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

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)))))))	MM Docket No. 97-234

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1999 **Released: August 5, 1999**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION AND BACKGROUND

1. In the *First Report and Order* in this proceeding, 13 FCC Rcd 15920 (1998) (*First R&O*), the Commission adopted rules and procedures to implement provisions of the Balanced Budget Act of 1997 expanding our competitive bidding authority, under Sections 309(j) and 309(l) of the Communications Act of 1934, 47 U.S.C. §§ 309(j), 309(l),[1] to include the commercial broadcast services. In a *Memorandum Opinion and Order* resolving numerous petitions for reconsideration filed against the *First R&O*, the Commission generally upheld its previous determinations made with respect to auction rules and procedures for the various broadcast services.[2]

2. Our recent *MO&O* did, however, refine the eligibility standards for the "new entrant" bidding credit, which, as adopted in the *First R&O*, provides a tiered credit for broadcast auction winning bidders with no, or very few, other media interests. In response to several reconsideration petitions, and to promote the clear and consistent application of the eligibility standards for the bidding credit, the *MO&O*: (1) amended the eligibility standards for the bidding credit to be consistent with the Commission's general broadcast attribution standards; (2) amended the eligibility standards for the credit so that a bidder's attributable interests in existing secondary broadcast stations are not counted among the bidder's other mass media interests in determining eligibility; and (3) refined the standards for determining whether a winning bidder's proposed broadcast station and the bidder's existing station(s) serve the "same area," thereby rendering the bidder ineligible for a bidding credit. *See MO&O*, FCC 99-74 at ¶¶ 71-79. The *MO&O* also provided that, in a further order in this proceeding, the Commission would consider an additional refinement to the attribution standards to be utilized in determining the eligibility of broadcast auction applicants for the new entrant bidding credit. *See id*. at ¶ 74. We address herein these further attribution issues.

[1] Pub. L. No. 105-33, 111 Stat. 251 (1997) (hereafter Budget Act).

[2] *See Memorandum Opinion and Order* in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, FCC 99-74 (rel. April 20, 1999) (*MO&O*).

II. DISCUSSION

3. In our *MO&O* in this proceeding, the Commission concluded that the eligibility standards for the new entrant bidding credit should be amended to be consistent with our general broadcast attribution standards, by which we define what constitutes a "cognizable interest" in applying the broadcast multiple ownership rules. Specifically, to determine whose other media interests would be counted in establishing whether a winning bidder qualifies for a bidding credit, we determined to consider the other media interests held by the winning bidder and by any entity or individual with an attributable interest in the bidder. Similarly, the interests of the winning bidder (and of any entities or individuals with an attributable interest in the bidder) in other media of mass communications would be attributable for purposes of the new entrant bidding credit to the same extent that such other media interests are considered attributable for purposes of the broadcast multiple ownership rules. The *MO&O* also noted that the broadcast multiple ownership rules are the subject of a pending rulemaking and that revisions to those attribution rules could be made in the near future.[3] For purposes of applying the general broadcast attribution rules to determine eligibility for the new entrant bidding credit in any future auction, we stated that those attribution rules would be applied as they exist at the time of the short-form filing deadline for that auction. *See id.* at ¶ 71.

4. As explained in detail in the *MO&O*, we believed that utilizing our well-established broadcast attribution rules to determine eligibility for the new entrant bidding credit in broadcast service auctions would best promote the goals of the bidding credit. Because the interests defined as attributable under our general multiple ownership attribution rules had already been judged to give their holders "a realistic potential to affect the programming decisions of licensees or other core operating functions,"[4] we concluded that such interests should also be cognizable in determining whether a bidder in a broadcast auction should be given a bidding credit as a true "new entrant." Given that the multiple ownership rules are designed to promote diversity in programming sources and viewpoints for the broadcast services,[5] which is one of the purposes of the new entrant bidding credit, we found that the same attribution rules should be applied in both contexts. *See id*. at ¶ 72.

5. In addition to attributing mass media interests for purposes of the new entrant bidding credit to the same extent that such media interests are considered attributable for purposes of the broadcast multiple ownership rules, we determined in the *MO&O* to also consider, in a further order, whether to attribute the mass media interests of any individual or entity who holds a significant equity and/or debt interest in a broadcast auction bidder claiming new entrant status, even if such an interest is nonvoting.[6] Specifically, we

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[3] *See Further Notice of Proposed Rulemaking* in MM Docket Nos. 94-150, 92-51 and 87-154, 11 FCC Rcd 19895 (1996) (*Attribution Further NPRM*).

[4] *Attribution Further NPRM*, 11 FCC Rcd at 19896.

[5] *See Multiple Ownership Rules*, 22 FCC 2d 306, 307 (1970), *recon. granted in part*, 28 FCC 2d 662 (1971) (multiple ownership rules have twofold objective of fostering maximum competition in broadcasting and promoting "diversification of programming sources and viewpoints").

[6] Under our current general broadcast attribution rules, debt and nonvoting equity interests of any size (even those over 50%) are generally not attributable, while voting interests of only 5% or more are regarded as attributable. *See* 47 C.F.R. § 73.3555 Note 2. Certain significant nonvoting equity interests are cognizable, however, under the Commission's existing broadcast cross-interest policy. *See infra* ¶ 11.

stated that this further order would consider the appropriateness of attributing the mass media interests (if any) held by very substantial investors in, or creditors of, a bidder claiming a credit as a new entrant, and, if found appropriate, the threshold at which a nonvoting equity and/or debt interest in a new entrant should be regarded as attributable. The *MO&O* explained that these determinations would be made based on our further review of the record in the pending broadcast attribution proceeding, which had requested detailed comment on similar equity/debt issues. *See id*. at ¶ 74.[7] Following our review of this record, we now conclude that it would be appropriate to attribute the mass media interests of investors holding more than a 33% equity and/or debt interest in a broadcast auction bidder claiming new entrant status, even if such an interest is nonvoting.

A. Appropriateness of Attributing Media Interests of Substantial Investors

6. We believe it is entirely appropriate to attribute the mass media interests held by very substantial investors in any broadcast auction applicant claiming a new entrant bidding credit. The Commission has had a long-standing concern that the scope of any special incentives, such as bidding credits, be properly limited to those applicants intended to benefit from the incentive.[8] Attributing the media interests held by substantial investors in bidders claiming new entrant status would help properly limit the scope of the bidding credit to those truly new entities intended to benefit from the credit. In addition, adoption of such an attribution policy should reduce the likelihood of bidder manipulation of the eligibility standards for the bidding credit. For example, attributing the media interests held by very substantial investors would prevent a large media group owner from providing all the financing for an auction applicant that then claims new entrant status and eligibility for a substantial bidding credit.[9]

7. Attributing the interests, whether debt or equity, of substantial investors is justified to insure that only true new entrants qualify for the bidding credit because holders of otherwise nonattributable nonvoting interests may well have "a realistic potential" to influence bidders claiming new entrant status.[10] Legal and financial literature have noted the disappearing distinctions between equity and debt,[11] and the Commission

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[7] *See Attribution Further NPRM*, 11 FCC Rcd at 19900-08. In particular, the Commission proposed to, *inter alia*, amend our general broadcast attribution rules by adopting an "equity or debt plus" approach. Pursuant to this approach, the Commission proposed to attribute the otherwise nonattributable debt or equity interests in a licensee where (i) the interest holder was also a program supplier to the licensee or a same-market broadcaster or other media outlet subject to the broadcast cross-ownership rules, including newspapers and cable operators; and (ii) the equity and/or debt holding exceeds 33%. Under this proposal, a finding that an interest is attributable would result in that interest being counted for all applicable multiple ownership rules, local and national. *Id.* at 19901-02. Attached Appendix A identifies the parties submitting comments in response to the *Attribution Further NPRM*.

[8] *See, e.g., Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2395 (1994) (defining designated entities is "important both to establish eligibility criteria and to deter the use of sham companies to take advantage of the benefits meant for groups truly in need of [special] measures").

[9] *See* Petition for Reconsideration of DanBeth Communications, Inc. at 2 (in petition for reconsideration of *First R&O* in this proceeding, petitioner criticized the new entrant rules because they would permit a corporate applicant to qualify for a bidding credit even if 99% of the applicant's equity, in the form of non-voting stock, was owned by the licensee of 30 television stations).

[10] *See Attribution Further NPRM*, 11 FCC Rcd at 19896.

[11] *See, e.g.*, Easterbrook and Fischel, *Close Corporations and Agency Costs*, 38 Stan. L. Rev. 271, 274-75 n.8 (1986)

has recognized the complexity of distinguishing debt from equity in cases where alleged debt obligations were found to be more properly characterized as equity.[12] Academic literature also 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. Specifically, some recent literature in the corporate governance field has examined the role that various "constituencies" or "stakeholders" other than traditional shareholders play in business organizations and has, in particular, focused on the ability of debtholders to influence corporate decision-making.[13] The record in the broadcast attribution proceeding additionally reflects that holders of nonvoting stock and debt interests may be able to influence broadcast licensees in a significant manner.[14] Given this apparent ability of substantial investors and creditors to influence broadcast applicants

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("There is no fundamental difference between debt and equity claims from an economic perspective."); McDaniel, *Bondholders and Corporate Governance*, 41 Bus. Law. 413, 417 (1986) (distinctions between debt and equity are increasingly blurred in today's capital markets; high-yield, low-rated bonds look like debt but trade like equities, while many preferred stocks look more like debt than equity, and hybrid securities combine debt and equity features); Hu, *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 Tex. L. Rev. 1273, 1293-94 (1991) (variations in financial products are now so great and the line between equity and debt so difficult to draw that the Financial Accounting Standards Board has undertaken a major effort seeking to distinguish the two).

12 *See Fox Television Stations, Inc.*, 11 FCC Rcd 5714, 5719-21 (1995) (using guidelines from tax law, Commission concluded that debt interest at issue in determining compliance with alien ownership benchmark was more properly characterized as equity capital contribution); *NextWave Personal Communications, Inc.*, 12 FCC Rcd 2030, 2049-51 (WTB 1997) (using same guidelines from *Fox* case, two classes of debt instruments were treated as equity).

13 *See, e.g.*, Garvey and Swan, *The Economics of Corporate Governance: Beyond the Marshallian Firm*, J. Corp. Fin. 139, 148-50 (1994) (article concludes that stakeholders other than shareholders "appear to exert substantial influence over corporate policy choices"; in particular, creditors may strongly affect management decisions); Booth, S*tockholders, Stakeholders and Bagholders (or How Investor Diversification Affects Fiduciary Duty)*, 53 Bus. Law. 429, 436 (1998) (arguing that management may be more likely to act in interests of other constituencies, such as creditors and employees, than in interests of diversified shareholders); Triantis and Daniels, *The Role of Debt in Interactive Corporate Governance*, 83 Calif. L. Rev. 1073, 1076, 1080 (1995) (in article intended to broaden model of corporate governance by demonstrating role of debt, authors argue that debt is a potent and flexible governance instrument); Gilson and Vetsuypens, *Creditor Control in Financially Distressed Firms: Empirical Evidence*, 72 Wash. U.L.Q. 1005, 1007, 1013 (1994) (based on empirical research, authors conclude that creditors in financially troubled firms are able to influence corporate operating, personnel and financial policies and are able to bring about management changes without owning a significant amount of firms' voting stock); Maloney, McCormick and Mitchell, *Managerial Decision Making and Capital Structure*, 66 J. Bus. 189, 190-92 (1993) (empirical data found to support authors' hypothesis that debt in firms' capital structure improves managerial decision making, which reflects the different legal powers of debtholders and their ability to discipline management).

14 *See* Letter dated May 8, 1997 to Reed Hundt, Chairman, Federal Communications Commission from Joel Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice at 12-14 (stating that relationships other than ownership of voting stock can allow an entity to influence operations and strategies of a station and that substantial investments by a company in nonvoting stock or debt of a competing station can limit competition); Letter dated May 22, 1997 to Reed Hundt, Chairman, Federal Communications Commission from Larry Irving, National Telecommunications and Information Administration at 8-9 (noting that there are many ways to influence operations of broadcast licensee without purchasing voting stock and that any entity has incentive to exert influence over a licensee in which the entity has made an investment, so as to protect or enhance the value of that investment). *See also, e.g.*, Comments of Network Affiliated Stations Alliance at 2-3 (stating that networks possessing less than controlling and otherwise nonattributable interests in affiliated stations are able to exert considerable influence over

and licensees, we believe it would be contrary to the new entrant bidding credit's diversification goals if we failed to consider the media interests held by very substantial investors in, and creditors of, auction applicants seeking new entrant status.

8. Moreover, we feel that a stricter attribution policy is warranted in determining eligibility for a special measure that confers a significant governmental benefit. Bidders qualifying for a new entrant credit will enjoy a considerable advantage in an auction vis-a-vis nonqualifying bidders. Because new entrants will receive a substantial discount on the cost of their winning bids, they will also not be required to reimburse the public for the full market value of the spectrum being awarded by competitive bidding. Due to the significant advantages being conferred on applicants claiming new entrant status, and to insure fairness to competing bidders and the public, we conclude that more carefully limiting eligibility for such status by adoption of a stricter attribution standard is appropriate.[15] We also emphasize that our adoption herein of a stricter non-voting equity and/or debt attribution standard for application in the new entrant bidding credit context does not prejudge our resolution of any of the broader attribution issues addressed in the *Attribution Further NPRM*.

B. Threshold at Which Media Interests of Substantial Investors Should be Attributed

9. Having decided to attribute the mass media interests of any individual or entity who holds a significant equity and/or debt interest in an auction applicant claiming new entrant status, even if such an interest is nonvoting, we must also determine at what level these interests become significant. We conclude that we should consider the attributable media interests held by an individual or entity whose interest in the bidder, aggregating both debt and equity holdings, exceeds 33% of the total asset value (equity plus debt) of the bidder.[16]

10. Following a review of both the record in the pending broadcast attribution proceeding and the precedent provided by our long-standing broadcast cross-interest policy, we believe that setting this attribution threshold at 33% is appropriate in the new entrant context. In response to our proposal in the general broadcast attribution proceeding to adopt an "equity or debt plus" attribution approach with a 33% threshold (*see supra* note 7), some commenters advocated a higher threshold while others supported a lower threshold.[17] As discussed above (*see supra* ¶ 4), our general attribution rules are not merely concerned with

affiliates' core operating decisions); Viacom, Inc. at 7-8 (asserting that an investor who holds just 10% of capitalization of a station in form of equity and/or debt, and who is not contractually prohibited from participating in programming, personnel and budgetary matters of that station, is in a position to wield significant influence); Media Access Project, *et al.* at 13-14, 19 (arguing that there have been a number of instances of nonvoting equity or debt holders exercising substantial control over station operations and editorial decision-making).

[15] *See* 47 U.S.C. §§ 309(j)(3)(B) & (C) (Commission directed to design competitive bidding systems so that licenses are disseminated among a wide variety of applicants and so that the public recovers value of spectrum resource made available for commercial use).

[16] "Equity" includes all stock, whether common or preferred and whether voting or nonvoting. "Debt" includes all liabilities, whether short-term or long-term. "Total assets" is equal to the sum of all debt plus all equity.

[17] *See, e.g.,* Comments of ABC, Inc. at 8 (calling for 50% attribution benchmark based on a control concept); Media Access Project, *et al.*, at 18-19 (arguing that 33% threshold is "so high that it will overlook many investors with significant power to affect editorial decisions" and supporting a 20% benchmark); Viacom, Inc. at 7-8 (advocating a more stringent version of "equity or debt plus" approach that would attribute investors holding 10% or more of

controlling relationships, but also extend to relationships that provide "a realistic potential" to influence core operating functions of licensees. Accordingly, we believe that the threshold for attributing the media interests of investors in auction applicants claiming new entrant status should be set below one of the traditional benchmarks for "control" (*i.e.*, 50%), so as to capture more effectively relationships permitting sufficient influence over broadcast applicants. We do not, however, want to set the benchmark so low as to unduly adversely affect the ability of prospective broadcast auction applicants to obtain financing. A 33% benchmark reasonably balances these competing considerations. In adopting this threshold, we emphasize that this equity/debt standard does not preclude an individual or entity (including any existing broadcaster) from investing any amount in a prospective broadcast auction applicant. Nor does this 33% equity/debt standard require an applicant claiming new entrant status to contribute a minimum amount of equity, or otherwise affect an applicant's right to participate in a broadcast auction. Rather, this standard merely establishes that the attributable media interests (if any) of an investor who holds more than a 33% equity and/or debt interest in a broadcast auction bidder will be attributable to that bidder for determining its status as a new entrant. Thus, we feel that adoption of this 33% equity/debt standard in the new entrant context should not unduly hinder the ability of broadcast licensees generally, or broadcast auction applicants specifically, to obtain capital.[18]

11. We also believe that a 33% threshold is appropriate for the attribution standard adopted herein because it is consistent with our long-standing benchmark applied in the context of the broadcast cross-interest policy.[19] Because we have consistently found otherwise nonattributable interests in excess of 33% to be "meaningful" under a cross-interest policy designed to insure continued competition and diversity,[20] we

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capitalization of a station if such investors are not contractually prohibited from participating in station operations). *See also* Comments of CBS, Inc. at 6 (generally opposing "equity or debt plus" proposal, but nonetheless finding it preferable to continued application of the cross-interest policy and noting that 33% benchmark "appears reasonable").

[18] We note that some commenters in the pending broadcast attribution proceeding contended that the proposed "equity or debt plus" approach would adversely affect the flow of capital to broadcasting generally and/or might deter investment in small, minority, UHF or digital stations, in particular. *See, e.g.*, Comments of BET Holdings, Inc. at 2-3; Pappas Stations Partnership at 1-2; Tele-Communications, Inc. at 2-3; Fox Broadcasting Co. at 2-3; and Reply Comments of Tribune Broadcasting Company at 21-22. Other parties, however, conversely argued that the "equity or debt plus" approach would not disrupt broadcasters' access to capital. *See, e.g.*, Comments of Viacom, Inc. at 15; Media Access Project, *et al.*, at 7-10. For the reasons set forth above, we have no reason to conclude that adoption of the 33% equity/debt standard in the context of the new entrant credit would unduly deter investment in the broadcasting industry generally or in individual broadcasters specifically. In this regard, we reemphasize that the 33% equity/debt standard adopted herein applies only to determine eligibility for the new entrant bidding credit in broadcast auctions.

[19] The cross-interest policy has been applied to preclude individuals or entities from holding an attributable interest in one media property (*e.g.*, broadcast station, newspaper, cable system) and having a "meaningful," although nonattributable, interest in another media entity serving "substantially the same area." *See Notice of Inquiry* in MM Docket No. 87-154, 2 FCC Rcd 3699 (1987). The Commission, for example, applied this 33% cross-interest threshold in *Roy M. Speer*, where we limited the nonattributable equity holdings of a same-market television licensee in another local television station to 33%. *See* 11 FCC Rcd 18393, 18442-43 (1996), *on recon.*, FCC 98-200 (rel. Sept. 11, 1998). As we stated in *Roy M. Speer*, the objective of the cross-interest policy is to insure continued competition and diversity. *Id.* at 18442.

[20] *See, e.g., Roy M. Speer*, 11 FCC Rcd at 18442; *Cleveland Television Corp.*, 91 FCC 2d 1129, 1133 (Rev. Bd. 1982), *review denied*, FCC 83-235 (1983), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).

conclude that equity and/or debt interests exceeding 33% held by investors in auction applicants should similarly be regarded as meaningful for the purpose of establishing eligibility for a new entrant bidding credit intended to promote diversification of ownership of broadcast facilities. For all the reasons set forth in detail above, we hereby adopt this 33% equity/debt standard for use in determining eligibility for the new entrant bidding credit. We find good cause to make the rule amendments effective immediately upon publication in the Federal Register so that bidders in the September 28, 1999 Closed Broadcast Auction seeking a New Entrant Bidding Credit will be subject to the revised eligibility standard.[21]

III. PROCEDURAL MATTERS AND ORDERING CLAUSES

12. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix B.

13. Accordingly, IT IS ORDERED, That pursuant to the authority in Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403, this *Memorandum Opinion and Order* IS ADOPTED, and Part 73 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix C.

14. IT IS FURTHER ORDERED, That the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE immediately following publication in the Federal Register and OMB approval.

15. IT IS FURTHER ORDERED, That the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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21 *See Public Notice*, "Closed Broadcast Auction," DA 99-1346, released July 9, 1999.

APPENDIX A

Parties Submitting Comments in Response to *Attribution Further NPRM*

ABC, Inc.
AK Media Group, Inc.
Bahakel Communications
BET Holdings, Inc.
Blackstone Group, L.P.
Boston Ventures Management, Inc.
Canwest Global Communications Corporation
CBS, Inc.
Centennial Communications, Inc.
Diversified Communications
Fox Broadcasting Company
Glencairn, Ltd. and WPPT, Inc.
Glenwood Communications Corporation
HSN, Inc.
Jet Broadcasting Company, Inc.
King World Productions, Inc.
Knight-Ridder, Inc.
Local Station Ownership Coalition
McGillen, Cynthia L. and James P.
Media Access Project, *et al.*
Miller Broadcasting, Inc.
Montclair Communications, Inc.
National Association of Broadcasters
Network Affiliated Stations Alliance
Pappas Stations Partnership
Paxson Communications Corporation
Post-Newsweek Stations, Inc.
Press Broadcasting, Inc.
Saga Communications, Inc.
Sinclair Broadcast Group, Inc.
SJL Communications, Inc.
Tele-Communications, Inc.
Viacom, Inc.
Waterman Broadcasting Corporation
Wireless Cable Association International, Inc.

Parties Submitting Reply Comments in Response to *Attribution Further NPRM*

ABC, Inc.
AK Media Group, Inc.
Bahakel Communications, Ltd.
BET Holdings, Inc.

Blackstone Group, L.P.
Clear Channel Communications, Inc.
Fox Broadcasting Company
GTE Service Corporation
HSN, Inc.
Lockwood Broadcasting, Inc.
Media Access Project, *et al*.
Mt. Mansfield Television, Inc.
National Cable Television Association, Inc.
Pappas Stations Partnership
Qwest Broadcasting L.L.C.
Retlaw Enterprises, Inc.
SJL Communications, Inc.
Tele-Communications, Inc.
Tribune Broadcasting Company
Viacom, Inc.
Westwind Communications, L.L.C.
Wireless Cable Association International, Inc.

APPENDIX B

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix B of the *First R&O*[22] in this proceeding. In addition, a Supplemental Final Regulatory Flexibility Analysis (First Supplemental FRFA) was incorporated in Appendix B of the *MO&O*[23] in this proceeding that resolved various petitions for reconsideration filed against the *First R&O*. The Commission's Supplemental Final Regulatory Flexibility Analysis (Second Supplemental FRFA) in this *Memorandum Opinion and Order* reflects revised or additional information to that contained in the FRFA and First Supplemental FRFA. This Second Supplemental FRFA is thus limited to issues addressed in the attached *Memorandum Opinion and Order*. This Second Supplemental FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996.[24]

A. Need For and Objectives of Action: In the *First R&O* in this proceeding, the Commission adopted rules and procedures to implement provisions of the Balanced Budget Act of 1997 expanding its competitive bidding authority, under Sections 309(j) and 309(l) of the Communications Act of 1934, 47 U.S.C. §§ 309(j), 309(l), to include, *inter alia*, the commercial broadcast services. In a recent *MO&O* resolving numerous petitions for reconsideration filed against the *First R&O*, the Commission generally upheld its previous determinations made with respect to auction rules and procedures for the various broadcast services. That *MO&O* did, however, refine the eligibility standards for the "new entrant" bidding credit, which, as adopted in the *First R&O*, provides a tiered credit for broadcast auction bidders with no, or very few, other media interests. In particular, the Commission concluded in its previous *MO&O* that the eligibility standards for the new entrant bidding credit should be amended to be consistent with the general broadcast attribution standards, by which the Commission defines what constitutes an attributable interest in applying the broadcast multiple ownership rules. In addition to attributing mass media interests for purposes of the new entrant bidding credit to the same extent that such media interests are considered attributable for purposes of the broadcast multiple ownership rules, the Commission determined in that *MO&O* to also consider, in a further order, whether to attribute the mass media interests of any individual or entity who holds a significant equity and/or debt interest in a broadcast auction bidder claiming new entrant status, even if such an interest is nonvoting.[25] The attached *Memorandum Opinion and Order* does in fact determine to attribute the mass media interests of investors holding more than a 33% equity and/or debt interest in a broadcast auction bidder claiming new entrant status, even if such an interest is nonvoting.

B. Significant Issues Raised by Public in Response to Final Regulatory Flexibility Analysis: No

[22] 13 FCC Rcd 15920 (1998). Certain abbreviated references used in the attached *Memorandum Opinion and Order* are also used in this Appendix.

[23] FCC 99-74 (rel. April 20, 1999).

[24] Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA); *see generally* 5 U.S.C. §§ 601 *et seq.* Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[25] Under our current general broadcast attribution rules, *nonvoting* interests of any size (even those over 50%) are generally not attributable, while *voting* interests of only 5% or more are regarded as attributable. *See* 47 C.F.R. § 73.3555 Note 2.

petitions or comments were received in response to the FRFA or the First Supplemental FRFA. Small business-related issues were raised indirectly by some parties filing petitions for reconsideration against the *First R&O*. These issues were addressed in detail in the previous *MO&O* and the First Supplemental FRFA.

C. Description and Estimate of tbe Number of Small Entities Involved: In the FRFA and First Supplemental FRFA, the Commission utilized the definition of "small business" promulated by the Small Business Administration (SBA), even though, as discussed in detail in the FRFA, we tentatively believed that the SBA's definition of "small business" overstated the number of radio and television broadcast stations that were small businesses and was not particularly suitable for our purposes. No petitions or comments were received concerning the Commission's use of the SBA's small business definition for purposes of the FRFA and First Supplemental FRFA, and we will therefore continue to employ such definition for this Second Supplemental FRFA. As we are utilizing the same definition of small business for this Second Supplemental FRFA, the description and number of small entities affected by the rule change adopted in this *Memorandum Opinion and Order* should be the same as the entities described in both the FRFA and First Supplemental FRFA, and include, specifically, commercial broadcast stations (television, low power television, television translator, AM, FM and FM translator stations).[26]

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements: The *First R&O* adopted a number of rules that included reporting, recordkeeping and compliance requirements. These requirements were described in detail in the FRFA, and, as discussed in the First Supplemental FRFA, generally remained unchanged by the rule amendments adopted in the previous *MO&O*. The rule change adopted in this *Memorandum Opinion and Order* does not include any additional or different reporting or recordkeeping requirements, but only affects the standards for qualifying for the new entrant bidding credit.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered: The FRFA and First Supplemental FRFA described in considerable detail the steps taken in the *First R&O* and in the previous *MO&O* to minimize significant economic impact on small entities and the alternatives considered. The rule amendment adopted in this *Memorandum Opinion and Order* further refines the eligibility standards for the new entrant bidding credit. The Commission believes that attributing the mass media interests (if any) held by very substantial investors in bidders claiming new entrant status will help properly limit the scope of the bidding credit to those truly new entities intended to benefit from the credit (and who are likely to be small businesses). In addition, adoption of this attribution policy should reduce the likelihood of bidder manipulation of the eligibility standards for the bidding credit.[27]

The Commission also believes that setting this attribution benchmark at 33% reasonably balances its interest in capturing investor relationships that provide a realistic potential to influence the core operating functions

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[26] In the *MO&O*, the Commission clarified that the new entrant bidding credit was applicable only in broadcast service auctions and would not be applied in any Instructional Television Fixed Service (ITFS) auctions. *See MO&O* at ¶ 81. Thus, the rule amendment contained in this *Memorandum Opinion and Order*, which pertains only to the eligibility criteria for the new entrant bidding credit, will not apply to any ITFS licensees or applicants.

[27] For example, attributing the media interests held by very substantial investors would prevent a large media group owner from providing, by means of nonvoting equity or debt, most or all of the financing for an auction applicant that then claims new entrant status and eligibility for a substantial bidding credit. One party filing a petition for reconsideration against the *First R&O* in this proceeding had criticized the new entrant rules on this basis.

of broadcast auction applicants, and the needs of prospective auction applicants (including small businesses) to obtain financing. This 33% equity/debt attribution standard does not preclude an individual or entity (including any existing broadcaster) from investing any amount in a prospective broadcast auction applicant. Nor does this 33% equity/debt standard require an applicant claiming new entrant status to contribute a minimum amount of equity, or otherwise affect an applicant's right to participate in a broadcast auction. Because this standard only establishes that the attributable media interests (if any) of an investor who holds more than a 33% equity and/or debt interest in a broadcast auction bidder will be attributable to that bidder for determining its status as a new entrant, the Commission concludes that adoption of the 33% equity/debt standard should not unduly hinder the ability of broadcast licensees generally, or broadcast auction applicants specifically, to obtain capital.

F. Report to Congress: The Commission will send a copy of this *Memorandum Opinion and Order*, including this Second Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Memorandum Opinion and Order*, including the Second Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Memorandum Opinion and Order* and Second Supplemental FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

APPENDIX C

Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73 - RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

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

2. Section 73.5008 is amended by revising paragraph (c) to read as follows:

§ 73.5008 Definitions applicable for designated entity provisions.

* * * * *

(c) An attributable interest in a winning bidder or in a medium of mass communications shall be determined in accordance with § 73.3555 and Note 2. In addition, the attributable mass media interests, if any, held by an individual or entity with an equity and/or debt interest(s) in a winning bidder shall be attributed to that winning bidder for purposes of determining its eligibility for the new entrant bidding credit, if the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234.

In this Memorandum Opinion & Order, the Commission considers "additional refinement[s]," *supra* at para. 2, to the traditional broadcast attribution standards for purposes of the designated entity bidding credit in auctions. While I am pleased to see the Commission on its way toward final implementation of the mandates of the 1997 Budget Act, which requires competitive bidding for most licenses, I do not support the "refinements" to the attribution rules adopted today.

My first concern with these new rules is that they are overly-regulatory, complex, and difficult to administer. In this item, the Commission breaks from its previous rules by counting pure debt instruments -- in addition to equity interests -- in deciding whether a company's particular interests are attributable. I would not count debt for attribution purposes. When one ventures into the area of pure debt, held by any kind of investor, including purely institutional investors, one encounters an administrative hornets' nest. Almost all companies have some debt, and small companies tend to have debt held by banks, typically commercial loans or notes. Should such interests really be considered relevant for purposes of deciding who truly owns and operates a broadcast entity? For example, if Citicorp holds more than 33% of the debt for one or more companies, then its interest in each company will be attributable under these rules. But Citicorp certainly does not consider itself a broadcasting company, nor does it, in all likelihood, have any interest in the day-to-day operational decisions made at its investor companies.

Moreover, Citicorp, as any large institutional investor, does not with certainty know the precise percentage, at a particular point in time, that it holds of a company's debt. What Citicorp knows is that it has issued a million dollar corporate loan to a company; that the company has a $500,000 line of credit with the bank of which various amounts are exercised at any given time; and that the company has a cash account with Citicorp whose balance ranges from $50,000 to $500,000. So, how much debt does Citicorp hold at any given time? That depends on whether one measures gross or net debt. What percentage of a company's debt does Citicorp hold? Citicorp cannot possibly know because it does not know what debt the company has with other institutions or individuals. As a *practical* matter, debt is a concept that is nigh impossible to measure with reliable precision, even if there is support for the *theory* in academic literature. For these reasons, I disagree with the decision to extend attribution rules into the area of pure debt. This decision makes an already complicated regulatory scheme even more complicated, increasing the administrative burden on those who must live under it, not to mention those here at the Commission who must administer it.

My other concern with the rules adopted today is that I am not persuaded that they are adequately supported by the record. Specifically, the selection of the 33% benchmark -- *with respect to both debt and equity* -- appears to lack the requisite record basis. *Cf. Motor Vehicles Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (administrative agencies must "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made'") (citation omitted); *ATT v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (requiring that "conclusions reached [by an agency]have a rational connection to the facts found"). There is no record evidence of 33% being either less or more appropriate than, say, 25%, on the one hand, or 51%, on the other. Although the item *asserts* that "[t]he record in the broadcast attribution proceeding . . . reflects that holders of nonvoting stock and debt interests may be able to influence broadcast licensees in a significant manner," *supra* at para. 7, that does not mean, absent evidence to support the assertion, that this is true. Nor, more importantly, does it mean that 33% is the right place at which to draw the line for purposes of establishing significant influence. How large does a holding have to be before its possessor may be able to exert significant influence? There is little to no record evidence to guide this decision, just speculation and guesswork. Thus, as a matter of administrative law, the rules are difficult to defend against a charge of arbitrariness and/or lack of record support.

Finally, and on the merits, I suspect that these rules will harm "designated entities" more than they will help them. By dint of regulation, we have created incentives to cap investments in designated entities from any one source at 33%. Thus, these regulations artificially limit the amount of capital available to start-ups from a particular source, potentially forcing entrepreneurs to go to multiple sources for funding when, in a freer market, they might not have had to do so. The item counters by arguing that the rules do not prohibit investment over 33%, it just makes investment over such limits attributable to the investor. *See supra* at para. 10. Becoming snared in the web of this Commission's broadcast ownership rules, however, is a powerful incentive for investors to stay well under the cap. *Cf. Lutheran Church v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998) ("No rational firm . . . welcomes a government audit."). In effect, the benchmark will function as a "safe harbor." Thus, while the rules, to be sure, do not prohibit investments over 33%, they certainly deter them. And that is not good for small or new businesses seeking capital. I realize that this "artificial cap" criticism applies to any percentage limitation that would be selected, but I think that we could at least have set the number higher so as to mitigate these unintended consequences.

In sum, because I disagree with the decision to extend attribution rules into the uncharted area of debt interests, and because I am not persuaded that the selection of the 33% benchmark is supported by facts found on the basis of the record, I must respectfully dissent.