Corporate Ownership Reports
Ownership Multiple, Factor in Applications
Reports, Required to be Filed

Report & Order adopted revising standards for attributing interests in broadcast, cable television, and newspaper properties and to the manner these interests are reported. Proceeding terminated.
—*Attribution of Ownership Interests*
Docket No. 20521

FCC 84-115
34396

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Corporate Ownership Reporting and Disclosure by Broadcast Licensees.	Docket No. 20521
Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations.	Docket No. 20548
Amendment of Sections 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.	BC Docket No. 78-239
Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities.	MM Docket No. 83-46 RM-3653 RM-3695 RM-4045

REPORT AND ORDER
(Proceedings Terminated)

Adopted: March 29, 1984; Released: April 30, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSTAINING AND ISSUING A STATEMENT.

I. *Introduction*

1. The Commission has before it comments filed by numerous parties in response to its *Notice of Proposed Rule Making* in MM Docket No. 83-46 (*"Notice 83-46"*), FCC 83-46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983), and comments and pleadings filed in related docketed proceedings and rule making petitions as captioned above.[1] This *Report and Order* concludes those proceedings, comprehensively reviewing and revising the standards for attributing interests in broadcast, cable television and newspaper properties insofar as application of the Commission's various multiple ownership rules is concerned and for reporting those interests to the Commission.[2] Briefly stated, the specific changes adopted herein include:

(1) Raising the basic ownership benchmark for attribution to 5%, regardless of the size of the licensee (eliminating the distinction between "closely-held" and "widely-held" licensees);

(2) Raising the attribution benchmark for "passive" investors to 10%;

(3) Introduction of a "multiplier" in determining attribution in vertical ownership chains;

(4) Clarification of the status of non-voting stock and limited partnership interests as non-attributable interests;

(5) Clarification of the attribution of interests held in various kinds of trusts and other fiduciary capacities;

(6) Provisions for the relief from attribution of officers and directors whose duties are not related to any licensee or its operations; and,

(7) Modifications of existing ownership reporting requirements to reduce their burden and to conform them to the new attribution rules.

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[1] A list of the parties filing comments in each of these proceedings is contained in Appendix B.* A general summary of those comments, all of which have been fully considered herein, is contained in Appendix A.

[2] It is important to reiterate at the outset that this *Report and Order* is not intended to affect in any respect the Commission's current multiple ownership rules themselves and does not prejudge any action regarding those rules which the Commission may consider; it simply determines how and to whom these rules should be applied. *Notice 83-46, supra* at n.4. Review of the Commission's "seven station" rule, which limits the number of stations a single entity may own nationwide, is the subject of another current rule making proceeding. *Notice of Proposed Rule Making* in Gen. Docket No. 83-1009, FCC 83-440, released October 20, 1983, 48 Fed. Reg. 49438 (October 25, 1983), corrected 48 Fed. Reg. 50907 (November 4, 1983). Review of the Commission's regional concentration of control restriction, which limits the proximity of any three stations owned by a single entity, is also the subject of another rule making proceeding. *Notice of Proposed Rule Making* in MM Docket No. 84-19, FCC 84-10, released January 17, 1984, 49 Fed. Reg. 2478 (January 20, 1984).

II. *Historical Background*

2. As pointed out in *Notice 83-46*, the attribution rules constitute "the mechanism by which the multiple ownership rules are given practical effect. That is, [they] define what constitutes a 'cognizable interest' for the purpose of applying the multiple ownership rules to specific situations." *Notice 83-46, supra* at para. 1. In that role, they represent the Commission's judgment regarding what ownership interest in or relation to a licensee will confer on its holder that degree of influence or control over the licensee and its facilities as should subject it to limitation by the multiple ownership rules.

3. The Commission's first efforts at limiting the multiple ownership of broadcast facilities consisted of local and national restrictions adopted in the early 1940's.[3] The current rule restricting ownership of broadcast entities on a national basis, the so-called "seven station" rule, was adopted in 1953. *Amendment of Multiple Ownership Rules* (Docket No. 8967), 18 FCC 288 (1953). In adopting this rule, the Commission stated that its fundamental purpose was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest." *Id.* at 291–92. In this initial effort to achieve diversification of ownership, the Commission stated that it would make no distinction between a controlling interest and a non-controlling, minority interest for purposes of applying the rule, reasoning that minority shareholders can have considerable voice in the control and management of a corporate licensee. *Id.* at 292–93. It consequently determined that for a "widely-held" corporation (fifty or more stockholders), an interest constituting 1% or more of the outstanding voting stock would be cognizable, whereas for a "closely-held" corporation (less than fifty stockholders), any voting interest would be cognizable. *Id.* at 294.[4] It also

[3] Duopoly and national multiple ownership restrictions were adopted for FM and television in 1940 [5 Fed. Reg. 2384 (June 26, 1940)] and 1941 [6 Fed. Reg. 2284 (May 6, 1941)], respectively. The first one-to-a-market rule was adopted in 1941 as part of the *Report on Chain Broadcasting*. After the Supreme Court upheld these rules of general applicability in *National Broadcasting Co., Inc. v. U.S.*, 319 U.S. 190 (1943), the Commission adopted a duopoly rule for AM. 8 Fed. Reg. 16065 (November 27, 1943). A national multiple ownership restriction for AM was first applied in *Sherwood R. Brunton et al. (KQW)*, 11 FCC 407 (1946), where the Commission denied an application for the transfer of an AM station to Columbia Broadcasting System, Inc., because Columbia already owned several other AM stations. The Commission thereafter proposed the adoption of formal rules limiting overall AM station ownership in 1948. *Notice of Proposed Rule Making* in Docket No. 8967, 13 Fed. Reg. 5060 (August 31, 1948).

[4] The "owns, operates or controls" language of the duopoly and one-to-a-market rules has been construed by the Commission to render these provisions applicable only where a stockholder holds a majority voting interest in the licensee or otherwise exercises actual control over the licensee. As to stock ownership, therefore, the percentage attribution

recognized the position of the officers and directors of a licensee corporation and brought them within the purview of the rule. *Id.* The Court of Appeals ratified this use of a stockholding percentage benchmark for attributing ownership, while observing that ownership interests of one percent do not necessarily constitute control. *Storer Broadcasting Co. v. U.S.*, 240 F.2d 55 (D.C. Cir. 1956).

4. The need for adjustments in this basic attribution rule became apparent in subsequent years. Widespread noncompliance with the rules by investment companies (mutual funds) was revealed in the course of a 1963 case involving an application for the transfer of control of a station.[5] The Commission initially granted the application, conditioned on the involved parties' "strict compliance" with the rule, but upon reconsideration, it agreed to suspend any divestiture requirement pending further investigation of the extent of such violations. *Baltimore Broadcasting Corporation and Metromedia, Inc.*, 1 RR 2d 798 (1963). The Commission promptly instituted a rule making proceeding to study the extent of noncompliance with the multiple ownership rules, anticipating a return to strict compliance within a "reasonable period of time." *Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 15627, FCC 64-861, September 16, 1964, 29 Fed. Reg. 13211 (September 23, 1964). Instead, after considering the data submitted regarding stock ownership in the broadcasting industry, the Commission decided to amend its attribution standard to permit investment companies to own up to 3% of a licensee corporation before an ownership interest in the licensee would be attributed to them for purposes of the national and regional multiple ownership rules. An eligible entity utilizing this higher attribution benchmark, however, was required to file a disclaimer of any intent to control or influence the licensee.[6] *Report and Order* in Docket No. 15627, 13 FCC 2d 357 (1968). In the same order the Commission determined to

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benchmarks advanced in connection with the national multiple ownership rules are not literally germane to these local rules. Recognition, however, of minority stock ownership interests, as well as non-ownership interests, in duopoly and "hybrid" one-to-a-market contexts came with the development of the Commission's "cross interest" policy. *See Minnesota Broadcasting Corp.*, 13 FCC 672 (1949) [duopoly]; *Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973) [one-to-a-market]. *See also United Community Enterprises, Inc.*, 37 FCC 2d 953 (Rev. Bd. 1972) [evolution of the cross interest policy and its distinction from the multiple ownership rules]. Our action today does not affect the substantive aspects of this policy, which we shall continue to administer on a case-by-case basis. However, our decision herein will result in the application, as appropriate, of the duopoly and one-to-a-market rules themselves, in lieu of cross interest policy consideration, where voting ownership interests at or above the relevant benchmarks are involved. *See* para. 76, *infra.*

[5] *Baltimore Broadcasting Corporation and Metromedia, Inc.*, 1 RR 2d 795 (1963).

[6] The Commission rejected a proposal to use a 10% standard for investment companies, finding a 3% benchmark sufficient to minimize divestiture.

attribute stock held by stockbrokers and bank nominees to the individuals for whose benefit the stock was held, rather than to the nominal holders, thereby effectively eliminating any limit on the stock such a nominee could hold in that capacity. No similar provision was made for bank trustees as the Commission believed that those trustees usually held the power to vote the stock they held. The Commission subsequently further amended its rules to permit bank trustees to hold up to five percent of a corporation before an ownership interest would be attributed to them, reasoning that such holdings were "passive" in nature, with no intent to control the licensee. Again, it required that a specific disclaimer of intent to control be filed by any party wishing to avail itself of this standard.[7] *Report and Order* in Docket No. 18751, 34 FCC 2d 889 (1972). Subsequently, in an effort to equalize treatment of apparently similar entities, the 5% benchmark provision was extended to investment companies and insurance companies. So extended, this "passive" investor attribution standard was also applied to the Commission's cable television ownership limitations. *Report and Order* in Docket No. 20520, 59 FCC 2d 970 (1976),[8] *recon. granted in part, Memorandum Opinion and Order* in Docket No. 20520, 65 FCC 2d 336 (1977), *aff'd sub nom. National Citizens Committee for Broadcasting v. F.C.C.*, 559 F.2d 187 (D.C. Cir. 1977).

5. The Commission next proposed adoption of a 10% across-the-board attribution benchmark for the duopoly, one-to-a-market and regional ownership rules, in conjunction with its consideration of a regional concentration of control restriction.[9] When it subsequently adopted the regional rule, it noted that the 10% proposal received little attention,[10] and sought further comment on that issue in a *Further Notice of Proposed Rule Making* in Docket No. 20548 ("*Notice 20548*"), 63 FCC 2d 832 (1977). That rule making remains outstanding and has been incorporated into the present proceeding. The Commission has also initiated proceedings to consider various modifications of the reporting requirements for ownership interests, *Notice of Proposed Rule Making* in Docket No. 20521 ("*Notice 20521*"), FCC 75-710, released June 23, 1975, 40 Fed. Reg. 26543 (June 24, 1975), and to consider the propriety of attributing ownership to holders of various non-voting interests, as well as to examine the use of various insulating mechanisms to avoid attribution. *Notice of Inquiry and Notice of Proposed Rule Making* in BC Docket No. 78-239 ("*Notice*

[7] The Commission noted that a 5% standard would necessitate significantly less divestiture than a 3% standard. A proposal to use a 10% attribution standard for bank trustees was rejected.

[8] The Commission also eliminated the requirement that eligible passive investors file disclaimers of intent to influence or control.

[9] *Notice of Proposed Rule Making* in Docket No. 20548, 54 FCC 2d 331 (1975).

[10] *First Report and Order* in Docket No. 20548, 63 FCC 2d 824 (1977).

78–239"), 68 FCC 2d 1302 (1978). These proceedings also remain outstanding and have been incorporated into the present proceeding. Finally, several requests for further rule changes and a request for waiver are outstanding at this time and will also be resolved herein.[11]

III. *Discussion of the Issues*

A. *Attribution Benchmarks*

6. Selection of an appropriate stockholding level at which to attribute ownership of a corporate licensee's facilities to the individual stockholder is the most significant aspect of this review of the attribution rules. As we stated in *Notice 83–46*, the industry and the investment community have evolved dramatically since the rules first began developing in the 1940's, and they may now be unnecessarily restrictive. We observed that a relaxation of the benchmark might serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities. We noted the existence of numerous other ownership regulations of several federal agencies, including our own, and suggested that conformity among these rules and the consequent reduction of the reporting burden would be a desirable result. At the same time, however, we recognized that the underlying principles and concerns of our own rules may be unique and require distinct analysis and results. Comment was invited on all of the above concerns, including their legal, economic, social, and policy implications. Specific empirical data bearing on these matters was particularly requested. *Notice 83–46, supra* at para. 46. The Commission also questioned whether a distinction should continue to be made for attribution purposes between widely-held and closely-held corporations and, if so, whether this distinction should be redefined. *Id.* at para. 33.

7. In approaching the benchmark issue, we have looked to the guidance of other regulatory and statutory ownership provisions, the suggestions and arguments of the commenting parties and our own experience in evaluating the evolving state of today's telecommunications marketplace. Additionally, we have conducted a survey of Commission ownership files to determine, to the extent possible, the typical size and

[11] The rule making requests are: RM–3653, filed April 21, 1980, by the First Manhattan Company, requesting a rule amendment to establish a 5% cognizable ownership benchmark for investment advisors; RM–3695, filed June 5, 1980, by the Investment Company Institute, requesting a rule amendment to increase the cognizable ownership benchmark to 10% for investment companies and investment advisors; and RM–4045, filed January 27, 1982, by the Centennial Fund, requesting a rule change to allow self-administered pension funds to utilize a 5% ownership benchmark. The Ford Foundation seeks a waiver to permit it to hold up to a 5% interest in both closely-held and widely-held corporate licensees without attribution consequences.

distribution of stockholdings among the Commission's licensees.[12] Information was compiled from the ownership files of most widely-held corporate licensees,[13] and from a sample of closely-held licensees.[14] The survey's data provides us a more deliberate means of evaluating appropriate attribution levels than the "intuitive balance" suggested by some commenters. We are fully aware, of course, that many factors besides the size of a stockholding contribute to the influence or control the stockholder can or does exercise. However, stockholding size does have a legitimate, if imprecise relationship to its holder's ability to exercise influence or control, and it represents a useful tool for making this determination. It is also important to recognize that the relationship itself between cognizable ownership and actual influence over programming is at best indirect. Therefore, in structuring attribution levels to reflect this inexact relationship, we are mindful of the need for balance between inhibiting legitimate business opportunities and promoting a "clash of divergent views."

(1) *Benchmark for Non-Passive Investors*

8. Comments were primarily directed to the choice of a benchmark for widely-held corporations, and many seemed confined to that consideration only for institutional investors. They variously supported benchmarks of 1%, 5%, 10%, and 20%, although some implicitly urged a 49.9% benchmark for some situations. Commenters universally approved this comprehensive review of all of the rules, and several strongly urged that the Commission take the opportunity to simplify its rules.

9. Parties urging the Commission to retain its current 1% benchmark cited the lack of any evidentiary support for a change. They argued that raising the benchmark would adversely affect the advancement of minority interests in broadcasting because of the inevitable increase in conglomerate ownership that such action would permit. Parties supporting a higher benchmark, on the other hand, argued that the current criterion was selected arbitrarily in the first place, and that an upward adjustment is warranted given the profound changes in the investment

[12] Notice of the existence and availability of this study has been filed in the record of this proceeding.

[13] Widely-held licensees are those with fifty or more shareholders. Several ownership reports were being updated with recent entries and were not in the files when the survey was conducted; others were rejected for various reasons, including being outdated. Some filing parties were holding companies or subsidiaries, whose ownership information was not useful or was duplicative of that filed by other licensees in the same ownership chain. 172 ownership reports were included in the survey, out of approximately 200 widely-held licensees.

[14] There are approximately 5500 closely-held licensees. A sample of 375 ownership reports was randomly drawn from that universe. Relative to the size of the universe, this sample should provide an accurate profile of the stock ownership patterns of these licensees.

market and in the media marketplace since the existing standard was established. They concluded that raising the benchmark will advance the public interest by increasing the availability of resources to broadcasters which, in turn, should result in improved service.

10. Parties supporting 5%, 10%, and 20% each contend that the particular ownership level they support best identifies the level of stock ownership at which a shareholder will be able to affect the affairs of a licensee. Several parties also cite those rules and regulations of other federal agencies which use the same benchmark they advance as evidence of the appropriateness of their selection.

11. In establishing appropriate attribution levels for stock interests in corporate licensees, the Commission has historically taken a cautious approach. The underlying multiple ownership rules are premised on the principle that "a democratic society cannot function without the clash of divergent views." *Second Report and Order* in Docket 18110, 50 FCC 2d 1046, 1079 (1974), *recon. denied,* 53 FCC 2d 589 (1975), *remanded on other grounds, National Citizens Committee for Broadcasting v. F.C.C.,* 555 F.2d 938 (D.C. Cir. 1977), *aff'd,* 439 U.S. 775 (1978). *See also Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). Indeed, this "idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility." *Second Report and Order* in Docket 18110, *supra.* In this respect, "[t]he significance of ownership . . . lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *Id.* at 1051. In light of the weight to be given these considerations, and in the absence of any empirical evidence to guide its deliberations, the Commission exercised its best judgment in attempting to attribute any stockholding interest which might impart even slight influence in a licensee. We now believe, however, that this approach may have been unnecessarily restrictive in frequently attributing ownership to inconsequential interests.

12. *Widely-Held Companies.* Two factors convince us that, under current market and industry conditions, a 1% stockholder is unlikely to be able to exert control or programming influence on the basis of that stockholding in virtually any widely-held broadcast corporation. First, in comprehensively reviewing our ownership report files, we find that among all broadcast corporations studied a 1% shareholder is one of more than twelve individual shareholders, on average, reported as holding 1% or greater interests. Moreover, in some corporations, there are actually tens of 1% or greater shareholders. In many corporations, there are also several institutional shareholders with larger holdings. The 1% shareholder is, obviously, the least of these shareholders, and his shareholding is

only marginally greater than that of the host of lesser shareholders in the corporation. Consequently, a shareholder with 1% of a corporation's stock is not in a preeminent position among stockholders and is unlikely to have much influence among them on the basis of his stockholding, or to measurably affect the outcome of elective or discretionary corporate decisions. Second, with the increasing dispersion of stock into smaller holdings, the growing sophistication of company management methods and needs, and the rising participation in the stockmarket of individuals without management sophistication, stockholders have increasingly ignored or failed to independently exercise their voting rights. In this environment, corporate management has emerged as an increasingly independent source of control in corporations. This heightened independence of management means that a significant amount of stock must reside in one place to influence the activities of the management of most large corporations.[15] These factors taken together suggest that the 1% benchmark is unnecessarily low for accomplishing the stated objectives of the multiple ownership rules under current or anticipated conditions.

13. Having concluded that the existing attribution benchmark can be safely raised, we must now determine what new standard should be selected in its place. Our objective in this undertaking is to establish a benchmark which avoids unnecessary and possibly costly regulatory intervention by minimizing the attribution of noninfluential interests, yet which also identifies with reliable accuracy those interests that convey to their holders a realistic potential to affect the programming decisions of licensees. Based upon our analysis of the record, we have concluded that a 5% benchmark represents the best choice in this regard.

14. Our stockholding survey reveals that, under current attribution, aggregation, and reporting methods, a 5% shareholder appears to be one of the largest two or three shareholders, on average, in a widely-held corporate licensee.[16] In only a few cases are there more than three such shareholders, and in several cases there is only one such shareholder. Furthermore, a 5% or greater holding is substantially larger than the holdings of the host of lesser stockholders. Such a position makes the great majority of 5% or greater shareholders the preeminent shareholders

[15] Over the years, numerous scholarly treatises have chronicled the increasing occurrence of management control in large corporations as sizable family holdings dissipate and stock becomes more widely dispersed. *See, e.g.,* A.A. Berle, Jr., and G.C. Means, *The Modern Corporation and Private Property* (New York: MacMillan Co. 1932), revised ed., 1968; R.A. Gordon, *Business Leadership in the Large Corporation* (Berkeley: University of California Press, 1961); M.L. Mace, *Directors: Myth and Reality* (Boston: Harvard Business School Division of Research, 1971).

[16] Although NBC's ownership survey lacks the necessary information regarding the methods and parameters it used to permit our reliance on it, we note that it basically confirms our own findings. *See* Appendix A, n. 7.

in their respective companies, with enough votes to potentially affect the outcome of elective or discretionary decisions and to command the attention of management. In view of these facts, it appears that a 5% benchmark is likely to identify nearly all shareholders possessed of a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution. In a corporation with no holders of 5% or more of its stock (approximately one fifth of widely-held licensees), it is probable that a holding of less than 5%, even though the largest holding in the corporation, is neither sufficiently greater than other holdings to accord it a distinct position nor significant enough to overcome the entrenched position of corporate management, particularly with respect to the day-to-day business judgments of the licensee, such as programming decisions.

15. In contrast, the adoption of a benchmark higher than 5% may result in many substantial and influential interests being overlooked. For example, the average occurrence of 10% or greater shareholders, under current attribution methods, is less than one for each corporation, and approximately half of the Commission's widely-held licensees have no stockholder with that large an interest. For over half of these corporations, however, there are one or two stockholders with an individual holding between 5% and 9.9%, a holding much larger than that of any other single stockholder, whose interest would not be attributed.

16. Beyond the statistical data from our ownership survey, we have examined ownership benchmarks utilized in other regulatory frameworks with a view to their applicability to our attribution determination. Our review reveals strong support for a 5% standard. Specifically, we note that none of the guidelines studied more closely parallels in purpose our own concerns than the stockholding disclosure requirements of the Securities and Exchange Commission (S.E.C.).[17] These requirements provide for the collection and public availability of information on all entities holding 5% of the stock of large publicly-traded corporations. 15 U.S.C. § 78m(d). In considering the significance of these requirements, we are mindful that our multiple ownership rules protect unique First Amendment concerns not within the S.E.C.'s jurisdiction. However, despite the different missions of the agencies and their respective regulations, to the extent that specific aspects of their rules are directed to the same purpose, they can be productively compared. In this regard, while the S.E.C.'s requirements are expressly intended for the protection of the shareholders in each company and of participants in the stockmark-

[17] For a discussion of other benchmarks considered and our reasons for finding them less relevant than the S.E.C. reporting requirements, see *infra* at paras. 22-23.

et generally,[18] they are directed to identifying interests with the potential for significant influence or control - the same interests at which our attribution rules are directed. Perhaps most telling, Congress reduced the S.E.C. reporting level from 10% to 5% in 1970, on the premise that "[acquisitions of more than 5% of a company's stock] may lead to important changes in the management or business of the company. . . ." *H. Rep. No. 91-1655*, 91st Cong., 2d Sess. (December 2, 1970).[19]

17. Importantly, nearly every demonstrable benefit to be derived from amendment of the attribution rules is achievable in large measure with a 5% benchmark, without incurring the risks involved in setting the benchmark higher. A 5% benchmark will eliminate attribution for over 80% of currently attributed stock interests; whereas a 10% benchmark would relieve only an additional 10% of interests, while adding a significant risk of overlooking influential or controlling stockholders for many corporations. The reporting burden is correspondingly lightened by an increase to 5%, whereas an increase to 10% will not afford appreciable additional relief for those with the greatest burden because the largest corporate licensees must report 5% or greater stockholders to the S.E.C. anyway under its disclosure requirements. 15 U.S.C. § 78m(d). Moreover, we are adopting several modifications to the rules unrelated to the basic attribution benchmark that will further increase capital availability and ease the burden and restrictions of the rules, without jeopardizing their basic integrity.

18. *Closely-Held Companies.* We agree with the parties promoting the elimination of the current distinction between widely-held and closely-held corporations for attribution purposes. Although the dynamics of the management of the affairs of a company may differ according to the dispersion of its stock, commenters have persuasively argued that this is as likely to decrease the relative importance of a given block of stock as it is to increase its importance. The holder of a small percentage of voting stock in a small company can be just as powerless and uninfluential as one in a large company, and often will be more so due to the greater occurence of large shareholders. On the other hand, the mere size of the shareholder group and the usually personal nature of the relationships among the shareholders provides much more meaningful and frequent contact and reduces the anonymity of shareholders.

[18] *See, e.g., Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d 1216, 1225 (4th Cir. 1980); *Abbey v. Control Data Corp.*, 603 F.2d 724, 731-32 (8th Cir. 1979); *S.E.C v. Savoy Industries, Inc.*, 587 F.2d 1149, 1166 (D.C. Cir. 1978); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1276-77 (5th Cir. 1978).

[19] S.E.C. rules further require that every 5% holder report every additional 1% acquisition as a "significant change." 17 C.F.R. § 240.13d-2.

19. The ambivalence of these conjectures is resolved, however, by the ownership survey which indicates that a 5% benchmark seems the most appropriate for those corporations heretofore considered "closely-held." Approximately two fifths of small licensees are sole proprietorships or 50/50 partnerships, in which cases attribution to all parties is a straightforward matter. Another one third of small licensees have a single majority interest holder, where attribution to the minority stockholders, regardless of the size of their shareholdings, is inappropriate.[20] That leaves approximately one quarter of small licensees whose owners will be directly affected by the particular benchmark applied. In those companies with more than just a few stockholders, of which one or two have clearly dominant holdings, the average size of the lesser holdings is well under 5% and most shareholders will thus be relieved of attribution by a 5% benchmark. This is appropriate because the dominant shareholders are most likely to control the affairs of the corporation. In those companies with no clearly dominant holding, a larger number of shareholders are on a relatively more equal basis, and most of the largest holders, with relatively equal power, will have an interest attributed. However, when the distribution of shares becomes so wide that interests are less than 5%, no interests would be cognizable, as would be appropriate given the lack of power any single shareholder possesses. Moreover, in each of these cases, those parties who wield particular influence are reasonably certain to appear as officers and directors and to have an interest attributed on that basis. Thus, these rules will serve to eliminate attribution for most noncontrolling and uninfluential stock interests, by absolving all holdings less than 5% and most of those holdings greater than 5% which are meaningless in terms of influence or control because of the dominance of other shareholders. At the same time, few significant shareholders are likely to escape attribution.

20. This rule change will have the additional benefit of significantly simplifying the rules and eliminating any discriminatory effect the existing distinction between widely and closely-held corporations may have occasioned. It could also significantly enhance the financial alternatives available to many of those small operations which traditionally have had the most difficulty obtaining financing, without diluting the underlying multiple-ownership restrictions which may be in effect.

21. *Companies with Single Majority Stockholders.* In those instances where a corporate licensee, whether closely or widely-held, has a single majority voting stockholder, it appears neither necessary nor appropriate to attribute an interest to any other stockholder in the corporation. In these circumstances, the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of

[20] *See* para. 21, *infra.*

the licensee on the basis of their shareholdings. These interests, therefore, will not be deemed cognizable for purposes of our multiple ownership rules.[21] However, officers and directors of such licensee corporations will continue to have an attributable interest.

22. *Other Benchmark Options.* Several other federal agencies use various ownership percentage benchmarks, as set by Congress or the respective agencies, in their regulations. As we have noted, however, none of these benchmarks is so clearly directed as the S.E.C.'s reporting requirements to defining the same kind of ownership position involved in this Commission's multiple ownership rules. The benchmark most frequently cited as relevant guidance in amending our attribution rules is that restricting alien ownership of broadcast facilities.[22] The alien ownership restriction, however, is unique in several respects. In its aim, it is primarily and uniquely fashioned to curb alien activities against the United States in time of war.[23] Since an alien shareholder would presumably face the united opposition of native shareholders in such circumstances, it was not unreasonable for Congress to establish a relatively high stockholding level at which further alien stock ownership would be prohibited. The alien ownership provision also differs significantly from our multiple ownership rules in its scope and effect. It absolutely prohibits direct ownership of any single broadcast facility by aliens, it refers to total, as opposed to individual, alien ownership interests in any one facility, and it applies equally to all financial interests in all business forms of licensees. The multiple ownership rules, on the other hand, are directed to the possible cumulative effects of interests in several stations, and only restrict ownership in more than a given number of stations. Consequently, they refer to any single individual's (or entity's) specific interests and are directed primarily to voting and management interests. Moreover, the 20% standard has not been considered a conclusive presumption regarding the existence of alien control.[24]

23. Various other federal statutes and regulations containing ownership benchmarks appear equally inapt as guidelines. For example, the "insider" restriction of the Securities and Exchange Act,[25] is concerned with an individual's access to inside information which can be used to manipulate a corporation's stock on the exchange for the personal gain of

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[21] This exception plainly rests on the assumption that a simple majority vote is sufficient to affirmatively direct the affairs of a corporate licensee.

[22] 47 U.S.C. § 310. Among other things, this provision prohibits direct alien ownership of more than 20% of the stock of a broadcast licensee corporation.

[23] *See Noe v. F.C.C.*, 260 F.2d 769 (D.C. Cir. 1958); *Hearings on S.2910*, 73d Cong., 2d Sess. at 170-171. *See also* Watkins, *Alien Ownership and the Communications Act*, 33 Fed. Comm. L.J. 1 (1981).

[24] *See Glaser & Fletcher*, FCC 75-312, March 13, 1975, 33 RR 2d 37, 38 (1975).

[25] 15 U.S.C. § 78p.

that individual. The regulations of the Federal Aviation Administration and the Civil Aeronautics Board, as well as other agencies regulating specific industries, are generally limited to precluding collusive or anticompetitive economic behavior, while our rules also encompass a fundamental concern with diversity of viewpoints.[26] The unifying characteristic of these rules is that they are intended to prevent intrinsically illegal or undesirable activities. The levels of stock ownership which these rules variously identify as carrying an appreciable risk of permitting such activities seem inappropriate models where, as here, the activity at issue – influencing a licensee's programming decisions – is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation.

24. Finally, the Commission will not return to the use of *ad hoc* determinations for attributing the ownership of facilities, as suggested in *Notice 83-46, supra* at para. 23. Such a procedure would be virtually impossible to administer, if only for the sheer volume of determinations that would have to be made. For reports required on a regular basis, the same determinations would have to be made repeatedly due to slightly changing circumstances from one report to the next. If reports were not required regularly, the Commission would be entirely dependent on the haphazard notification that would result only when it occurred to an outside party that certain multiple interests might violate the rules and that the Commission should be advised. Furthermore, such a procedure would inevitably lead to unpredictable and inconsistent results, even if specific criteria such as those advanced in *Notice 83-46* were employed,[27] with the significant adverse consequences for licensees cited by the commenting parties. Even under the existing, specific attribution criteria, the Commission is called on to make innumerable individual judgments in the context of waiver requests and situations not contemplated by the rules. The rules adopted herein are intended to be sufficiently definitive to eliminate the need for most such individual determinations, lending consistency and predictability to the results.

25. *Rebuttability of the Benchmark.* While a definite benchmark will therefore be employed to establish cognizable interests, the presumption it establishes will be rebuttable in extreme cases. If an ownership interest is above the benchmark, the holder can attempt to show that the interest should not be cognizable. Such a stockholder will have a heavy burden of

[26] The C.A.B.'s regulations, for instance, are designed, in part, to prevent collusive fare structures, and presume a holder of 10% of a carrier's stock may be able to engage in such activities. 49 U.S.C. § 1378(f). It is notable that, for all acquisitions, C.A.B. requires the reporting of all 5% or greater interests for its consideration.

[27] *Notice 83-46* included proposed criteria that could be used for determining whether interests below the benchmark should be attributed, in the event a relatively high benchmark were adopted. *Notice 83-46, supra* at paras. 23-24.

proof. The primary factor in such a showing would be a demonstration that another person (or persons) is in indisputable control of the licensee.[28] Important elements of such a demonstration would include the size of the stockholding of the alleged controlling party and how that stockholding compares to the others in the corporation, the nature of active participation in the corporation by that person, and concrete examples of his ability to consistently control the activities of the licensee.[29] These provisions should provide relief in those cases which most clearly warrant exception from the rules, without jeopardizing the integrity of the rules or the order they will provide, as some commenters fear.

26. *Additional Considerations.* We are cognizant of the fact that there are many more broadcast and other media outlets operating today than when the current attribution rules were adopted. The Commission has responded to this change by investigating the need to amend our multiple ownership rules to reflect the apparent increase in inherent diversity represented by this growth and has proposed appropriate changes in those rules.[30] The substantial growth in media voices alone, however, while relevant to our attribution decision, is not of primary significance. As we noted earlier, the attribution rules are the mechanical process of determining what constitutes an interest sufficient to affect the operations of the licensee. This determination is distinct from the determination of the number of outlets one party should operate to achieve the optimum level of diversity and competition.

27. While several parties argue that these marketplace changes result in more competition for broadcasting capital, there has been no evidence presented in this proceeding to indicate that the availability of capital generally has not increased along with the demands upon it. In any event, we are convinced that the substantial relaxation of the attribution standards effected by our decision here should be more than adequate to remove any constraint which these rules impose on capital sources. We note, moreover, that any easing of the multiple ownership restrictions themselves, now under consideration by the Commission, will profoundly affect investor activity and the availability of capital for all broadcasters.

28. While there have been general claims that the current rules present a serious impediment to the entrance of new broadcasters and thereby actually reduce diversity, those concerns should and will be addressed to the extent they are not simply overstated and undersupport-

[28] Modifications in the rules adopted herein remove the need for such a showing by even substantial minority shareholders if there is a single majority shareholder in the corporation. *See* para. 21, *supra*.

[29] While the Commission will consider requiring a pledge of noninvolvement in any case for which an exception is granted pursuant to such a demonstration, the offer of such a pledge will not itself be dispositive.

[30] *See* n.2, *supra*.

ed. Specifically, several provisions are outlined below which significantly enhance the ability of new and small broadcasters to employ their primary sources of capital without undermining the integrity of the rules or the premises upon which they are based.

29. *Conclusion.* We are convinced that the 5% attribution benchmark we are adopting today, together with the other modifications adopted herein, should increase potential capital availability to broadcasters, even beyond the extent to which any need has been demonstrated by commenters.[31] It will also render the rules more realistic and effective, reduce the reporting and compliance burden where feasible, and avoid unnecessary government intrusion where possible, all while maintaining the essential integrity of the underlying multiple ownership rules.

(2) *"Passive" Investors*

30. In *Notice 83-46*, the Commission also sought comment on whether there are any legal or policy reasons for maintaining the distinction and separate benchmark for "passive" investors such as bank trust departments, insurance companies, and mutual funds. The evolution of this distinction is outlined in paragraph 4, *supra.*

31. Several parties urge retention of the separate classification and benchmark for "passive" institutional investors, and propose various modifications of that classification to include additional institutions. In this regard, they reiterate the Commission's own rationale that such institutions invest for income only, are so bound by fiduciary responsibility, and are either prohibited by law or simply not in the practice of taking control or influencing the programming decisions of the companies in which they invest. Opposing parties argue that the distinction is unrealistic, as a given ownership position confers the same status, whether to an individual or an institution. Others add that a general raising of the benchmark eliminates the need for continuing the distinction.

32. The Commission has already recognized the somewhat different position of certain "passive" institutional investors as compared to other investors, and has determined that such status warrants separate consideration and treatment within our attribution rules. We have said in the past: "With rare exceptions, the banks are passive investors who manage the trusts for investment purposes for the beneficiaries and not

[31] One party submitted a study comparing the debt/equity ratios and retained earnings of selected Canadian and U.S. broadcast companies. While this information intends to suggest that the current 1% benchmark may be restricting capital, it is not sufficiently reliable to justify a dramatic change in the rules. In this regard, we note the profound differences in the size and fundamental nature of the two countries' industries and the conglomerate nature of several of the sample corporations. Moreover, information supplied by other parties concerning recent revenue levels and stock prices, while also not conclusive, indicates a generally healthy state for the industry.

to control the management or policies of a broadcast company;"[32] that "institutional investors [insurance companies, investment companies, bank trust departments] play passive investment roles;"[33] and that the benefits this exception will provide by "strengthening the economic foundation of the broadcasting and cable industries" outweighs the concern over the influence exerted by the voting and trading of the larger blocks of stock which the exception permits.[34] In our previous consideration of this subject we further found that "commenting parties have offered no actual cases of institutional investors using their minority interest in widely-held cable or broadcast companies to exert influence on the management of such companies."[35]

33. These reasons pertain no less today. Commenters have advanced no evidence, and we are aware of none, which would contradict the appropriateness of the passive status we have traditionally accorded to investment companies, bank trust departments and insurance companies. Moreover, based on our experience with the existing 5% benchmark and the comments of numerous parties to this proceeding, it appears that the benchmark for these "passive" institutional investors can be safely raised to 10%. This action should substantially increase the investment flexibility of these entities and, in so doing, expand the availability of capital to the broadcast and cable industries without significant risk of attribution errors. We do not believe, however, that an increase in the passive benchmark above 10% is similarly advisable. We have previously observed that merely voting or trading large blocks of stock can affect the management of a company,[36] and the S.E.C. has reached a similar conclusion.[37] Based on our stock distribution survey, it appears that a block of 10% or more of voting stock approximates the shareholding level in most broadcast corporations that could often result in this effect, even if inadvertent and unintended.

34. The application of this benchmark presumes, of course, that the party using it maintains a truly passive role in the affairs of the licensee. This would include refraining from contact or communication with the licensee on any matters pertaining to the operation of its stations and no representation on the board or among officers of the licensee corporation

[32] *Report and Order* in Docket No. 18751, *supra* at 892.

[33] *Report and Order* in Docket No. 20520, *supra* at 975; *Report and Order* in Docket No. 15627, *supra* at 369; *Report and Order* in Docket No. 20520, *supra*.

[34] *Id.*

[35] *Id.*

[36] *Report and Order* in Docket No. 15627, *supra* at 369; *Report and Order* in Docket No. 20520, *supra*.

[37] *Report and Order* in Docket No. 20520, *supra*; Securities and Exchange Release No. 14692, *On Beneficial Ownership Reporting Requirements: Report of S.E.C. to Senate Committee on Banking, Housing, and Urban Affairs,* July 1980, at n.87.

by persons professionally or otherwise associated with the institution. As a safeguard in this respect, each licensee will be required to certify that no such party has exerted or attempted to exert any influence or control over any of the affairs of the licensee. With inclusion of this certification provision, we find it unnecessary to require disclaimers of control by passive investors themselves, as has been required in the past.

35. While similar institutions should be treated similarly, several commenters correctly point out that all institutional investors do not operate in the same manner and that each should be accorded attribution status based on its specific function and nature. We agree. Accordingly, we will here consider individually each of the types of institutions which have been specifically proposed for inclusion as passive investors in this proceeding.[38] In doing so, by identifying qualifying and disqualifying characteristics, we will provide relevant guidance for future cases which may arise. Under the instant circumstances, we find this approach preferable to adopting criteria in a vacuum, the implications of which might not be apparent.

36. In RM-3653, First Manhattan Company requests that "investment advisors"[39] be accorded the same treatment as other passive investors since they resemble them in many respects and in some respects might be considered even more passive. In this connection, First Manhattan points out that investment advisors are generally divorced from the power to vote stock or to direct its disposition. In RM-3695, Investment Company Institute makes the same request, and proposes a 10% benchmark.[40] In those instances where an investment advisor does not have the power to vote the stock it holds or to direct its disposition, it should be and will be

[38] The request for waiver by the Ford Foundation is moot in that it seeks 5% benchmark status, which will now be universally applied as a result of our action today. In its petition, Ford admits that it takes a somewhat active role in promoting certain social policies, both through its use of proxies and through direct contact with the management of the companies in its portfolio. Given this activity, it cannot be considered passive and should be and will be attributed with ownership at the 5% stockholding level. In any event, Ford indicates that its problems with the multiple ownership rules resulted from cross-directorships, rather than because of its stockholdings. In this regard, we note that our actions herein concerning the insulation and nonattribution of directors and the use of a multiplier in certain situations may provide additional relief.

[39] An investment advisor is an entity or individual that advises others, for a fee, of the value of securities and the advisability of securities investments. 15 U.S.C. § 80b-2(a)(11). An investment advisor, commonly a "broker dealer" (15 U.S.C. § 78o), will often directly invest for its clients, using its own discretion within whatever guidelines the client may provide. In this respect, it differs from an investment company since the stocks that it purchases belong directly to its client (although they may be held custodially in the investment advisor's name), whereas an investment company purchases stock for itself and in turn sells stock in the investment company.

[40] RM-3695 also requests that investments companies be given a 10% benchmark. That issue has already been addressed. *See* para. 33, *supra*.

treated the same as any other custodial holder; that is, ownership will not be attributed to it even if its name is on the stock certificate. With this provision, there is no need to raise the benchmark further than the standard 5% for such entities. We are aware, however, that an investment advisor's services, under its contract, may include the voting of the stock it holds. Such stock will be subject to the standard 5% benchmark and attributed to the investment advisor as appropriate. While some justification may exist to warrant according investment advisors passive status, we are not fully confident, based on the record now before us, that we should do so at this time. In view of the substantial upward adjustment of the basic attribution benchmark accomplished by our action today and the ease with which investment advisors may avoid attribution by passing through voting rights to beneficial owners, we do not believe that declining to grant these entities passive status at this time will be prejudicial. To the extent necessary under the revised criteria, we will continue to consider waiver requests from investment advisors regarding the appropriate attribution of their voting interests.[41]

37. Centennial Fund, in its petition (RM-4045), seeks an extension of passive status to pension funds, arguing that such status was rejected in the *Report and Order* in Docket No. 20520, *supra,* only because of a lack of evidence and experience with these funds under the newly enacted Employee Retirement Income Security Act of 1974 ("ERISA"). It does acknowledge that pension funds are not entirely passive, but it contends that the same can be said for the recognized passive investors. Our own research, however, has disclosed testimony in a Senate hearing indicating the increasing extent to which pension funds particularly are managing their own investments and actively pursuing various social goals in their investment policies, consistent with their fiduciary responsibility under ERISA.[42] [43] There is no similar evidence regarding the activities of

[41] We note that First Manhattan, an investment advisor, was granted exemption from the standard benchmark in *Stoner Broadcasting System, Inc.*, 74 FCC 2d 547 (1979). That ruling, which was limited to the particular stockholding and was prompted by a desire to avoid divestiture of stock already held, involved an amount of stock less than that permitted by the new standard benchmark, and specifically depended on First Manhattan's agreement not to vote the stock above the current 1% benchmark. Moreover, no further accumulation of stock was to be permitted, and no subsequent violation was to be permitted following any voluntary divestiture. Given these decisional factors, this case does not support a general characterization of investment advisors as passive entities for attribution purposes.

[42] *Pension Fund Investment Policies: Hearings before Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. (November, 1978); *Beneficiary Participation in Private Pension Plans: Staff Report of the Subcommittee on Antitrust, Monopoly, and Business Rights of the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. (1979).

currently recognized passive investors. Furthermore, one of the major problems encountered by pension funds as recounted by Centennial - investment in two or more portfolio companies with investments in broadcasters - will be relieved in most instances by the multiplier provision adopted herein. Accordingly, we decline to accord passive status to pension fund investors.[44]

38. We also will not accord passive status to Small Business Investment Companies (SBICs), Minority Enterprise Small Business Investment Companies (MESBICs) and other venture capitalists at this time. While we recognize the critical role these entities play in the establishment and expansion of new and small broadcast companies, and particularly the entry and support of minority owned enterprises, we are convinced that the actions we have taken herein should satisfy the investment flexibility needs of these companies without extension to them of passive status under our attribution rules.[45] Specifically, it appears that the investment restrictions they typically face can be relieved by our provisions for non-voting stock (including preferred stock and non-voting stock with convert-

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[43] For example, the Amalgamated Clothing and Textile Workers Union received support from several other labor unions in a campaign of "corporate isolation" in conjunction with its efforts to unionize J.P. Stevens. Manufacturers Hanover Trust Company was pressured into dropping two Stevens' officials from its Board of Directors to avoid the withdrawal of over $1 billion in union trust and pension funds. Two multi-million dollar union accounts were actually closed, and union pension fund organizations led groups in placing various labor-management issues on the 1979 Stevens' proxy for consideration by stockholders. This campaign by ACTWU was cited as a major factor in bringing about the settlement announced on October 17, 1980. "News for Investors," Volume VII, No. 10, November 1980, at 205.

[44] We are aware that we have previously permitted a pension fund to utilize the passive investor attribution benchmark on the grounds, *inter alia*, that it resembled a mutual fund. *College Retirement Equities Fund*, 35 FCC 2d 885 (1972); *Report and Order* in Docket No. 20520, *supra* at 979. This decision, however, was based on the facts of that particular case and did not reflect a judgment that pension funds generally should be deemed passive investors for attribution purposes. Indeed, in the Commission's subsequent reconsideration of its *Report and Order* in Docket No. 20520, it specifically rejected passive status for pension funds, stating that "we have not been shown any justification or need for an across-the-board rule." *Memorandum Opinion and Order* in Docket No. 20520, 65 FCC 2d 336, 339 (1977). In any event, our findings in this proceeding suggest that pension funds, as a class of investors, are not so consistently passive in nature as to warrant relaxed benchmark treatment under our attribution rules. Moreover, because of these findings and because no need for additional relief has been demonstrated, we will not extend the 10% benchmark now applicable to passive investors to the College Retirement Equities Fund ("CREF"). Our decision in this regard will not prejudice CREF since it is currently subject to a 5% benchmark and may continue to utilize that percentage criterion under the standard attribution benchmark.

[45] We note that, while generally prohibited from assuming control of the companies in which they invest, SBICs and MESBICs are authorized to exercise control over debtor companies for temporary periods under specified conditions. 13 C.F.R. § 107.901.

ible voting rights), for various kinds of convertible securities and paper, and for limited partnership interests, as well as the substantial upward adjustment of the basic benchmark itself. In light of these alternatives, we find no compelling reason to alter the 5% benchmark for these entities.[46]

39. Some commenters have pointed out the problems encountered under our attribution and multiple ownership rules by certain institutions which may acquire stock involuntarily on a temporary basis. To relieve the specific difficulties in this regard of which we are aware, insurance companies henceforth will be permitted to exceed the 10% standard for a period of not more than one year in cases where they acquire stock as a result of a recapitalization of a company in which they have invested. If divestiture of the interest exceeding the benchmark is not achieved within one year of the date of acquisition of the interest, it will be attributed to the company concerned unless specific waiver of the rules is granted before that time. Identical provisions shall be applied to bank trust departments which acquire such interests involuntarily, *e.g.*, in the execution of an estate.

40. Finally, we note that the Commission's primary focus in devising its attribution rules governing stock ownership in corporate licensees is to identify and account for those parties holding significant potential influence over these licensees by virtue of their shareholdings. In this endeavor, we have generally concentrated on those parties with the power to vote the stock concerned. Following this approach, we deem it appropriate to relieve from attribution any party, whether an institution or an individual, that holds stock in a custodial capacity and effectively passes through the right to vote that stock to the beneficial owner. This provision is particularly significant for brokerage houses, which commonly hold large amounts of stock in "street name" for other parties, and for investment advisors, that often buy stock in their own names on behalf of their clients. This clarification of our attribution rules, in conjunction with application of the multiplier to reduce the attribution of indirect interests in vertical ownership situations, should provide significant relief to many institutional investors without appreciable risk of attribution errors. We emphasize, however, that to the extent the power to vote the stock concerned is not effectively passed through, the multiple interests of custodial holders will continue to be aggregated for attribution purposes.

[46] Some commenters requested an exception to our rules to permit SBICs and MESBICs to own unlimited amounts of voting stock without attribution, arguing that their passive natures and worthy purposes warranted such exemption. For the reasons stated above concerning passive status for these investment entities, we do not consider this exception advisable.

B. *Use of a "Multiplier" in Vertical Ownership Situations.*

41. *Notice 83–46* also proposed multiplying successive interests in vertical ownership situations to determine the attributable status of a remote interest in the ultimate licensee. After reviewing the comments, we conclude that this use of a multiplier would more realistically reflect a party's attenuated interest in a licensee where there are intervening corporations, than does the present practice of fully attributing any interest above the benchmark through each intervening corporation. As an entity's interest becomes further removed from the actual licensee, there is participation by increasing numbers of intervening officers, directors and managers in any decision ultimately affecting the licensee. Even those interests which are effectively controlling through any one link in a vertical ownership chain will be diluted by these intervening layers of management. As a practical matter then, the actual involvement with the ultimate licensee of officers, directors and major stockholders of a corporation with a significant but remote interest in the licensee may be virtually nil where several intervening corporations exist. Multiplication of the interests is intended to account for this diminution of involvement in attributing ownership interests. We will, however, modify the "straight" multiplier as proposed in *Notice 83–46* in one significant respect. Where a link in the ownership chain represents a percentage interest exceeding 50%, that link will not be included in the successive multiplication used to determine the cognizable status of ownership interests in the vertical chain.[47] With this exception, then, any party's interest in a licensee which is held indirectly through a chain of companies will have the appropriate benchmark applied for determining attribution to the product of the percentage values of the successive stockholdings which lead to the licensee.[48]

[47] This pass through provision reflects the line of *de jure* control. While indicia of *de facto* control similarly could be used to restrict the multiplier, that would require this Commission to judge on an *ad hoc* basis when to apply the multiplier. More importantly, shareholders would be at risk of violating the multiple ownership rules at any time an intermediate entity in which they held an investment was "deemed" to be in *de facto* control or attributed with a cognizable ownership interest by virtue of the multiplier's effect on a remote subsidiary which was "deemed" to be in *de facto* control of the licensee. Such action injects uncertainty, complexity and great administrative burden on applicants, licensees and the Commission alike, while rendering the multiplier of little practical use. Noting the underlying inexact relationship between program influence and ownership interests in the first instance, on balance we conclude that the remote possibilities of attenuated influence over station programming are outweighed by the benefits of a simple, certain and administratively useful mechanism to reflect this attenuation.

[48] For example, assume that stockholder A owns 10% of company X, which owns 20% of company Y, which owns 60% of company Z, which owns 15% of company L, a broadcast licensee. Under the modified multiplier approach, Y's interest in L would be 15% (the

42. We do not presume that the exercise of programming influence in these situations can be predicted with the mathematical exactitude this formula suggests.[49] However, it will provide a simple, workable and long overdue means of accounting for the real dilution of interest in these situations and thus end much inappropriate attribution which occurs under the present method. While perhaps imperfect, we do not believe that this approach entails a significant probability of attribution errors. To the extent, however, that such errors do occur, we are convinced that they will not be substantial, particularly in view of the relatively low basic benchmark we have adopted herein. On balance, we conclude that the benefits to be achieved by adopting a multiplier outweigh the limited risk involved.

C. *Other Attributable Interests.*

43. In 1978 the Commission instituted a rule making to consider the appropriate attribution of stock held in voting trusts and of various other non-voting interests in licensees. *Notice BC 78-239, supra.*[50] The stated reason for this action was to consider the argument that attribution of ownership to these non-voting interests would reflect the potential for influence that such interests carry and might serve to maximize diversification of ownership of broadcast and cable television interests. *Notice BC 78-239, supra* at 1303. The Commission specifically questioned whether trustees of voting trusts are sufficiently insulated from the beneficial owners to independently exercise voting rights and whether significant

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same as Z's interest because Y's interest in Z exceeds 50%), X's interest would be 3% (0.2 x 0.15), and A's interest would be 0.3% (0.1 x 0.2 x 0.15). Using the modified multiplier and the existing 1% benchmark, A's interest in L would not be cognizable, while under the current rules governing vertical attribution it would be. If both the new 5% benchmark and the modified multiplier are used, neither A nor X would have an attributable interest in L.

[49] This lack of "mathematical exactitude" constituted the singular basis for our earlier rejection of the multiplier concept in the *Report and Order* in Docket No. 15627, *supra.* The more thorough analysis undertaken herein leads to the contrary conclusion for the reasons stated.

[50] The impetus for such a review of Commission policy derives from our consideration of two assignment of license cases which posed questions as to the propriety of using a voting trust and non-voting stock to facilitate station transfers which would not be allowed under the multiple ownership rules if the respective stocks were held outright. In both cases the Commission noted that precedent was ambiguous, that the propriety of such devices was not clear, but that there were other public interest considerations favoring grant of the transfers pending the institution of a rule making. *Bonneville International Corp.*, FCC 77–832, released December 8, 1977, 43 RR 2d 863; *Evening Star Broadcasting Co.*, 68 FCC 2d 129 (1978), *reaff'd as mod. on other grounds*, 68 FCC 2d 158 (1978). Similar concerns were raised by the employment of trusts to avoid the proscriptions of the cross-ownership rules in *Rust Craft Broadcasting Co.*, FCC 77–829, released July 26, 1978, 43 RR 2d 947, and *Television Wisconsin, Inc.*, FCC 77–830, released July 26, 1978, 43 RR 2d 958.

influence resides with the power to dispose of the stock held in trust. It also sought information on the extent of such arrangements in broadcasting ownership provisions and the customary provisions they included. It further questioned whether a block of non-voting stock could carry influence if large enough, particularly when held in conjunction with some other business or familial relationship. With regard to both non-voting stock and voting trusts, the Commission sought comment on the likely effect that the attribution of such interests would have on minority ownership in broadcasting. At the same time the Commission asked whether an ownership interest should be attributed to other non-ownership interests such as lease-back arrangements and debt holdings. The question of whether these non-ownership interests should be reported had already been raised in *Notice 20521, supra.* In *Notice 83-46* the Commission stated its intent to include these issues in this comprehensive review, requesting any comments that would contemporize or further elucidate those already filed in response to *Notice BC 78-239, supra. Notice 83-46, supra* at para. 27.

44. It appears from the comments in response to the subject rule makings that most non-voting interests in licensees should not be considered cognizable for purposes of applying the multiple ownership rules.[51] Contrary to some assertions, there is little "risk of influence" pertaining to these interests. Yet, they comprise a variety of important, effective vehicles by which a substantial amount of capital can be made available to the industry without jeopardizing the efficacy of the underlying multiple ownership provisions. Judging from the comments submitted, one area in which many of these mechanisms are most useful is in facilitating increased participation by new entrants and small licensees, and particularly minorities.

(1) *Non-voting Stock*

45. As several parties suggest, non-voting stock by its specific nature precludes the means to influence or control the activities of the issuing corporation, and this relationship is knowingly and intentionally entered into by the corporation and by the stockholder. No party has proposed circumstances under which this stock could confer any appreciable power on its holder. Moreover, the availability of an unattributable non-voting stock investment mechanism provides significant benefits. This device, for example, appears to be an invaluable means by which existing and prospective licensees raise new capital without diluting their control over their companies. It can also contribute significantly to relieving the

[51] Bearing in mind the limited probity of the observation, we note that the attribution practices of other federal agencies studied unanimously accord non-cognizable status to non-voting interests.

dilemma faced by venture capital companies. Through non-voting stock, these companies can obtain the equity deemed necessary to compensate their risk, while avoiding any implication of the control prohibited by our rules and other federal regulation.[52] Such vehicles are thus particularly significant in promoting the diversity of ownership at which the multiple ownership rules are directed.[53] Accordingly, we will continue to consider non-voting stock interests to be non-cognizable for purposes of the multiple ownership rules.

46. Non-voting stock which is convertible to voting stock will also not be considered a cognizable interest. If the contingency upon which the conversion right rests is beyond the control of the stockholder, attribution is clearly not appropriate, as no power to control or influence is even arguable. However, even if the contingency is within the stockholder's power to effect and its exercise may be imminent, until the stockholder actually has the power to vote, he should not be able to exercise influence or control subject to our rules. A "threat" to convert stock in order to vote is an empty gesture if such conversion would put the stockholder in violation of the multiple ownership rules.[54] If such a conversion would not violate the rules, reliance upon it to exert influence does not contravene the purpose of the multiple ownership rules.

47. A reservation the Commission has expressed concerning non-voting stock with convertible voting rights is that it may have a depressing effect on the value of common voting stock if "dumped" on the market, and therefore might confer some power on its holder. *See, e.g., Evening Star Broadcasting Co., supra.* No demonstration of this possible phenomenon has been advanced in response to that case or the subsequent rule making proceedings, and we are prepared now to disregard that reservation. Additionally, a power to compel dividends or financial distribution attached to a non-voting interest has not been shown to confer the power to influence or control a licensee in a manner contemplated by the multiple ownership rules, and we will not consider the existence of such a power to change the noncognizable nature of a non-voting stockholding.

(2) *Other "Convertible" Interests*

48. This same logic applies to warrants, debentures, and other convertible interests, many of which can be bought and sold for value

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[52] *See, e.g.,* n.45, *supra.*

[53] Despite the ability of two entrepreneurs cited by one party to finance their station acquisitions without surrendering equity to a financer, many parties are not in such a strong financial position. Those parties should not be denied the opportunity to enter the industry, even if they must begin operations in a demanding financial position.

[54] Our enforcement authority clearly extends to individuals whose actions precipitate a violation of our rules. *See* para. 77, *infra.*

without ever being converted to stock. Like non-voting stock, they represent another important vehicle for financing because they exist outside the concerns and constraints of the multiple ownership rules.[55] We see no reason to alter this status or withdraw the clear benefits it confers.

(3) *Debt and Lease-Back Agreements*

49. We will not consider debts or lease-back agreements to confer a cognizable interest in the holder. There is no direct influence or control which pertains to them, and any indirect influence or control, if it occurred, would be too irregular and involve too many other factors for the Commission to oversee. Although there is no explicit information before us, it seems probable that the inclusion of debt in our rules would create numerous rule violations and present extremely severe restrictions on capital sources for broadcasters large and small, particularly since the sources of debt financing are far fewer than for equity financing. Some sources of financing must obviously be available to broadcasters, and these sources seem by far the least likely to involve an interest with which the multiple ownership rules need be concerned.

(4) *Partnerships and Associations*

50. Traditionally, partnership interests have been attributed under our rules. With respect, at least, to all but limited partners, this appears both logical and consistent with our objectives since partners are characteristically endowed with the power and responsibility to collectively or singly conduct the affairs of the partnership.[56] Accordingly, we will continue to attribute these interests as we have in the past. Other proprietary and cooperative ownership arrangements will be considered on a case-by-case basis in view of their highly variable natures.

51. *Limited Partnership Interests.* Limited partnership interests, however, can be safely exempted from the effects and implications of the attribution rules. A typical limited partner is in a position similar to that of the holder of a debt or non-voting stock as far as involvement in the management of the company is concerned.[57] Such an interest, conferring no influence or control over the licensee, is thus not within the purview of the multiple ownership rules. Furthermore, the involvement of limited partners in certain enterprises provides another important source of

[55] One party is concerned with the potential rule violations it faces when it accepts stock pledges or warrants as security for a loan. There seems little likelihood, however, of loan defaults precipitating stock conversions sufficient to pose a problem under our attribution and multiple ownership rules. In any event, in those cases where conversion is desired, the resulting stock presumably has some value which should permit its sale if its retention would otherwise violate the rules.

[56] *See, e.g.,* Sections 7 and 9–10 of the Uniform Partnership Act. 6 U.L.A. § § 7, 9–10.

[57] The inability of a limited partner to affect the management of a partnership has already been recognized by the Commission. *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981).

capital for the industry,[58] without inherently affecting the distribution or concentration of control within the industry.

52. While we are convinced that limited partnership interests should be accorded non-cognizable status, we are also concerned, in view of the variable nature of the law in this area at the state level, that some means be provided to verify appropriate insulation of the general partner from any possibility of control or influence by the limited partners. As a means to this end, and in order to provide a measure of predictability as well as guidance for prospective limited partners, we will look to the provisions of the Uniform Limited Partnership Act of 1976 as a standard.[59]. Limited partners of a limited partnership conforming in all significant respects to these provisions will be considered exempt from attribution upon certification by the licensee or applicant that the partnership so conforms. Limited partners taking their interest under a partnership agreement which differs in any material respect from these provisions will be accorded non-cognizable status only upon submission of the agreement to the Commission accompanied by an acceptable explanation of how it nonetheless satisfies our stated concerns. Any limited partner relieved of attribution by these provisions may not be involved in any material respect in the management or operation of the broadcast, cable television or newspaper entity concerned.

(5) *Trusts*

53. Voting trusts present a somewhat more complex problem. In many cases, trusts are established for personal and economic reasons unrelated to any Commission rule, such as estate planning and income for dependents. Such trusts should be facilitated to the extent possible. Also, despite some banks' experience to the contrary, voting trusts are occasionally established specifically to effect compliance with the Commission's rules for holdings which would violate the rules if held outright. They are often used to execute a multi-phase transaction or one involving both broadcast and nonbroadcast properties which will ultimately result in holdings consistent with the rules, but entail temporary violations of the rules.[60] At other times, a trust may be used to indefinitely avoid divestiture of a valuable investment, often in conjunction with a new transaction.

54. The Commission has recognized the effective insulation such arrangements can provide, while maintaining a concern about their

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[58] *See, e.g.*, "Limited Partnerships and Leveraged Buyouts," *Broadcasting*, November 14, 1983, p. 40.

[59] 6 U.L.A. § 101, *et seq.* We will be particularly interested in conformance with § § 107–804, designed to ensure the independence of the general partner.

[60] *See, e.g., Metropolitan Theatres Corp.*, 85 FCC 2d 1004 (1981), *Westinghouse Broadcasting Co., Inc.*, 84 FCC 2d 938, 48 RR 2d 1377 (1981).

potential for abuse, depending on the particular provisions of each trust.[61] We will continue to accept trusts as legitimate insulation devices, judging their acceptability for our purposes on a case-by-case basis. We take this opportunity to clarify the criteria by which we evaluate these agreements in order to provide guidance for future use.

55. Any person (or entity) holding or sharing the power to vote the assets of a trust will have those assets attributed to him. If those assets are above the benchmark adopted herein, that person will be deemed to have a cognizable interest in the licensee's facilities. This is a straightforward application of the multiple ownership rules which are directed to the influence or control which the power to vote stock confers. Additionally, a grantor or beneficiary (or any other third party) who holds the unrestricted power to replace a trustee or to revoke a trust will also have the assets of that trust attributed to him, unless such power is contingent upon some event beyond that person's control. Such an arrangement clearly permits the holder of the replacement or revocation initiative to substitute his judgment for that of the trustee on issues involving the subject licensee.[62]

56. Where the power to sell voting stock is retained solely by the beneficiary or grantor, there is a potential for abuse which the Commission has recognized in past cases[63] and which has been reinforced by several parties to this proceeding. Retention of such a power will therefore constitute a cognizable interest if the trust assets exceed the benchmark established herein.[64] However, if power to sell the stock is held by the trustee or shared with the trustee, then only the trustee will have the interest attributed, as the trustee's fiduciary responsibility and independence of action should prevent the beneficiary from using the ability to sell stock to directly influence or control a licensee. In any case, if the beneficiary or grantor of a trust is to avoid attribution of the stock, the trustee must be an independent person with no familial or business relationship with the beneficiary or grantor. Moreover, the trust instrument must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities. Also, in order to ensure noninvolvement by the beneficiary or grantor, their entire holding in the licensee must be in trust to avoid attribution of the interest.[65]

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[61] *See* n.50, *supra.*

[62] *See, e.g., Farmville Broadcasting Co.*, 47 FCC 2d 463 (1974).

[63] *See, e.g., Television Wisconsin, Inc., supra.*

[64] The S.E.C. has also determined that the power to dispose of stocks, standing alone, gives its holder the ability to "change or influence control," in deciding to include that power in its disclosure regulations. Securities Exchange Act Release No. 14692; *On Beneficial Ownership Reporting Requirements: Report of S.E.C. to Senate Committee on Banking, Housing and Urban Affairs,* July, 1980, at n.87.

[65] *Television Wisconsin, Inc., supra.*

D. *Consideration of Officers and Directors.*

57. In *Notice 83-46* the Commission also stated its intention to explore the issue of attribution to officers and directors (and equivalent representatives of noncorporate entities). It specifically suggested that some prescribed insulating mechanism might be appropriate to relieve attribution to those officers and directors and other representatives of an entity with a cognizable interest in a licensee who individually have no meaningful relationship to the licensee or its operations. *Notice 83-46, supra* at para. 43.

58. After reviewing the comments addressing this issue, we continue to believe that a limited means of relieving certain corporate officers and directors of attribution consequences should be available. The scope of our intention in this regard is narrow, however, for we do not intend to permit officers or directors to disclaim their interests as a matter of course. The basic rationale for attributing interests to officers or directors of corporate licensees or those of the licensee's parent corporations remains valid. Generally, the potential influence over a licensee wielded by these individuals is significant and should be cognizable if the purposes of our multiple ownership rules are to be properly vindicated. We recognize, as various parties contend, that this approach may impose constraints on the availability to interested corporations of officers and directors with "media expertise" because it restricts the limited number of such individuals from serving in these capacities on behalf of multiple corporate licensees. It is, however, precisely the ability of an officer or director, particularly one with "media expertise," to influence multiple licensees that our ownership rules are intended to detect and limit, and properly so.[66]

59. On the other hand, we do find it appropriate to provide attribution relief for corporate officers or directors of multi-faceted parent corporations where these individuals' duties and responsibilities are neither directly nor indirectly related to the activities of any broadcast licensee in which their corporation has a cognizable interest.[67] By the premise of this exception, such officers or directors will not exercise authority or influence in areas that will affect the licensee or licensees involved, and we see no reason to attribute an interest to them "by association." Under this provision, eligible officers and directors will be accorded exemption from attribution upon submission by the licensee, in conjunction with its

[66] To the extent, of course, that these officers or directors are sufficiently removed from the ultimate licensee by intervening corporate entities, the multiplier provision adopted herein may afford them attribution relief. *See* paras. 41–42, *supra*.

[67] The officers and directors of licensees themselves may not utilize this provision, although they may continue to seek non-cognizable status, as in the past, by specific waiver request.

ownership report or in conjunction with a relevant application, of the individual's name, his full title, and a description of his duties and responsibilities, along with an explanation of why that person should not be attributed an interest. This should be an efficient way of handling the matter that will avoid the administrative burdens and delays that use of an individual waiver approach would entail. Moreover, these clear guidelines will permit companies to act with some certainty in this area. The simplicity of this process, however, should not be taken to connote a lack of concern on our part that licensees exercise care in ensuring the accuracy of their submissions. Statements not meeting the standards we have described will be rejected and the licensee will be expected to effect prompt compliance with our rules. This should discourage any inclination to claim this exception where it is not warranted.

E. *Reporting of Interests.*

60. All licensees are currently required[68] to name in their Ownership Reports (FCC Form 323) all officers and directors of the licensee, specifying their stock interest, citizenship, and dates of election, and all partners or stockholders (if more than fifty stockholders, only those with 1% or more of the outstanding stock) and their stock interests and citizenship. The Report also requires information on any other broadcast interest of the licensee and its principal parties (officers, directors, stockholders, partners), and any family relationships or business associations among the principals. Further, the Report requires a listing of all stock transactions since the previous Report, including date, amount paid, and the before and after stockholdings and votes of the transferor and transferee. These reports are required of licensees upon the grant of a construction permit, for each renewal application, and in conjunction with any transfer or assignment application. Additionally, widely-held licensees must file annually, while all other licensees are required to report, within 30 days, any change in their ownership information. A separate form is required for any other entity which directly or indirectly controls the licensee or which holds 25% of its stock.

61. An apparent flaw in this reporting system, recognized in *Notice 83-46, supra* at para. 36, is its inability to identify and properly attribute parties who hold interests in several separate accounts, each of which individually is below the reporting threshold, but which aggregately constitute a cognizable interest. This problem is exacerbated by the increasing occurrence of accounts held in "street name" by various custodial holders. The Commission sought comment on means to avoid this problem, as well as the frequency with which ownership reports should be required in the future, if at all, and whether the reporting

[68] 47 C.F.R. § 73.3615