide* debt, including a guarantee for a loan, is not ordinarily attributable under our rules. In addition, options, warrants, and other nonvoting interests with the right of conversion to voting interests are not ordinarily attributable until the conversion is effected. In the *Report and Order*, however, we explained that the EDP approach would focus on those relationships that afford the interest holder the incentive and means to exert influence over the core operations of a licensee.[82] For example, substantial investors or creditors that do not hold a direct voting interest may have the incentive and means, through contractual arrangements with the licensee, to exert as much, if not more, influence over some corporate decisions as voting equity holders whose interests are attributable.[83] We amended our rules to provide that where a major program supplier or same-market media entity holds a substantial financial interest in a licensee exceeding 33 percent of the total assets, that interest is attributable. In addition, we amended our rules making the exemption of certain contractual arrangements, including debt and unexercised options and warrants, subject to the EDP rule.[84]

32. Until exercised, options and warrants do not convey the underlying interest they entail, but they do constitute assets that are sold for consideration. Accordingly, we will include the amount of consideration paid for the option or warrant in determining whether the option or warrant holder's interest is attributable under the EDP rule, and we will include any security deposit or financial contribution made by a guarantor for the guarantee of a loan in determining whether the guarantor's interest is attributable under the EDP rule. As noted, we wish to establish, so far as possible, a bright-line test that avoids the

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simple term loan, could push an interest beyond the 33 percent threshold, even when the interest was not a concern at the time the loan was made. *Id*.

[82] *See e.g.*, *Report and Order*, 14 FCC Rcd at 12582, ¶47, 12584, ¶ 51, 12585, ¶ 5612589, ¶ 62.

[83] *Report and Order*, 14 FCC Rcd at 12582-83, ¶¶ 48-49, 12584, ¶ 51.

[84] 47 C.F.R. § 73.3555 Note 2(f).

uncertainty of case-by-case review, and to premise the EDP rule on whether the extent of a financial interest is significant and is coupled with a relationship between the investor and the licensee that gives the investor an incentive to exert influence. Thus, we clarify that we will add any consideration or other amounts paid for options or warrants to any other equity or debt investment the holder has in a licensee. Similarly, we will include any financial contributions made by a guarantor, including amounts placed into escrow as security for a loan guarantee or amounts otherwise made in connection with the guarantee, to any other equity or debt investments the guarantor has in a licensee. In all cases, we will then divide that aggregated amount by the total asset value of the licensee to determine whether the option or warrant holder's interest exceeds the 33 percent benchmark.

b. The Multiplier Rule

33. We also clarify, on our own motion, that we will use a "multiplier" in applying the EDP rule to indirect interests held in licensees. We have traditionally used a multiplier under our attribution rules to determine the ownership interest of a party whose interest is held through intervening corporate entities. Specifically, attribution ownership interests in a broadcast licensee, cable television system, or daily newspaper that are held indirectly by a party through one or more intervening corporations are determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain. Under our pass-through exception, however, a link in the ownership chain that represents a percentage interest exceeding 50 percent is treated as a 100 percent interest, when calculating the successive links in the ownership chain.[85] We also note that in calculating the foreign ownership of a licensee or its parent under Section 310(b) of the Communications Act, as amended, we multiply the percentage of interest held by each foreign investor in the successive links of the ownership chain, regardless of the amount of equity the foreign investor holds.[86]

34. As we do under our attribution rules in calculating whether an interest exceeds the voting stock benchmark in a corporation, we will multiply the successive links in the vertical ownership chain of a licensee or other media entity to determine whether an indirect interest in the licensee or other media entity is attributable under the EDP rule. Specifically, we will multiply the successive percentage interests, aggregating both equity and debt, in each intervening entity where a party holds an indirect interest in the licensee or other media outlet. Rather than applying the pass-through exception in determining whether an interest is attributable under the EDP rule, however, we will multiply the percentage interest even where the interest in the link exceeds 50 percent. For example, if Investor A has a total equity and debt interest in Corporation B amounting to 50 percent of Corporation B's total asset value, and Corporation B has a total equity and debt interest in Licensee X amounting to 80 percent of Licensee X's total asset value, Investor A's interest in Licensee X would be 40 percent (0.50 x 0.80) for purposes of applying the EDP rule.

35. In adopting the use of a multiplier, the Commission concluded that multiplication of

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85 47 C.F.R. § 73.3555 Note 2(d). For example, if X owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%). *Id*.

86 In re Applications of BBC License Subsidiary, L.P, *Memorandum Opinion and Order*, 10 FCC Rcd 10968, 10974, ¶ 25 (1995). The *pro rata* equity holdings of each investor in the licensee or parent are then aggregated to determine whether the sum of their interests exceeds the statutory benchmark set forth in Section 310(b). *Id*.

successive interests would more realistically reflect a party's attenuated interest in a licensee where there are intervening corporations.[87] The Commission established the pass-through exception to reflect the *de jure* control, rather than the *de facto* control, an entity might have over a licensee.[88] Because the EDP rule applies not only to voting equity, but also to nonvoting equity and debt, we will not employ the pass-through exemption to determine which interests are attributable under the EDP rule. We made this same determination in the context of foreign ownership. Accordingly, we will multiply the successive interests, aggregating both equity and debt, in each intervening entity, even where the interest exceeds 50 percent, to determine whether an indirect interest in a licensee is attributable under the EDP rule. We also clarify that we will use the multiplier not only in applying the EDP rule to corporations, but also to financial interests in partnerships, limited liability companies, or any other type of organizational form.

c. Interests in Multiple Stations

36. We next clarify how the EDP rule is applied where an investor holds an interest in an entity that owns several stations in one market or multiple stations in several markets. The issue of how to apply the EDP rule may arise, for example, where the investor holds a nonvoting financial interest amounting to over 33 percent of the total asset value of the entity that owns or is the licensee of the multiple stations. If the investor's interest is nonvoting stock, debt, an insulated limited liability company or limited partnership interest, the interest would not be attributable under our non-EDP attribution rules. If, however, the investor is either a major program supplier to a station owned by the multiple-station owner, or has a non-EDP attributable interest in another station in the same market in which the multiple-station owner owns a station, the issue arises whether the investor has, under the EDP rule, an attributable interest in all of the stations owned by the multiple-station owner. Such an issue might also arise in a case where a voting stock interest in the entity is non-attributable under the single majority shareholder exemption because the exemption is grandfathered, as discussed below.

37. We clarify that the investor in the foregoing case will not automatically hold an attributable interest under the EDP rule in all of the stations or media outlets owned by or licensed to the multiple-station owner. Rather, the investor will have an attributable interest under the EDP rule only in those stations or media outlets owned by or licensed to the multiple-station owner where the investor meets the triggering relationship prong of the EDP rule, *i.e.*, the investor is a major program supplier to a station owned by the multiple-station owner, or the investor is a same-market media entity. Specifically, an investor will have an attributable interest, under the EDP rule, in any station that is owned by or licensed to a multiple-station owner and to which the investor supplies over 15 percent of the station's total weekly broadcast programming hours.[89] An investor will also have an attributable interest under the EDP rule in a station or media outlet owned by or licensed to the multiple station owner that is in the same market as a station or media outlet in which the investor also has an attributable interest under our

87 *1984 Attribution of Ownership Interests Report and Order*, 97 F.C.C. 2d at 1018, ¶ 41.

88 *1984 Attribution of Ownership Interests Report and Order*, 97 F.C.C. 2d at 1018, n.47.

89 *See Report and Order*, 14 FCC Rcd at 12585, ¶ 55 (noting that the EDP rule will apply only to the major program supplier's investments in a station to which it supplies 15 percent of the station's total weekly broadcast programming hours).

non-EDP attribution rules.[90] For example, Shareholder A owns over 33 percent of the total assets of Multiple-Station Owner B, which owns Station X in Omaha. Because Shareholder A also owns over 5 percent of the voting stock of Station Y in the Omaha market, Shareholder A's 33 percent interest in Station X is attributable under the EDP rule. Multiple-Station Owner B also owns Station Z in Cleveland. If Shareholder A is neither a major program supplier to Station Z nor holds an otherwise attributable interest in another media entity in the Cleveland market, Shareholder A would not have an attributable interest under the EDP rule in Station Z in Cleveland.

d. Officers and Directors

38. Finally, we clarify how we will apply the EDP rule to officers and directors. In doing so, we follow established precedent. Under our attribution rules, the officers and directors of a parent company of a broadcast licensee, cable television system, or daily newspaper, with an attributable interest in any subsidiary entity, are deemed to have a cognizable interest in the subsidiary.[91] We will apply the same principle under the EDP rule. Each director or officer is individually attributed with the company's full equity and debt interests for purposes of applying the EDP rule. Where an entity has a financial interest in a licensee, its officers or directors will be deemed to hold that same financial interest. For example, Bank A has provided a loan amounting to 35 percent of the total assets of Radio Licensee X, but holds no voting stock in X, and no interest in any other media entity in that market subject to the broadcast multiple ownership rules. Bank A has no attributable interest in Radio Licensee X under the EDP rule. Under these facts alone, while Outside Director of Bank A is attributed with all of the investments held by Bank A, Outside Director does not have an attributable interest in Radio Licensee X because Bank A does not have an attributable interest in X. If, however, Outside Director of Bank A owns a radio station in the same market in which Radio Licensee X operates, Outside Director would have an attributable interest, under the EDP rule, in Radio Licensee X based on Bank A's 35 percent interest in X.

39. We will not, however, treat an officer's or director's investment in a media entity as the company's investment for the purpose of applying the EDP rule. For example, under the facts described above, although Outside Director would have an attributable interest in Radio Licensee X because Outside Director owns another radio station in the market, Outside Director's interest in the other radio station is not also attributable to Bank A.

B. Single Majority Shareholder Exemption

40. **Background**. Under the single majority shareholder exemption from attribution, in a corporation in which a single shareholder owns more than 50 percent of the voting stock of the corporation, the interests of minority shareholders are not attributable. In the *Report and Order*, we intended that the EDP rule would limit the availability of the single majority shareholder exemption.[92]

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[90] *See Report and Order*, 14 FCC Rcd at 12584, ¶ 52 (stating that to trigger application of the EDP rule to same-market media entities, the interest held in the non-EDP media entity in the same market must be attributable without reference to the EDP rule).

[91] 47 C.F.R. § 73.3555 Note 2(h).

[92] *Report and Order*, 14 FCC Rcd at 12579, ¶ 36 (amending 47 C.F.R. § 73.3555 Note 2 (b)). Note 2(b) provides that subject to the EDP rule, "[n]o minority voting stock interest will be cognizable if there is a single (continued….)

Thus, for example, if a minority shareholder's financial interest in a licensee amounts to over 33 percent of the licensee's total asset value and the minority shareholder is either a major program supplier to the licensee or a same-market media entity, the minority shareholder's interest would be attributable under the EDP rule, even if the licensee has a single majority shareholder. We declined, in the *Report and Order*, to eliminate the single majority shareholder exemption for broadcast stations,[93] while we eliminated the exemption from our general cable attribution rules.[94]

41. **Discussion**. UCC asks the Commission to eliminate the single majority shareholder exemption for broadcasters, arguing that it is arbitrary and capricious to eliminate the exemption for cable systems and not for broadcast stations.[95] We grant UCC's request. In the *Cable Attribution Report and Order*, we concluded that the single majority shareholder exemption should be eliminated because of our concern "that a minority shareholder may be able to exert influence over a company even where a single majority shareholder exists."[96] We generally found in that proceeding no evidence that differences in ownership, financing, or management structures between the cable and broadcast industries warrant creating an attribution standard for applying the cable horizontal ownership, or other cable rules, that is different than the standard we use in applying the broadcast multiple ownership rules.[97] Thus, we see 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.

42. In addition to resolving the apparent inconsistency that resulted from our decision to eliminate the single majority shareholder exemption in the cable context, eliminating this exemption from the broadcast attribution rules would promote one of our primary goals in this proceeding: to improve the precision of our attribution rules in identifying cognizable interests for purposes of our ownership rules. In adopting the single majority shareholder exemption in 1984, the Commission reasoned that minority interest shareholders "would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings" where a single majority shareholder controls the corporation.[98] The Commission therefore determined that these minority interests would not be deemed cognizable for purposes of the multiple ownership rules.[99]

43. In this proceeding, as in the cable attribution rulemaking, we have repeatedly stated that our attribution rules are designed to identify not only interests that enable an entity to control a company,

(Continued from previous page)
holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee, cable television system or daily newspaper in which the minority interest is held." *Id*.

93 *Report and Order*, 14 FCC Rcd at 12579, ¶ 36.

94 *Cable Attribution Report and Order* at ¶ 81.

95 UCC Petition at 12-13.

96 *Cable Attribution Report and Order* at ¶ 81.

97 *Cable Attribution Report and Order* at ¶ 33.

98 *1984 Attribution of Ownership Interests Report and Order*, 97 F.C.C. 2d at 1008-09, ¶ 21.

99 *1984 Attribution of Ownership Interests Report and Order*, 97 F.C.C. 2d at 1008-09, ¶ 21.

but also interests that give an entity the potential to exert significant influence on a company's major decisions, even if the entity cannot control the company. Minority shareholders may not be able to control the affairs or activities of licensees, but, in certain circumstances, they clearly have the potential to influence a licensee's actions. Although the influence of a minority shareholder may be diminished somewhat where a single majority shareholder controls the licensee, we have no reason to believe that the minority shareholder's influence is eliminated or so attenuated in such circumstances that we should ignore its ownership interest for purposes of our ownership rules. Accordingly, we will amend Note 2 of Section 73.3555 of our rules to eliminate the single majority shareholder exemption from the broadcast attribution rules.

44. We further conclude that the single majority shareholder exemption will no longer apply to minority interests acquired on or after the adoption date of this *Memorandum Opinion and Order*. Accordingly, any minority interests in a company with a single majority shareholder will be grandfathered if the interest was acquired before the adoption date of this *Memorandum Opinion and Order*. Grandfathering of these minority interests will be permanent until the grandfathered interest is assigned or transferred. We note, however, that grandfathered minority interests in companies with single majority shareholders remain subject to the EDP rule.

C. LMA Attribution and Filing Requirements

45. **Background**. An LMA or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill the time and sells the commercial spot announcements to support the programming.[100] In the *Report and Order*, we adopted attribution rules for television LMAs. Specifically, an intra-market television LMA is *per se* attributable if the LMA involves more than 15 percent of a brokered station's weekly broadcast hours.[101] In contrast, we will not attribute television time brokerage agreements between stations in different markets, unless the agreements come under the EDP rule. Specifically, an inter-market television LMA is attributable only if the broker supplies more than 15 percent of a station's programming (*i.e.*, the broker is a major program supplier), and it has a financial investment that is more than 33 percent of the brokered station's total asset value.[102] We also decided to attribute intra-market radio LMAs for purposes of applying all of our multiple ownership rules that are applicable to radio stations, not just the radio duopoly rule, as in the past.[103]

46. In the *Report and Order*, we decided to review the issue of grandfathering existing intra-market radio LMAs on a case-by-case basis. Specifically, we concluded that we would consider the issue of grandfathering radio LMAs whose attribution as of November 16, 1999, the effective date of the newly

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[100] *Report and Order*, 14 FCC Rcd at 12591, ¶ 66 and 12638 (amending 47 C.F.R. § 73.3555 Note 2(k)).

[101] *Report and Order*, 14 FCC Rcd at 12585, ¶ 55 n.120, 12586, ¶ 56, 12591, ¶ 66, 12597-98, ¶¶ 83-86.

[102] *Report and Order*, 14 FCC Rcd at 12586, ¶ 56, 12599-600, ¶¶ 88-89. While we will not count same-market television LMAs toward the brokering licensee's national ownership limits, we will count inter-market time brokerage agreements attributable under the EDP rule for purposes of the national ownership limits. *Report and Order*, 14 FCC Rcd at 12597-98, ¶¶ 83-86.

[103] *Report and Order*, 14 FCC Rcd at 12600, ¶ 90. We note that the radio LMA attribution rules once applied to the national radio ownership rules. These ownership rules were eliminated as the result of the Telecommunications Act of 1996.

adopted rules, resulted in ownership violations.[104] We further concluded that any interest, other than intra-market radio and television LMAs, newly attributable under the rules that would result in violations of the ownership rules, would be grandfathered if the triggering interest was acquired before November 5, 1996, the date of the *Further Notice* in this proceeding.[105] We determined that grandfathering would apply only to the current holder of the attributable interest, and if the grandfathered interest was later assigned or transferred, new owners would be given one year to come into compliance with the multiple ownership rules.[106] Non-grandfathered interests, except for non-grandfathered intra-market television LMAs, must be divested to comply with our multiple ownership rules within twelve months of the date of adoption of the *Report and Order*.[107] Finally, we require the licensee that is the brokering station to file with the Commission, within 30 days of execution of a time brokerage agreement, a copy of any such agreement, redacted as necessary, that would result in the arrangement being attributed.[108]

47. **Discussion**. UCC asks the Commission to deem unlawful LMAs entered into after August 6, 1999, the date the *Report and Order* was released. UCC argues that LMAs are an unlawful evasion of the ownership rules that hinder diversity and competition and are no longer necessary with adoption of the revised duopoly rule. UCC further states that the grandfathering plan for existing LMAs protects existing equity interests and suggests that LMAs entered into after August 6, 1999, may have been entered into to bypass the Commission's transfer or assignment authorization requirements or to prevent a competitor from obtaining a transfer.[109] NAB urges the Commission to reject UCC's request because the Commission has already found that the record shows that a number of television LMAs have resulted in public interest benefits.[110]

48. We made no finding in the *Report and Order* that LMAs are *per se* unlawful as of any date. Our newly adopted attribution rules do not preclude parties from entering into LMAs. Rather, we amended our rules to make intra-market LMAs and some inter-market LMAs attributable for purposes of our broadcast ownership rules. Some LMAs are grandfathered, while interests in others may need to be divested. Parties may still enter into LMAs with the understanding that they may be subject to applicable ownership rules. Moreover, nothing suggests that Congress intended the Commission to deem *per se* unlawful all LMAs entered into after a certain date. Indeed, in the Conference Report on Section 202(g)

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104 *Report and Order*, 14 FCC Rcd at 12600-01, ¶ 91, 12630, ¶ 169.

105 *Report and Order*, 14 FCC Rcd at 12630, ¶¶ 168 and 170. The grandfathering period for intra-market television LMAs is addressed in the *Local Television Ownership Report and Order*.

106 *Report and Order*, 14 FCC Rcd at 12630-31, ¶ 170.

107 *Report and Order*, 14 FCC Rcd at 12631, ¶ 171. The compliance period for non-grandfathered intra-market television LMAs is addressed in the *Local Television Ownership Report and Order*.

108 *Report and Order*, 14 FCC Rcd at 12601, ¶ 94. We also require stations involved in intra-market as well as inter-market television LMAs to keep copies of the agreements in their local public inspection files, with confidential or proprietary information redacted where appropriate. *Id*.

109 UCC Petition at 18-22.

110 NAB Opposition at 4-5.

of the Telecommunications Act of 1996,[111] the conferees recognized "the positive contributions of television LMAs."[112] We find no reason to reconsider our decision that LMA interests may be attributable under our newly adopted rules, but that LMAs are not unlawful. Accordingly, we deny UCC's request.

49. UCC also urges the Commission to require all existing LMAs, not just attributable LMAs, to be filed with the Commission. UCC asserts that filing all LMAs would allow the Commission to determine the attribution status of LMAs. UCC further asks the Commission to post the data on the Commission's web site to allow citizen monitoring (similar to FCC Form 398) of the agreements and to facilitate voice counting.[113] We will not change the filing requirements for LMAs as adopted in the *Report and Order*. The attribution rules impose an affirmative obligation on licensees to determine whether a particular LMA is attributable and, if it is, to file the agreement with the Commission. Commercial radio and television licensees must also maintain copies of time brokerage agreements in their local public inspection files.[114] As we stated in the *Report and Order*, we believe a licensee's affirmative obligation in combination with our filing requirements will subject LMAs to sufficient scrutiny by competitors, the public, and the Commission.[115] UCC provides no evidence to the contrary. We therefore deny UCC's request and reaffirm the requirement that brokering stations must file redacted copies of attributable LMAs with the Commission within 30 days of execution of the agreement.

D. Cross-Interest Policy

50. **Background**. The cross-interest policy has been applied to preclude individuals or entities from holding an attributable interest in one media property (broadcast station, newspaper, cable system) and having a "meaningful" albeit nonattributable interest in another media entity serving "substantially the same area."[116] In the *Report and Order*, we eliminated the cross-interest policy.[117] The policy had covered: (1) key employee relationships, under which a key employee, such as general manager, program director, or sales manager of one station was generally prohibited from having an attributable ownership interest in or serving as a key employee of another station in the same community or market; (2) nonattributable equity interests, under which an individual who had an attributable interest in one media outlet was generally prohibited from holding a substantial nonattributable equity interest in another media outlet in the same market; and (3) joint venture arrangements, under which two local

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111 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(g), 110 Stat. 56 (1996).

112 H.R. CONF. REP. NO. 104-458, at 163 (1996).

113 UCC Petition at 22-23.

114 *Report and Order*, 14 FCC Rcd at 12601-02, ¶ 94; 47 C.F.R. § 73.3526(e)(14).

115 *Report and Order*, 14 FCC Rcd at 12602, ¶ 95.

116 *Report and Order*, 14 FCC Rcd at 12604, ¶ 100 (citing *Notice of Inquiry* in MM Docket No. 87-154, 2 FCC Rcd 3699 (1987)).

117 *Report and Order*, 14 FCC Rcd at 12609, ¶ 112. In 1989, the Commission limited portions of the cross-interest policy so that it would no longer apply to consulting positions, time brokerage arrangements and advertising agency representative relationships. *Id*. at 12604, ¶ 102 (citing *Policy Statement* in MM Docket No. 87-154, 4 FCC Rcd 2208 (1989)).

broadcast licensees were prevented from entering into joint associations to buy or build a new broadcast station, cable television system, or daily newspaper in the same market.[118] UCC asks us to reconsider this decision.

51. In the *Report and Order*, we noted that eliminating the cross-interest policy fulfilled our goals of maximizing the clarity of the attribution rules, providing reasonable certainty and predictability to parties to allow transactions to be planned, and easing application processing.[119] We decided that the regulatory costs and the chilling effects of the cross-interest policy and the benefits of applying a clear and discernable standard outweigh any risks of potential abuses in eliminating the policy.[120] We noted that the cross-interest policy had developed to fill gaps in our attribution criteria that had become apparent through our case-by-case application of the ownership rules.[121] We also noted that many aspects of the cross-interest policy are now subsumed under our newly revised attribution rules, including the EDP rule.[122] While we recognized that the EDP rule does not cover all the areas encompassed by the cross-interest policy, including key employees, for example, we noted that internal conflict of interest policies, common law fiduciary duty, and contract remedies provide adequate substitutes for our administration of the policy with respect to key employees. We also noted that many key employees are also officers and directors and are thus already covered by the attribution rules. In any event, we noted that the very small risk of harm to competition by a key employee in an instance not covered by any of these other regulations and remedies is greatly outweighed by the benefits of eliminating our case-by-case approach to transactions and applying bright line tests, such as the EDP test and our other attribution rules.[123]

52. With respect to joint ventures, we stated our belief that application of a cross-interest policy is unwarranted.[124] We noted that the ownership and attribution rules define the level of combined ownership that is permissible in the local market and that the cross-interest policy as applied to joint ventures is largely subsumed by the application of the current multiple ownership rules. To the extent that the cross-interest policy is not so subsumed, we stated our belief that it should be eliminated. Because the ownership rules define the limits of permitted local ownership combinations, we noted that it makes no sense and is unduly burdensome to have a routine additional layer of case-by-case review for those joint ventures that fully comply with those rules. We also noted that the application of the antitrust laws should prevent or remedy any abuses of joint venture relationships not already subject to the multiple ownership rules.[125] Finally, we noted that we retain the discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct

118 *Report and Order*, 14 FCC Rcd at 12605, ¶ 103.

119 *Report and Order*, 14 FCC Rcd at 12609, ¶ 112.

120 *Report and Order*, 14 FCC Rcd at 12610, ¶ 116.

121 *Report and Order*, 14 FCC Rcd at 12604, ¶¶ 100-01.

122 *Report and Order*, 14 FCC Rcd at 12610, ¶ 116.

123 *Report and Order*, 14 FCC Rcd at 12609-10, ¶ 114.

124 *Report and Order*, 14 FCC Rcd at 12610, ¶ 115.

125 *Report and Order*, 14 FCC Rcd at 12610, ¶ 115.

such a review.[126]

53. **Discussion**. UCC asks the Commission to reconsider our decision to eliminate the cross-interest policy.[127] UCC contends that the Commission has not explained why the policy should not be retained in small and medium markets, where, according to UCC, a small, closely interrelated business environment lends itself to the kinds of arrangements previously prohibited under the cross-interest policy. UCC argues that the desire for regulatory certainty is not a proper justification for repealing the cross-interest policy and that the Commission has failed to consider the impact of its decision on diversity. Finally, UCC argues that repeal of the cross-interest policy may result in allowing business combinations and relationships, that were not permitted under the cross-interest policy, that are not covered by the EDP rule, and that are not addressed by other rules and remedies referenced by the Commission in its *Report and Order*. It considers this result to be against the public interest.[128]

54. We decline to reconsider our decision to eliminate the cross-interest policy. Our decision in the *Report and Order* to eliminate the cross-interest policy was based on our judgment that the regulatory costs and chilling effects of administering the cross-interest policy and the benefits of applying clear ownership and attribution standards outweigh any risks of abuses in eliminating the policy. As we noted, the cross-interest policy did not prohibit the relationships it covered outright, but required an *ad hoc* determination as to whether the relationships at interest would be permitted. We determined that the public interest would be better served by administering, to the greatest extent possible, bright line tests with respect to attribution and ownership rather than case-by-case determinations, which delay processing and involve public and regulatory costs. We did not, however, base our conclusion, as UCC implies, simply on the increased certainty that a rule-based proscription provided. Rather, we carefully reviewed the interests typically addressed by the cross-interest policy and included within the ambit of the new rules those interests that we concluded warranted continued limitation. Most obvious among these is the consideration of nonvoting equity and debt interests under our EDP standard.

55. In short, our attribution tests were based on our best judgment, after a review of the record, as to what relationships should count in terms of administering the ownership rules. Our ownership rules, in turn, are based on our competition and diversity analysis. The local ownership rules do take into account the nature and size of the market. Further, we also retained discretion, in an appropriate case, "to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review."[129] While UCC argues that the ownership rules do not cover all relationships that it views as abusive or anticompetitive, this argument simply contests our considered conclusion in this matter. Contrary to UCC's arguments, administering regulatory procedures that are, to the greatest extent possible, clear and consistent is an important aspect of the public interest. The Commission fully explained its decision to eliminate the cross-interest policy. Accordingly, we deny UCC's request to reinstate the cross-interest policy.

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[126] *Report and Order*, 14 FCC Rcd at 12610, ¶ 116.

[127] UCC Petition at 13.

[128] UCC Petition at 14.

[129] *Report and Order*, 14 FCC Rcd at 12610, ¶ 116.

III. CONCLUSION

56. In this *Order on Reconsideration*, we decline to limit or expand the scope of the EDP rule or to allow any general exceptions to the rule at this time. On our own motion, we clarify several issues that pertain to the application of the EDP rule. We eliminate the single majority shareholder exemption for purposes of the broadcast attribution rules, while grandfathering existing minority interests held pursuant to the single majority shareholder exemption. We also decline to deem all LMAs entered into after August 6, 1999, to be unlawful, and we decline to require all existing LMAs, not just attributable LMAs, to be filed with the Commission. Finally, we reaffirm our decision to eliminate the cross-interest policy.

IV. PROCEDURAL MATTERS

57. Authority for issuance of this *Memorandum Opinion and Order on Reconsideration* is contained in Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405.

58. *Paperwork Reduction Act Analysis*. This *Memorandum Opinion and Order on Reconsideration* contains either new or modified information collections. The Commission, therefore, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget to comment on the information collections contained in this *Memorandum Opinion and Order on Reconsideration* as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this *Memorandum Opinion and Order on Reconsideration* in the Federal Register. Comments should address: (a) whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections in this *Memorandum Opinion and Order on Reconsideration* should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth Street, S.W., Room 1-C804, Washington, D.C. 20554, or over the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or over the Internet to edward.springer@omb.eop.gov.

59. *Supplemental Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act (RFA),[130] the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) of the possible impact on small entities of the rules adopted in this *Memorandum Opinion and Order on Reconsideration*.[131] The Supplemental FRFA is set forth in Appendix C.

V. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that the petitions for reconsideration or clarification ARE GRANTED to the extent provided herein and otherwise ARE DENIED pursuant to Sections 4(i), 303(r),

[130] 5 U.S.C. § 601 *et seq*.

[131] 5 U.S.C. § 604.

403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405, and Section 1.429(i) of the Commission's rules, 47 C.F.R. § 1.429(i).

61. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) & (j), 303(r), 307, 308 and 309, Parts 21, 73, and 76 of the Commission's rules, 47 C.F.R. Parts 21, 73, 76, ARE AMENDED as set forth in Appendix B.

62. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix B SHALL BE EFFECTIVE sixty days after publication in the Federal Register.

63. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order* in MM Docket Nos. 94-150, 92-51, and 87-154, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

64. IT IS FURTHER ORDERED that the new or modified paperwork requirements contained in this *Memorandum Opinion and Order on Reconsideration* (which are subject to approval by the Office of Management and Budget (OMB)) will go into effect upon OMB approval.

65. IT IS FURTHER ORDERED that this proceeding is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

PETITIONS FOR RECONSIDERATION

1. The Minority Media Telecommunications Council (MMTC)
2. National Association of Broadcasters (NAB)
3. Sinclair Broadcast Group, Inc. (Sinclair)
4. Office of Communications, Inc. of United Church of Christ *et al*. (UCC)
   Black Citizens for a Fair Media
   Center for Media Education
   Civil Rights Forum
   League of United Latin American Citizens
   Philadelphia Lesbian and Gay Task Force
   Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights
   Wider Opportunities for Women, and the Women's Institute for Freedom of the Press
5. Wells Fargo Communications Finance, Division of Norwest Bank MN, NA (Wells Fargo)

OPPOSITITIONS TO PETITIONS FOR RECONSIDERATION

1. NAB
2. UCC

REPLIES TO OPPOSITIONS

1. NAB
2. UCC

APPENDIX B
Rule Changes

Parts, 21, 73, and 76 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 21-DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 47 U.S.C. 552, 554.

2. Section 21.912 is amended by:
(a) designating Note 1 as "Note 1 to § 21.912";
(b) removing paragraph Note 1(b);
(c) redesignating paragraphs Note 1(c) through Note 1(l) as paragraphs Note 1(b) through Note 1(k);
(d) revising redesignated paragraphs Note 1(c) and Note 1(e);
(e) revising the first and second sentence of redesignated paragraph Note 1(f)(2);
(f) revising redesignated paragraph Note 1(h)(3);
(g) revising the introductory text to redesignated paragraph Note 1(i), and redesignated paragraph Note 1(i)(2); and
(h) designating Note 2 as "Note 2 to § 21.912".
The revisions read as follows:

<u>§ 21.912 Cable television company eligibility requirements and MDS/cable cross-ownership</u>.

* * * * *

Note 1 to § 21.912: * * *

(c) Attribution of ownership interests in an MDS licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph (i) of this Note, attribution of ownership interests in an MDS licensee or cable television system that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this Note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1x0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable. For purposes of paragraph (i) of this Note, X's interest in "Licensee" would be 15% (0.6x0.25) and A's interest in

"Licensee" would be 1.5% (0.1x0.6x0.25). Neither interest would be attributed under paragraph (i) of this Note.]

* * * * *

(e) Subject to paragraph (i) of this Note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (i) of this Note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(f) * * *

(2) For a licensee or system that is a limited partnership to make the certification set forth in paragraph (f)(1) of this Note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (f)(1) of this Note, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the LLC or RLLP. * * *

* * * * *

(h) * * *

(3) The sum of the interests computed under paragraph (h)(1) of this Note plus the sum of the interests computed under paragraph (h)(2) of this Note is equal to or exceeds 20 percent.

(i) Notwithstanding paragraphs (e) and (f) of this Note, the holder of an equity or debt interest or interests in an MDS licensee or cable television system subject to the MDS/cable cross-ownership rule ("interest holder") shall have that interest attributed if:

* * * * *

(2) the interest holder also holds an interest in an MDS licensee or cable television system that is attributable under paragraphs of this Note other than this paragraph (i) and which operates in any portion of the franchise area served by that cable operator's cable system.

* * * * *

Note 2 to § 21.912: * * *

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Part 73-RADIO BROADCAST SERVICES

3. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334 and 336.

4. Section 73.3555 is amended by:

(a) designating Note 1 as "Note 1 to § 73.3555";

(b) designating Note 2 as "Note 2 to § 73.3555";

(c) removing paragraph Note 2(b) to Section 73.3555;

(d) redesignating paragraphs Note 2(c) through Note 2(k) to Section 73.3555 as paragraphs Note 2(b) through Note 2(j) to Section 73.3555;

(e) revising redesignated paragraphs Note 2(c) and Note 2(e) to Section 73.3555;

(f) revising the first and second sentence of redesignated paragraph Note 2(f)(2) to Section 73.3555;

(g) revising redesignated paragraph Note 2(h)(3) to Section 73.3555;

(h) revising the introductory text to redesignated paragraph Note 2(i) to Section 73.3555, and redesignated paragraph Note 2(i)(2)(i) to Section 73.3555;

(i) designating Note 3 as "Note 3 to § 73.3555";

(j) designating Note 4 as "Note 4 to § 73.3555";

(k) designating Note 5 as "Note 5 to § 73.3555";

(l) designating Note 6 as "Note 6 to § 73.3555";

(m) designating Note 7 as "Note 7 to § 73.3555";

(n) designating Note 8 as "Note 8 to § 73.3555";

(o) designating Note 9 as "Note 9 to § 73.3555"; and

(p) designating Note 10 as "Note 10 to § 73.3555".

The revisions read as follows:

<u>§ 73.3555 Multiple Ownership</u>

* * * * *

Note 1 to § 73.3555: * * *

* * * * *

Note 2 to § 73.3555: * * *

(c) Attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph (i) of this Note, attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this Note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1x0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable. For purposes of paragraph (i) of this Note, X's interest in "Licensee" would be 15%

(0.6x0.25) and A's interest in "Licensee" would be 1.5% (0.1x0.6x0.25). Neither interest would be attributed under paragraph (i) of this Note.]

* * * * *

(e) Subject to paragraph (i) of this Note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (i) of this Note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(f) * * *

(2) For a licensee or system that is a limited partnership to make the certification set forth in paragraph (f)(1) of this Note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (f)(1) of this Note, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. * * *

* * * * *

(h) * * *

(3) The sum of the interests computed under paragraph (h)(1) of this Note plus the sum of the interests computed under paragraph (h)(2) of this Note is equal to or exceeds 20 percent.

(i) Notwithstanding paragraphs (e) and(f) of this Note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

* * * * *

(2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this Note other than this paragraph (i); or

* * * * *

Note 3 to § 73.3555: * * *

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Note 4 to § 73.3555: * * *

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Note 5 to § 73.3555: * * *

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Note 6 to § 73.3555: * * *

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Note 7 to § 73.3555: * * *

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Note 8 to § 73.3555: * * *

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Note 9 to § 73.3555: * * *

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Note 10 to § 73.3555: * * *

5. Section 73.3613 is amended by revising paragraph (d) and revising paragraph (e) to read as follows:

§ 73.3613 Filing of contracts.

* * * * *

(d) *Time brokerage agreements*. Time brokerage agreements involving radio stations, where the licensee (including all parties under common control) is the brokering entity, there is a principal community contour overlap (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) with the brokered station, and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving television stations where licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both licensed to the same market as defined in the local television multiple ownership rule contained in § 73.3555(b), and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving radio or television stations that would be attributable to the licensee under § 73.3555 Note 2(i). * * *

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC: contracts relating to the joint sale of broadcast advertising time that do not constitute time brokerage agreements pursuant to § 73.3555 Note 2(j); subchannel leasing agreements for Subsidiary Communications Authorization operation; franchise/leasing agreements for operation of telecommunications services on the TV vertical blanking interval and in the visual signal; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

6. Section 73.3615 is amended by revising the second sentence in paragraph (a)(3)(iii)(B) to read as follows:

§ 73.3615 Ownership reports.

* * * * *

(a) * * *
(3) * * *
(iv) * * *
(B) * * * If X has a voting stockholder interest in the licensee, only those voting interests of X that are cognizable after application of the "multiplier" described in Note 2(c) of § 73.3555 of the rules, if applicable, shall be reported. * * *

* * * * *

Part 76-MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

7. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

8. Section 76.501 is amended by:
(a) designating Note 1 as "Note 1 to § 76.501";
(b) designating Note 2 as "Note 2 to § 76.501";
(c) designating Note 3 as "Note 3 to § 76.501";
(d) designating Note 4 as "Note 4 to § 76.501";
(e) designating Note 5 as "Note 5 to § 76.501";
(f) designating Note 6 as "Note 6 to § 76.501"; and
(g) revising paragraph Note 6.

The revisions read as follows:

§ 76.501 Cross-ownership

Note 1 to § 76.501: * * *

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Note 2 to § 76.501: * * *

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Note 3 to § 76.501: * * *

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Note 4 to § 76.501: * * *

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Note 5 to § 76.501: * * *

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Note 6 to § 76.501: In applying paragraph (a) of § 76.501, for purposes of paragraph Note 2(i) of this section, attribution of ownership interests in an entity covered by this rule that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product. The ownership percentage for any link in the chain that exceeds 50% shall be included. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would 15% (0.6x0.25), and A's interest in "Licensee" would be 1.5% (0.1x0.6x0.25).]

APPENDIX C
Supplemental Final Regulatory Flexibility Analysis
Memorandum Opinion and Order on Reconsideration

As required by the Regulatory Flexibility Act (RFA),[132] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in Appendix A of the *Notice of Proposed Rulemaking* (*Notice*)[133] and Appendix A of the *Further Notice of Proposed Rule Making* (*Further Notice*) in this proceeding.[134] The Commission sought written public comment on the proposals in the *Notice* and *Further Notice*, including comment on the IRFAs. The comments received were discussed in the Final Regulatory Flexibility Analysis (FRFA) contained in the *Report and Order* (*R&O*) in this proceeding.[135] As described below, this *Memorandum Opinion and Order on Reconsideration* (*MO&O*) grants reconsideration of one action taken in the *R&O* and provides clarification of other issues. This associated Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) addresses the rule modifications on reconsideration and conforms to the RFA.[136]

Need For, and Objectives of, the *Memorandum Opinion and Order*

The attribution rules seek to identify those interests in licensees or media entities that confer on their holders a degree of influence or control such that the holders have the potential to affect the programming decisions of licensees or other core operating functions. The attribution rules are used to implement the Commission's broadcast multiple ownership rules. The Commission's goals in this proceeding are to improve the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees and markets, and facilitate application processing. While its focus is on the issues of influence or control, the Commission must also tailor the attribution rules to permit arrangements where an ownership or positional interest involves minimal risk of influence to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry. The rule revisions and clarifications contained in this *MO&O* meet these goals.

Summary of Significant Issues Raised by the Public

The comments in response to the IRFAs that addressed small business issues were discussed in the FRFA contained in the *R&O* in this proceeding. We received no petitions for reconsideration in direct response to that FRFA. In its petition for reconsideration, however, the Office of Communications, Inc. of United Church of Christ *et al*. (UCC) asked the Commission to eliminate the single majority shareholder exemption for broadcast stations, arguing that it is arbitrary and capricious to eliminate the exemption for cable systems

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132 *See* 5 U.S.C. § 603. Congress amended the RFA, *see* 5 U.S.C. § 601 *et. seq*., by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

133 The IRFA in Appendix A of the *Notice of Proposed Rule Making*, 10 FCC Rcd 3606, 3655-56 (1995), was incorporated pursuant to Pub. L. No. 96-354, § 603, 94 Stat. 1165 (1980).

134 *Further Notice*, 11 FCC Rcd 19895, 19919-27 (1996).

135 *Report and Order*, 14 FCC Rcd 12559, 12642-55 (1999).

136 *See* 5 U.S.C. § 604.

and not broadcasters.[137] Under the single majority shareholder exemption from attribution, in a corporation in which a single shareholder owns more than 50 percent of the voting stock of the corporation, the interests of minority shareholders are not attributable. The Commission grants UCC's request, finding 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. Any minority interest in a company with a single majority shareholder will be grandfathered if the interest was acquired before the adoption date of this *MO&O*. Grandfathered minority interests in companies with single majority shareholders, however, remain subject to the equity/debt plus (EDP) rule.[138]

Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The rules revisions contained in this *MO&O* will apply to full service television and radio licensees and permittees, potential licensees and permittees, cable services or systems, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service, and newspapers. These entities are discussed in detail in the FRFA contained in the *R&O* at Section III.[139]

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *MO&O* clarifies various aspects of the EDP rule adopted in the *R&O*. One clarification is to use the "multiplier" in calculating an EDP interest. Specifically, the Commission will multiply the successive percentage interests, aggregating both equity and debt, in each intervening entity where a party holds an indirect interest in the licensee or other media outlet. In calculating an EDP interest, however, the Commission will not apply the pass-through exception, which applies to indirect voting stock interests in corporations where a link in the ownership chain that represents a percentage interest exceeding 50 percent is treated as a 100 percent interest. Thus, the Commission will multiply successive interests for purposes of EDP, even where the interest exceeds 50 percent.[140] The decision not to apply the pass-through exception is less restrictive than the traditional application of the multiplier on all entities, including small businesses.

The *MO&O* also eliminates the single majority shareholder attribution exemption. Elimination of the single majority shareholder attribution exemption does not affect grandfathered small entities. Moreover, elimination of the single majority shareholder exemption does not affect the Commission's ownership reporting requirements. The reporting requirements for non-grandfathered licensees may increase, however, because those licensees will be required to report interests that are newly attributable as a result of elimination of the exemption. Those entities are already required to file ownership reports with the Commission, so any additional cost associated with this reporting requirement is nominal.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

[137] UCC Petition at 12-13.

[138] *See supra* at ¶¶ 40-44.

[139] *Report and Order*, 14 FCC Rcd at 12643-49.

[140] *See supra* ¶¶ 33-35.

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[141]

Under the Commission's pass-through exception to the multiplier rule, a link in the ownership chain that represents a percentage interest exceeding 50 percent is treated as a 100 percent interest, when calculating the successive links in the ownership chain. The *MO&O* clarifies that the Commission will not apply the pass-through exception in using the multiplier to calculate interests under the EDP rule. An alternative to this decision is to apply the pass-through exception for purposes of EDP, which would make the calculation of attributable EDP interests as restrictive on all entities, including small businesses, as those calculated under the traditional application of the multiplier.

The *MO&O* eliminates the single majority shareholder attribution exemption. To minimize the disruptive effect of this attribution rule change, the *MO&O* grandfathers entities, subject to the EDP rule, relying on the single majority shareholder exemption whose interests were acquired before the adoption date of the *MO&O*. An alternative to eliminating the exemption would be to leave the rule as is. In addition to assuring consistency with the prior decision to eliminate the exemption for cable operators, however, the Commission believes that eliminating the exemption from the broadcast attribution rules will promote one of its primary goals to improve the precision of the Commission's attribution rules in identifying cognizable interests for purposes of the ownership rules.

Report to Congress: The Commission will send a copy of the *MO&O*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to SBREFA.[142] In addition, the Commission will send a copy of the *MO&O*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *MO&O* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[143]

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[141] 5 U.S.C. § 603(c).

[142] *See* 5 U.S.C. § 801(a)(1)(A).

[143] *See* 5 U.S.C. § 604(b).

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests Order on Reconsideration, MM Docket Nos. 94-150, 92-51, 87-154.

I write separately to explain my decision to concur in today's *Reconsideration Order* on the attribution of broadcast and cable interests.

In our *Attribution Report and Order*, we acknowledged the very real influence that the brokering party to a Local Marketing Agreement (LMA) exercises over the brokered station and concluded that certain LMAs should be attributable in order to reduce incentives to use LMAs to circumvent our ownership rules. We also required that these attributable LMAs be filed with the Commission. While I strongly agree that these steps were necessary and appropriate, I continue to believe that other troubling aspects of LMAs still need be addressed.

I have long held the view that LMAs represent a sort of artifice that raise substantial concerns about who actually controls the brokered station and who is actually responsible and accountable for the station's programming during brokered time. When we relaxed the broadcast ownership rules in 1999, I noted that "we need to consider more broadly the role of LMAs in broadcasting. . . .[W]e need to consider whether the benefits of LMAs could be attained through other arrangements, such as actual joint ownership that do not raise questions concerning the responsibility and accountability of the actual licensee of a station."[1]

More recently, this issue was raised in a Commission order released just two days ago, in which the Commission denied a request for a stay of the grant of an assignment of licenses in transactions implicating two LMAs in the Columbus, Georgia market.[2] Although I voted to affirm the Mass Media Bureau's decision in that case, I wrote separately to express my doubts about the terms of the particular LMAs involved. I said that I believe that the rights and entitlements contained in the agreements presented a significant risk that an unauthorized transfer of control of the brokered station may occur.

Given these concerns, I urged my colleagues to support a narrowly tailored expansion of the LMA filing requirement[3]. Like Commissioner Tristani, I believe that we cannot make fully informed decisions about whether to continue to allow LMAs or whether to impose additional restrictions on their use unless we have more information about their use. For example, how extensively are LMAs being used in the industry? Are the brokers usually the prospective buyers of the brokered station? Do the

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[1] *Statement of Chairman William E. Kennard, Attribution Report and Order*, at 2.

[2] In the Matter of Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc., File Nos. BAL/BALH-20000728ACS-ADT (rel. Jan. 17, 2001).

[3] Under existing Commission rules, only LMAs that cover more than 15% of a station's broadcast week and are brokered by a same-market station or a party meeting our EDP attribution standard must be filed with the Commission. We could have modestly expanded this filing obligation by requiring a brokered station to forward LMAs to the Commission if the station is a party to multiple LMAs that, taken together, cover more than 15% of the station's weekly broadcast schedule, even if no single LMA covers more than 15% of the brokered station's weekly schedule.

terms of the LMA make clear distinctions between the rights of the broker and the licensee? Are the 10- and 15-year terms in the Columbus agreements typical?

Today, the Commission refused to solicit answers to these critical questions, citing the burden of such a requirement. But, the burden would have been marginal. Broadcasters are already required to maintain copies of these agreements in their local public inspection files. I simply cannot agree with the majority that this modest first step toward a fuller consideration of these quasi-ownership arrangements between broadcast stations was unwarranted.

STATEMENT OF COMMISSIONER SUSAN NESS, DISSENTING IN PART

Re: Review of the Commission's Regulations Governing Attribution of Broadcast Interests

While I support most of the *Order's* conclusions, particularly elimination of the single majority shareholder exemption, *see Order* at ¶¶ 40-44, I would have preferred narrowly crafting an exemption to the equity-plus-debt ("EDP") rule to better reflect the realities of the banking industry. Specifically, I believe that a bank whose lending arm extends credit to a broadcaster does not implicate our diversity concerns when its equity investment arm invests in a different broadcaster in the same market. In practice, the lending and equity groups in a modern bank do not coordinate their efforts. When our attribution rules contemplate treating such disparate groups as the same source of ownership and influence, the rules misconstrue marketplace realities. As one commenter in this proceeding pointed out, when our rules codify such inaccurate reflections of the financial industry, banks can be discouraged from making investments in the broadcasting industry. *See Petition for Reconsideration of Wells Fargo Communications Finance, Division of Norwest Bank MN, NA* at 2-3 (October 18, 1999).

Thus, I would have supported a narrowly crafted exemption to the EDP rule for banks and other institutional investors, where the practices of lending institutions demonstrate that our policy interest in viewpoint diversity is not threatened by the investments of a bank's equity and lending entities. I therefore respectfully dissent in part. *See Order* at ¶¶ 19-22.

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH, DISSENTING IN PART AND CONCURRING IN PART

I respectfully dissent in large part from this Memorandum Opinion and Order on Reconsideration, which generally affirms the decisions made in the original Report and Order on attribution rules for mass media entities. I do so for the reasons given in my separate statement in that Report and Order.[1] I join, however, the portion of today's item that maintains the Commission's elimination of the cross-interest policy,[2] a regulatory repeal that I supported on the first go-round.

[1] *See* Statement of Commissioner Harold W. Furchtgott-Roth, Dissenting in Part and Concurring in Part. *Report & Order, In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; and Reexamination of the Commission's Cross-Interest Policy*, 14 FCC Rcd. 12559 (1999).

[2] *See supra* at ¶¶ 50-55.

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

Re: Reconsideration of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket Nos. 94-150, 92-51 and 87-154.

I write separately to state my deep discomfort with the continued prevalence of LMAs in the broadcasting industry. Too often, I believe, LMAs are used to achieve a *de facto* change in control of a broadcast license where such a change would otherwise be impermissible -- either because the transfer would violate the Commission's ownership rules or because the Commission has not yet formally acted on a transfer application. In both cases, LMAs have the harmful effect of separating the entity that programs a broadcast station from the entity responsible for ensuring that the station serves the public interest.

As with many problems before the Commission, one of the main barriers to sensible decision-making is the lack of factual information. We simply do not know how many LMAs exist, what the terms are, and whether those terms serve the public interest. For this reason, I dissent from the majority's decision not to require the filing of non-attributable LMAs with the Commission. I would have required that *all* LMAs be filed. Under the majority's approach, a licensee could enter into ten LMAs, each covering ten percent of its programming hours, and yet because none of the individual LMAs reached the fifteen percent level, the Commission would never know that the licensee was no longer programming its own station. Only when we know the true scope of the problem can we properly assess whether and how it should be addressed.