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Federal Communications Commission

47 CFR Parts 21, 73, 74, and 76

Review of the Commission's Regulations Governing Attribution Ownership Rule; Final Rule

Broadcast Television National Ownership Rules; Final Rule

Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules; Final Rule

Comment Sought on Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules; Notice

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 21, 73, 74 and 76

[MM Docket No. 94–150, 92–51, 87–154; FCC 99–207]

Review of the Commission's Regulations Governing Attribution Ownership Rule

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's broadcast, broadcast cable cross-ownership and cable/Multipoint Distribution Service Cross-ownership (''MDS'') attribution rules. The intended effect of this action is to improve the clarity and precision of our current rules while avoiding disruptions in funding to licensees.

DATES: Effective November 16, 1999, except for § 73.3526(e)(14) and (e)(16) and § 73.3613(d) and (e) which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective dates for those sections.

FOR FURTHER INFORMATION CONTACT: Mania K. Baghdadi, Jane Gross or Berry Wilson at (202) 418–2120, Policy and Rules Division, Mass Media Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (''*R&O*''), FCC 99–207, adopted August 5, 1999; released August 6, 1999. The full text of the Commission's *R&O* is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room TW–A306), 445 12 St. S.W., Washington, D.C. The complete text of this *R&O* may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857–3800, 1231 20th St., N.W., Washington, D.C. 20036.

Synopsis of Report & Order

Introduction

1. The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions. In this *R&O,* we amend our broadcast and our cable/Multipoint Distribution Service (''MDS'') attribution rules to improve the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees and markets, and facilitate application processing—our goals in initiating this proceeding. In taking these steps, we have sought to avoid undue impact on our goal of promoting the rapid conversion of broadcast television licensees to a digital mode. We initiated this long-pending proceeding in 1995, sought further comment after the passage of the Telecommunications Act of 1996, and have had the benefit of numerous comments on the variety of issues resolved herein. The new attribution rules we adopt today are integrally related to the rules adopted in our companion local television ownership and national television ownership proceedings. A reasonable and precise definition of what interests should be counted in applying the multiple ownership rules is a critical element in assuring that those rules operate to promote the goals they were designed to achieve.

Background

2. The attribution rules that are the subject of this proceeding define what constitutes a ''cognizable interest'' in applying the broadcast multiple ownership rules, the broadcast/cable cross-ownership rule, and the cable/MDS cross-ownership rule. We issued the *Attribution Notice,* 60 FR 6483, February 2, 1995, to review the attribution rules based on several considerations, including: (1) Changes in the broadcasting industry and in the multiple ownership rules since our last revision of the attribution rules over ten years ago and our consequent desire to ensure that the attribution rules remain effective in identifying interests that should be counted for purposes of applying the multiple ownership rules; (2) concerns raised that certain nonattributable investments, while permissible under current rules, might permit a degree of influence that warrants their attribution; (3) concerns that individually permissible cooperative arrangements between broadcasters are being used in combination so as to result in significant influence in multiple stations that is intended to be prohibited by the multiple ownership rules; and (4) the need to address attribution treatment of Limited Liability Companies (''LLCs'').

3. We solicited comment in the *Attribution Notice* on several issues, including: (1) Whether to increase the voting stock benchmark from 5 percent to 10 percent and the passive investor benchmark from 10 percent to 20 percent; (2) whether to expand the category of passive investors; (3) whether and, if so, under what circumstances to attribute nonvoting shares; (4) whether to retain our single majority shareholder exemption from attribution; (5) whether to revise our insulation criteria for limited partners, and whether to adopt an equity benchmark for noninsulated limited partners; (6) how to treat interests in LLCs and other new business forms under our attribution rules; (7) whether to eliminate the remaining aspects of our cross-interest policy; and (8) how to treat financial relationships and multiple business interrelationships which, although not individually attributable, should perhaps be treated as attributable interests when held in combination.

4. Congress subsequently enacted the Telecommunications Act of 1996 (''1996 Act''), Public Law 104–104, 110 Stat. 56 (1996), which substantially relaxed several of our ownership rules. We issued the *Attribution Further Notice,* 61 FR 67275, December 20, 1996, to seek comment as to how these ownership rule revisions should affect our review of the attribution rules. We also sought comment on new proposals, including a proposal to attribute the otherwise nonattributable interests of holders of equity and/or debt in a licensee where the interest holder is a program supplier to a licensee or a same-market media entity and where the equity and/or debt holding exceeds a specified threshold. Additionally, we sought comment on: (1) Proposals to attribute television Local Marketing Agreements (''LMAs'') and to modify the scope of the radio LMA attribution rules; (2) whether we should revise our approach to joint sales agreements (''JSAs'') in specified circumstances; (3) a study conducted by Commission staff, appended to the *Further Notice,* on attributable interests in television broadcast licensees and on the implications of this study for our attribution rules, particularly on the voting stock benchmarks; (4) whether we should amend the cable/MDS cross-ownership attribution rule; and (5) transition issues.

5. We believe the rule revisions we adopt today promote these goals. In this *R&O,* we: (1) Adopt an equity/debt plus attribution rule that would narrow, but not eliminate, the current exemptions from attribution for nonvoting stock and debt, as well as the single majority shareholder exemption; (2) attribute certain television LMAs and modify the radio LMA rules; (3) retain the 5 percent voting stock attribution benchmark, but raise the passive investor voting stock benchmark to 20 percent; (4) retain the current definition of passive investor; (5) eliminate the cross-interest policy;

(6) decline to adopt attribution rules for JSAs; (7) adopt as an attribution rule our interim processing policy under which we apply limited partnership insulation criteria to LLCs; (8) retain the current insulation criteria for attribution of limited partnerships; (9) revise the cable/MDS cross-ownership attribution rule to conform it to the broadcast attribution rules, as revised in this *R&O*; and (10) establish transition measures with respect to interests made attributable as a result of rules adopted in this *R&O* that would result in violations of the multiple ownership rules. So that our broadcast attribution rules remain consistent, we also modify the attribution rules that apply to the broadcast/cable cross-ownership rule, § 76.501(a) to incorporate the attribution rule changes adopted today.

Issue Analysis

A. Stockholding Benchmarks

6. *Background.* The *Attribution Notice* sought comment on whether we should increase the voting stock benchmarks from five to ten percent for non-passive investors and from ten to twenty percent for passive investors. This issue was originally raised in the *Notice of Proposed Rule Making and Notice of Inquiry,* 57 FR 14684, April 22, 1992) in MM Docket No. 92–51, (*''Capital Formation Notice''*), which cited concerns about the availability of capital to broadcasters. Insufficient evidence was submitted in comments to the *Capital Formation Notice* to warrant raising the benchmarks, and, therefore, the *Attribution Notice* again raised the issue of whether to increase the voting stock benchmarks. In the *Attribution Further Notice,* the Commission noted that commenters responding to the *Attribution Notice* had again not submitted specific empirical data sufficient to conclude that the benchmarks should be raised. The *Attribution Further Notice* thus asked for additional information to justify raising the benchmarks, including information on changes in the economic climate and competitive marketplace, and the link between additional capital investment and raising the voting stock benchmarks.

7. *Comments.* Few commenters responded to our requests in the *Attribution Further Notice* for additional comments supporting the increase in the active investor benchmark to 10 percent.

8. *Decision.* We have decided to retain the current active voting stock benchmark at 5 percent. First and most importantly, in reviewing the evidence related to the issue of non-passive voting equity benchmarks, we remain convinced that shareholders with ownership interests of 5 percent or greater may well be able to exert significant influence on the management and operations of the firms in which they invest. In this regard, we have not been presented with empirical evidence to rebut our conclusion in the *Attribution Order* 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.''

9. In this regard, a growing body of academic evidence indicates that an interest holder with 5 percent or greater ownership of voting equity can exert considerable influence on a company's management and operational decisions. This is particularly true with widely-held corporations where a 5 percent stockholder is likely to be among the largest shareholders in the firm. One recent study demonstrated that block trades involving 5 to 10 percent of the firm's voting stock resulted in a 27 percent turnover rate of the CEO of the traded firm, that a 20 to 35 percent block trade resulted in a 40 percent turnover rate of the CEO of the traded firm, and that block trades over 35 percent of the voting equity resulted in a 56 percent turnover rate, L.E. Ribstein, *Business Associations* 987 (1990). The turnover of the CEO was tracked over a one year period following the date of the trade. These results, spanning an increasing level of ownership starting at 5 percent, demonstrate a consistent relationship between ownership trades and the rate of replacement of top management. The results imply that investors who acquire and hold such large blocks of voting stock can influence the choice of management of the firms in which they invest.

10. Another study presents evidence that 5 percent or greater stockholders vote more actively than less-than-five percent shareholders, and they tend to vote more often against the recommendations of management in votes over corporate anti-takeover amendments (J.A. Brickley, R.C. Lease and C.W. Smith, *Ownership Structure and Voting on Antitakeover Amendments*, 20 Journal of Financial Economics 267–291 (1988)). This study suggests that larger owners, starting at a 5 percent level of ownership, tend to be more active in influencing management than smaller owners. The two studies considered together provide evidence that ownership percentages starting at 5 percent can influence management policies and have an impact on firm value.

11. In addition, notwithstanding our requests for empirical evidence, in the *Attribution Notice* and again in the *Attribution Further Notice,* commenters have not provided the kind of specific data to justify raising the non-passive investor benchmark even though they generally supported raising the benchmark. And, while commenters have not provided sufficient empirical evidence to justify raising the active voting stock benchmark, the *Attribution Further Notice* did incorporate and invite comment on a Commission staff study that categorized and quantified attributable interests in commercial broadcast television licensees, as reported in the Ownership Reports that licensees are required to file. Several facts emerge from that study that are relevant to our decision concerning the voting stock benchmarks. First, the study found and reported that increasing the attribution benchmark for non-passive investors from 5 percent to 10 percent would decrease by approximately one third the number of currently-attributable owners. This increase in the non-passive investor benchmark would also increase from 81 to 134 the number of stations (out of 389 commercial for-profit television stations studied that are incorporated and are not single majority shareholder stations), for which no stockholders and only officers and directors would be held attributable. These large potential changes in the number of attributable owners heighten our concern about the impact of raising the 5 percent benchmark. In light of the lack of sufficient evidence that such an increase is necessary or appropriate, we are reluctant to institute a change that would have such a major impact.

12. Further, we note that our concerns over capital availability that originally prompted the proposal to increase the active voting stock benchmark have eased somewhat, particularly in light of the increasing strength shown by the communications sector and financial markets in general over the past several years. For example, communications transactions increased by 38 percent during 1996, with the total value of mergers, acquisitions, share offerings and other deals totalling $113 billion. Within the communications sector, TV transfers of ownership in 1996 increased by 121.26 percent in dollar terms over 1995 figures, and FM and AM transfers increased by 283.27 percent and 99.34 percent, respectively. In total, dollars spent on radio and television transactions increased from $8.32 billion in 1995 to $25.362 billion in 1996, with the number of transactions

increasing from 849 to 1115 over the same period. Station trading remained strong in 1997, with a total of 1067 radio and television transactions worth $23.44 billion. In 1998, the total number of radio and television transactions fell slightly, as a result of the slower pace of radio consolidation, to 950 transactions, with the value of these transactions remaining fairly stable at $22.8 billion. This overall increase in capital spending from 1995 to 1998 occurred while our current attribution rules were in effect, and therefore provides us with strong evidence that those rules do not impede the availability of capital in the communications industry. And, to the extent that there are still concerns about not impeding capital flow to broadcasting, we believe that they will be adequately addressed by our increase in the passive investor benchmark. In sum, in reviewing the overall body of evidence on this issue, we believe that our original decision to set a 5 percent benchmark to capture influential interests remains valid and will not unduly restrict capital availability.

13. Finally, retention of the 5 percent benchmark remains consistent with the SEC's analogous 5 percent benchmark. Pursuant to § 13(d)(1) of the Exchange Act, 15 U.S.C. 78m(d)(1), any person who becomes a direct or indirect owner of more than 5 percent of any class of stock of a company through a stock acquisition must file a statement with the Securities and Exchange Commission (SEC). The purpose of this reporting requirement is generally to ensure that investors are alerted to potential changes in control. The broadcast attribution rules have a similar objective as they are intended to identify ownership interests that confer on their holders the potential to influence or control a licensee's day-to-day operations.

Passive Investor Benchmarks

14. *Comments.* Most commenters that responded to this issue favored raising the passive investor benchmark.

15. *Decision.* We will increase the voting stock benchmark from 10 percent to 20 percent for passive investors. We believe that increasing the passive investor benchmark to 20 percent will give broadcasters increased access to investment capital, while preserving the Commission's ability to enforce its ownership rules effectively. This decision takes into account the special nature of the passive investor category, in terms of the legal and fiduciary requirements that constrain passive investors' involvement in the management and operational affairs of the firms in which they invest.

16. We believe that we can increase the passive investor benchmark without incurring substantial risk that investors who should be counted for purposes of applying the multiple ownership rules will avoid attribution. Clearly, passive investors continue to face multiple constraints on their ability to become directly involved with the management and operations of the firms in which they invest, including statutory and regulatory restrictions as well as fiduciary obligations.

17. In setting the limit at 10 percent, we noted that an increase above 10 percent was not advisable at that time based on our concern about the impact on corporate management that could result, even unintentionally, from the trading and voting of large blocks of stock by purportedly passive investors. We have not been presented with any evidence to indicate that our ten percent benchmark has resulted in any such block trading problems. Moreover, any inadvertent effect of a passive investor's decision to sell its stock, for example, because it is dissatisfied with the return on its investment, simply reflects the marketplace at work, and a responsive action by management to make the entity more profitable in response to a sale is simply an appropriate reaction to market demands.

18. While we note that our concerns about capital availability have eased somewhat, to the extent that these concerns remain, particularly based on funding needs related to the conversion to digital television, we believe that increasing the passive investor benchmark is a relatively safe way to facilitate such further investment in broadcasting, without compromising the ability of our attribution rules to capture influential interests. Raising that benchmark will reduce barriers to investment in broadcasting and result in greater efficiencies in the use of capital.

Definition of Passive Investors

19. *Background.* In response to the *Capital Formation Notice*, several commenters raised the issue as to whether the Commission should expand its definition of ''passive investors'' to include such institutional investors as pension funds, commercial and investment banks, and certain investment advisors. These commenters argued that these largely institutional investors invest primarily for reasons of financial returns, rather than to exert significant influence or control, and therefore their interests should be treated as passive investments. In the *Attribution Notice*, the Commission stated that it did not intend to revisit its 1984 decision, which defined the passive-investor category to include only bank trust departments, insurance companies and mutual funds, and we tentatively concluded that we would not expand the passive investor category to include Small Business Investment Companies (''SBICs'') and Special Small Business Investment Companies (''SSBICs''), as we had not been able to conclude that these entities met our definition of ''passive.'' Nonetheless, we invited further comment on these tentative conclusions.

20. *Comments.* Several commenters urged the Commission to expand its passive investor category.

21. *Decision.* We reaffirm our earlier decision to retain the current definition of ''passive investors,'' which is limited to bank trust departments, insurance companies and mutual funds. We noted that we earlier stated that we ''do not intend to revisit our decision of 1984 in order to broaden the category of passive investors. . . .'' We are not convinced that other types of investors lack the interest and/or the ability to actively participate in the affairs of the firms in which they invest. This is particularly true of public pension funds, many of which have apparently become increasingly active in proxy fights and other devices to put pressure on management perceived to be underperforming. Furthermore, commercial and investment bank activities do not fall under the same fiduciary restrictions, discussed above, that apply to bank trust departments. And, we have not been presented with sufficient evidence thus far to revise our earlier tentative conclusion not to include SBICs and SSBICs in the definition of passive investors.

B. Equity/Debt Plus and Attribution Exemptions

Background

22. In the *Attribution Notice*, we invited comment as to whether multiple cross-interests or currently nonattributable interests, when held in combination, raise diversity and competition concerns warranting regulatory oversight. We anticipated that any regulation of such inter-relationships would require case-by-case review of applications, but we did not otherwise delineate specific proposals to address these concerns. We also invited comment as to whether to restrict or eliminate the current nonvoting stock and single-majority shareholder attribution exemptions, expressing concerns that some interest holders that are eligible for these

exemptions might nonetheless exert significant influence such that the interest should be attributed.

23. In the *Attribution Further Notice*, we proposed to adopt a targeted equity/debt plus (''EDP'') attribution approach to deal with the foregoing concerns. We noted that our proposed new EDP rule would operate in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad. This approach would not eliminate the nonvoting and single majority shareholder exemptions from attribution, but would limit their availability in certain circumstances. Under this approach, we proposed to attribute the otherwise nonattributable debt or equity interests in a licensee where: (1) 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 (2) the equity and/or debt holding exceeds 33 percent. Under our EDP proposal, a finding that an interest is attributable would result in that interest being counted for all applicable multiple ownership rules, local and national.

Comments

24. *Single Majority Shareholder and Nonvoting Stock Attribution Exemptions.* As discussed in the *Attribution Further Notice*, most commenters in response to the *Attribution Notice* urged us to retain the single majority shareholder and nonvoting stock attribution exemptions, but network affiliates have expressed concerns that the exemptions have allowed networks to extend their nationwide reach by structuring nonattributable deals in which the networks effectively exert significant influence if not control over licensees.

Decision

25. *Overview.* As we noted in the *Attribution Further Notice*, the relaxation of the multiple ownership rules resulting from the 1996 Act requires neither relaxation nor tightening of our attribution rules but does underscore the importance of maximizing the precision of the attribution rules. We should take care in enforcing the multiple ownership limits, which have been deliberately set at certain levels, to ensure that the attribution rules neither unduly loosen nor restrict those limits, but rather apply them with the greatest precision to entities that have the power to influence a licensee's operations. We have been mindful of this goal in the decisions that follow.

26. We will not eliminate the single majority shareholder or nonvoting stock exemptions, but, rather, to address the concerns that we raised in the *Attribution Notice* and *Attribution Further Notice*, we will adopt our equity/debt plus attribution proposal, modified as discussed herein, as a new rule that would function in addition to the other attribution rules. Under this new EDP rule, where the investor is either (1) a ''major program supplier,'' as defined herein to include all programming entities (including networks and inter-market time brokers) that supply over 15 percent of a station's total weekly broadcast programming hours, or (2) a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators, and newspapers), its interest in a licensee or other media entity in that market will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33 percent of the total asset value (equity plus debt) of the licensee or media entity. As a shorthand, we will use the term, ''total assets,'' herein to refer to the total asset value of the licensee. In the case of a major program supplier, the EDP rule will apply and the interest will be attributable only if the investment is in a licensee to which the requisite triggering amount of programming is provided. A finding that an interest is attributable under EDP would result in attribution for purposes of applying all relevant multiple ownership rules, local and national, except that, as discussed in the *TV National Ownership Order*, we will not double-count same-market TV stations towards application of the national TV ownership rules.

27. We will define equity to include all stock, whether common or preferred and whether voting or nonvoting. We will also include equity held by insulated limited partners in limited partnerships. Debt includes all liabilities, whether short-term or long-term. Total assets, by definition, is equal to the sum of all debt plus all equity. Finally, an interest that is attributable pursuant to the EDP rule will count in determining compliance with all applicable ownership rules, national as well as local.

28. The equity/debt plus approach is intended to resolve our concerns, expressed in the *Attribution Notice*, that multiple nonattributable business interests could be combined to exert influence over licensees. As we stated in the *Attribution Notice*, we are concerned that our nonvoting stock, single majority shareholder, and debt attribution exemptions can permit nonattributable investments that could carry the potential for influence such that they implicate diversity and competition concerns and should be attributed.

29. The EDP rule addresses the most serious concerns we raised in the *Attribution Notice* and *Attribution Further Notice* concerning the underinclusiveness of the attribution rules, particularly those that were supported in the record. Based on the record, we have targeted our remedy and focused those concerns in shaping the EDP rule. For example, except in cases involving a same-market media entity or major program supplier, as defined herein, the single majority shareholder exemption and exemptions for nonvoting stock, preferred stock, corporate debt and other corporate liabilities will continue to apply as they do now. Moreover, the EDP rule will not apply to a program supplier's investment in a licensee or station unless the program supplier provides over 15 percent of that station's total weekly broadcast hours. Thus, a program supplier may invest without limit in the nonvoting stock, preferred stock or debt of a licensee to which it does not provide the requisite level of programming without having its interest attributed.

30. Furthermore, same-market or other relationships not within the defined EDP triggering relationships described herein will continue to be non-attributable. For example, an investor that is not a major program supplier and that is not a same-market media entity (*i.e.*, it does not have an attributable interest in a station, newspaper, or cable system in a given market) can continue to hold more than 33 percent of the total nonvoting assets of two stations or more in that same market without either interest being attributable.

31. The targeted approach embodied in the EDP rule reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions. In this regard, some commenters have urged us to retain our

current approach or implement a new case-by-case approach, considering the combined impact of multiple business and financial relationships in a particular transaction.

32. However, we believe that the bright-line EDP test is superior to a case-by-case approach. The EDP rule will provide more regulatory certainty than a case-by-case approach that requires review of contract language. Thus, the EDP rule will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs. While an *ad hoc* approach might be more tailored than the EDP rule, it also might lead to complicated interpretation and processing difficulties and would likely add uncertainty to resolution of attribution cases. Of course, we retain discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review. Such cases might occur, for example, when there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence such that the Commission's multiple ownership rules should be implicated, notwithstanding the fact that these combined interests do not come within the parameters of the EDP rule. We do not intend by this reservation of discretion to resurrect the cross-interest policy, elsewhere eliminated in this *R&O*. Rather, we merely emphasize our obligation under the Communications Act to apply the public interest standard and, as necessary, to scrutinize extraordinary or unanticipated circumstances that may arise.

33. In the *Attribution Further Notice*, we invited comment on the impact of a 33 percent EDP threshold on small business entities, particularly on whether there would be a disproportionate impact on small or minority entities. While some parties have argued that adoption of an equity/debt plus proposal would deter capital flow to broadcasting generally and might curb investment in smaller, minority, or UHF stations, in particular, or in digital television, others have argued strongly that this is not the case. We have no reason to believe that the EDP rule would unduly deter investment. The equity/debt plus proposal does not preclude investment by any entity; rather, it limits nonattributable investment levels for entities that have the potential to influence licensees. Moreover, the limit does not apply to all entities that might invest or help fund the transition to digital television or otherwise invest in licensees. In addition, we will consider individual rule waivers in particular cases where substantial evidence is presented that the conversion to digital television would otherwise be unduly impeded or that a waiver would significantly expedite DTV implementation in that particular case.

34. While we have invited comment on those issues, it is nonetheless our view that promoting our goal of ensuring adequate funding for the transition to digital television is better accomplished through our ownership rather than our attribution rules. The attribution rules are designed to attribute entities that wield significant influence on core operations of the licensee. It is the ownership rules that limit investment based on our core policies of diversity and competition. Arguments with respect to whether additional investment should be permitted have been made in the context of our companion multiple ownership proceedings. We believe that the attribution rules should function as precisely as possible to identify influential interests and that relaxation of ownership limits, if warranted, should be accomplished directly through revision of the multiple ownership rules, not indirectly through manipulation of what is considered ''ownership.''

35. *Triggering Relationships.* As we proposed in the *Attribution Further Notice*, the EDP approach will focus directly on those relationships that may trigger situations in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence over the core operations of the licensee. The approach of focusing on specified triggering relationships would extend the Commission's current recognition that the category or nature of the interest holder is important to whether an interest should be attributed. For example, under the current broadcast attribution rules, passive investors are subject to a higher voting stock attribution benchmark, since these parties are subject to fiduciary and other restraints on their exercise of influence over licensees and are, by their nature, principally concerned with investment returns rather than direct influence over the licensee. The two relationships that will trigger the rule, major program supplier and same-market media entity, are relationships that afford the interest holder the incentive and means to exert influence over the licensee.

36. In adopting the EDP rule, we affirm our tentative conclusion in the *Attribution Further Notice* that there is the potential for certain substantial investors or creditors to exert significant influence over key licensee decisions, even though they do not hold a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much, if not more, influence or control over some corporate decisions as voting equity holders whose interests are attributable.

37. *Same-Market Media Entities.* As we noted in the *Attribution Further Notice*, same-market broadcasters and certain other same-market media entities may raise particular concerns because of our goal of protecting local diversity and competition. Firms with existing local media interests may have an incentive and means to use financing or contractual arrangements to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations. Indeed, the Commission's cross-interest policy reflected its concern for competition and diversity where an entity has an attributable interest in one media outlet and a ''meaningful relationship'' with another media outlet serving substantially the same area. Accordingly, we will include same-market media entities as one of the relationships that will trigger application of the EDP rule.

38. To trigger application of the EDP rule to same-market media entities, the interest held in the non-EDP media entity in the same market must be attributable without reference to the EDP rule; the holding of a non-attributable interest in one station or entity in a market does not trigger application of the EDP rule where an EDP level, but otherwise non-attributable, interest is acquired. Thus, under this prong of the EDP rule, a nonvoting interest in 34 percent of the total assets of two stations in the same market will not result in attribution of either station. This is because the EDP rule is only triggered when the entity acquiring the second interest also holds an interest in a same-market media entity that is attributable under the current attribution rules other than the EDP rule. We follow case law in the cross-interest policy context in this regard. As discussed below, that policy is implicated in situations where a party holds an attributable interest in one media outlet and has a ''meaningful relationship'' with another media outlet serving ''substantially the same area. As we proposed, we will include same-

market radio and television broadcasters as well as cable operators and newspapers in the category of same-market media entities subject to the equity/debt plus attribution standard. Cable operators and newspapers are subject to cross-ownership rules and have also been subject to the cross-interest policy. There is, accordingly, good reason to include them in the EDP rule.

39. For purposes of applying this prong of the EDP rule to radio stations, newspapers, and cable operators, as proposed in the *Attribution Further Notice,* we will define the ''same market'' by reference to the definition of the market used in the underlying multiple ownership rule that is implicated. As noted by Knight-Ridder, such an approach will help avoid confusion among the regulated entities in applying the EDP rule. With respect to television stations, as we also noted in the *Attribution Further Notice,* the definition of what is the same market for purposes of applying the EDP attribution standard is resolved in the companion television local ownership proceeding.

40. *Program suppliers.* In the *Attribution Further Notice,* we invited comment on whether we should include program suppliers under the ''equity/debt plus'' attribution test to address our concern and that of some commenters that program suppliers such as networks could use nonattributable interests to exert influence over critical station decisions, including programming and affiliation choices. We cited recent transactions involving program suppliers where it appeared that nonattributable investors could be granted rights over licensee decisions that might afford them significant influence over the licensee. We invited comment as to whether we should encompass radio and television time brokerage agreements or LMAs under the proposed ''equity/debt plus'' attribution approach, if we specify program suppliers as a triggering category.

41. We will include major program suppliers in the EDP rule. We will define the ''major program suppliers'' that are subject to this new attribution standard to include entities that provide more than 15 percent of a station's total weekly broadcast programming hours. We believe that the 15 percent standard should apply to all providers of programming to stations, including those that provide programming pursuant to inter-market LMAs. As noted above, the EDP rule would apply only to the major program supplier's investments in a station to which it supplies the requisite amount of programming. In addition, where a person or entity has an attributable interest in a major program supplier, that person or entity will be deemed to be a major program supplier for purposes of applying the EDP rule.

42. We have decided to define a major program supplier subject to the EDP rule as all programming entities that supply over 15 percent of a station's weekly programming for the following reasons. We agree with those commenters that argue that not every program provider can exert sufficient influence such that its otherwise non-attributable financial interests in a licensee should potentially be subject to attribution. We note the views of commenters that the major networks should be subject to the EDP rule and those that argue for including providers of substantial amounts of programming to a station. Those entities that provide substantial quantities of programming to a licensee are, we believe, in a strong position to exert significant influence over that licensee, particularly when the programming connection is coupled with the requisite financial investment, such that the EDP rule should be triggered. We believe that the 15 percent standard accomplishes these goals, as it would encompass those entities providing substantial quantities of programming that also have the requisite investment in the station and would exclude those entities that provide only small amounts of programming and that therefore do not have potential to exert significant influence over licensees. Moreover, it is a standard that we have experience in applying, as it is the standard currently used in determining whether an intra-market radio LMA is *per se* attributable, and it is the standard that will be used in determining whether an intra-market TV LMA is *per se* attributable. Under our new rule, an intra-market LMA is *per se* attributable if it involves more than 15 percent of a station's programming. In contrast, an inter-market LMA is attributable, under the EDP rule, only if it involves more than 15 percent of a station's programming and if the LMA is accompanied by a financial investment that is above the 33 percent investment threshold. It would sweep too broadly to attribute inter-market LMAs that are unaccompanied by the requisite financial investment. The substantial investment provides additional incentive and ability for influence or control. Finally, it is a clear and administratively simple standard to apply, promoting our goal of making the EDP rule a bright-line test.

43. A clear rationale exists for not attributing network affiliation agreements not accompanied by the requisite investment or debt agreements not involving program suppliers or same-market broadcasters. We do not attribute all network affiliation agreements because, absent a substantial equity or other investment that may create accompanying obligations, the affiliate is free to negotiate with the network for particular terms. With respect to lenders, such as banks, our experience indicates that their motivation is return on their investment, and that they do not have the same incentive as the networks to influence the programming or other core operational choices of the licensee.

44. While some commenters strongly argued that applying the EDP rule to program suppliers would curb investment in broadcast stations and possibly hurt weaker UHF stations and might deter investment that would facilitate the conversion to DTV, they do not provide empirical evidence to support this argument. We also note that the rule does not preclude investment, but merely provides that investments over a certain level will be deemed presumptively attributable. Networks are therefore free to invest in their affiliates, subject of course to the applicable multiple ownership rules. Moreover, the EDP rule does not attribute investments, even those by networks in their affiliates, which fall below the 33 percent threshold. Thus, a major program supplier may have an investment that is equivalent to 32 percent of the total assets of a station to which it supplies programming in excess of the 15 percent standard. This would comply with all EDP limits and the interests would not be attributable. In addition, the EDP rule does not affect investments by entities other than major program suppliers or same-market media entities. Accordingly, we believe that the EDP rule will not curb investment, deter new entry, or curb the conversion to DTV.

45. We have decided not to sweep so broadly as to include all entities from which a licensee obtains programming but only to include those entities that provide more than 15 percent of a station's weekly total programming. We have not been presented evidence that smaller program suppliers and syndicators that do not provide substantial quantities of programming to stations have the potential to wield significant influence such that their investment should be attributed. Under these circumstances, there appears to be no real need to impose constraints on investments by these syndicators and by new networks that do not provide the triggering amount of programming. If it

appears that problems arise in these areas, we can later broaden the EDP rule.

46. *Investment Thresholds.* Under the EDP rule, where the creditor or equity interest holder is a same-market broadcaster or major program supplier, as defined herein, in addition to applying the existing attribution criteria, we would attribute any financial interest or investment in a station or other media outlet where it exceeds 33 percent of the total assets (debt plus voting, non-voting and preferred stock) of the licensee. We intend to aggregate the equity and debt interests of such an investor (including both non-voting stock in whatever form it is held and voting stock) in a licensee or other media outlet for purposes of applying the investment threshold. Thus, when the investor's total investment in the licensee or other media outlet, aggregating all debt and equity interests, exceeds a specified threshold percentage of all investment in the licensee (the sum of all equity plus debt), that investment would be attributable. In aggregating the different classes of investment, equity and debt, we intend to use total assets (debt plus voting, non-voting, and preferred stock) as a base. We will not apply the percentage threshold separately to debt and to equity interests because this could lead to distortions in applying the EDP rule, depending on the percentage of total assets that each class of interests comprises. For example, were we to apply the percentage thresholds separately, a company with only 10 percent of its capital from debt would be attributable to a creditor providing only 3.4 percent of the company's total assets, while any equity holder providing 32 percent of the total capital would be nonattributable.

47. The FCC has recognized that holding voting stock in sufficient quantities confers the ability to exert influence or control over the licensee. Our decision to expand our focus beyond voting stock to nonvoting stock and debt is buttressed by academic literature. Nonvoting stock and debt may now be used to control or influence a licensee in a significant manner, especially when coupled with another meaningful relationship or when held by someone that has the incentive to influence the station or media entity. There is an incentive for licensees and other entities that face regulatory constraints on their acquisition of voting stock and other currently attributable interests (*e.g.,* networks that face the 35 percent national reach cap) to seek to combine currently non-attributable investments with contractual rights in such a manner so as to gain significant influence, and we believe that the current attribution exemptions have afforded such entities the ability to do so. Accordingly, the EDP rule examines not only the investment in voting stock but also nonvoting equity and debt in order to limit the ability of such entities to circumvent the attribution rules.

48. We have decided to set the threshold at 33%, as proposed in the *Attribution Further Notice.* We believe that a 50 percent threshold would be inappropriately high. Our goal is not merely to attribute interests with the potential to control but also those with a realistic potential to exert significant influence. On the other hand, the suggested thresholds of 25 percent or 10 percent seem too low. In setting the threshold for attribution of these newly attributable interests, we want to be cautious not to set the limit so low as to unduly disrupt capital flow to broadcasting. In addition, we believe that the threshold for attribution of nonvoting interests should be substantially higher than the attribution level for voting interests, which give the holder a ready means to influence the company. The proposed 33% threshold seems to be an appropriate and reasonable attribution threshold. We note that we have discretion to exercise our judgment in setting a percentage threshold in this regard and to draw an appropriate line, a challenging yet inevitable task for government agencies. We have employed a 33 percent benchmark applied in the context of the cross-interest policy, and that particular benchmark does not appear to have had a disruptive effect. In *Cleveland Television,* the Commission held that a one-third non-voting preferred stock interest by a broadcaster in another station in the same market conferred ''insufficient incidents of contingent control'' to violate the multiple ownership rules or the cross-interest policy, and that the holders, by virtue of ownership of the non-voting preferred stock interest would not retain the means to directly or indirectly control the station. More recently, we have applied *Cleveland Television's* 33 percent threshold in *Roy M. Speer,* where we limited the non-attributable equity holdings of a same-market television licensee in another local television station to 33 percent. We will use this threshold in applying the EDP rule but note that we could adjust the threshold later, if warranted.

49. We recognize that the attributable status of a certain investment could change, based, for example, on a change in the firm's assets, resulting in the investor's interests dropping below the 33 percent threshold, or vice versa. We will require parties to maintain compliance with the attribution criteria as any such changes occur. Where sudden, unforeseeable changes take place, however, we will afford parties a reasonable time, generally one year, to come into compliance with any ownership restrictions made applicable as a result of the change in attributable status. Finally, we note that we have conditioned a number of recent cases that have raised similar concerns on the outcome of this proceeding. We intend to issue separate orders, as necessary, to apply the EDP rule to any cases that have been conditioned on the outcome of this proceeding.

C. Time Brokerage Agreements or LMAs

Background

50. An LMA or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming. Currently, we do not attribute television LMAs, and, accordingly, these relationships are not subject to our multiple ownership rules. In the radio context, however, time brokerage of another radio station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours results in attribution of the brokered station to the brokering licensee for purposes of applying our multiple ownership rules.

51. In the *Attribution Further Notice,* we incorporated the tentative proposal, initially set forth in the *Local Ownership Further Notice,* 60 FR 6490, December 19, 1996, to attribute television LMAs based on the same principles that currently apply to radio LMAs. Thus, time brokerage of another television station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours would be attributable and would count toward the brokering licensee's national and local ownership limits. We specifically proposed to count attributed television LMAs in applying our other ownership rules, including, for example, the broadcast-newspaper cross-ownership rule, the broadcast-cable cross-ownership rule, and the one-to-a-market rule (or radio-television cross-ownership rule).

Comments

52. Most commenters addressing this issue supported our proposal to attribute television LMAs based on the

same principles that currently apply to radio LMAs.

53. Many parties agreed with our tentative conclusion that television LMAs should be attributable because they confer significant influence over the programming of the brokered party's station.

54. Commenters opposed to attributing LMAs generally did not disagree that LMAs confer significant influence over the programming of the brokering party's station, but either denied that LMAs can have negative competitive or diversity effects or argued that their public interest benefits outweigh these other considerations.

55. We issued a Public Notice requesting all parties to all existing television LMAs, or time brokerage agreements, to provide certain factual information regarding the terms and characteristics of these agreements. The responses received to the questionnaire also provide information supporting our view that LMAs accord the broker significant influence that warrants attribution. First, the LMA, or time brokerage agreement, typically brokered most, if not all, of the brokered station's broadcast time. The percent of time brokered with both same-market and out-of-market LMA stations averaged 90 percent or greater. Second, LMA contracts tended to have extended maturities, which are renewable in the majority of cases. Same-market LMA contracts averaged seven years in duration, and ranged from one to 21 years, while out-of-market LMA contracts averaged somewhat less at five years, with a range from two to ten years. In addition, a significant number of LMA agreements contained options to purchase the station.

56. *Decision.* We will adopt a new rule to *per se* attribute television LMAs, or time brokerage of another television station in the same market, for more than fifteen percent of the brokered station's broadcast hours per week and to count such LMAs toward the brokering licensee's local ownership limits. We have determined in the *TV National Ownership Order* that we will not count same-market LMAs towards the brokering licensee's national ownership limits, as that would constitute double-counting these LMAs. We will count inter-market time brokerage agreements where they come under the EDP rule for purposes of the national ownership limits. We believe that the rationale for attributing LMAs set forth in the *Radio Ownership Order,* 57 FR 18089, April 29,1992—*i.e.,* to prevent the use of time brokerage agreements to circumvent our ownership limits—applies equally to same-market television LMAs. We will determine whether an LMA involves a ''same market'' station based upon the revised duopoly rule's standards. Thus, if the brokered station is in the same DMA as the brokering station, the LMA is ''same market'' for purposes of determining compliance with the ownership rules. If the LMA is found to be a same-market LMA, we will then apply the other multiple ownership rules to see if they are implicated.

57. We note that in the *Radio Ownership Order,* the Commission voiced its concern that substantial time brokerage arrangements among stations serving the same market, combined with the increased common ownership permitted by the revised local rules, could undermine broadcast competition and diversity. The Commission therefore decided to preclude that possibility by attributing local time brokerage arrangements, at least until it had some experience with the effect of that new regulatory approach in broadcast markets. We are convinced that the radio LMA attribution rule adopted in that Order has operated successfully to ensure that the goals set forth in the radio ownership rules are not undermined by the existence of unattributed influence over radio stations in the same market. We believe that a similar approach is warranted concerning television LMAs.

58. In the *Attribution Further Notice,* we reiterated our belief that the attribution rules must function effectively and accurately to identify all interests that are relevant to the underlying purposes of the multiple ownership rules and that should therefore be counted in applying those rules. Now, based on our experience with attribution of radio LMAs and the record in this proceeding, we conclude that a stand-alone, or *per se,* rule that attributes a same-market television LMA, or time brokerage of a television station in the same market, for more than 15 percent of the brokered station's weekly broadcast hours is necessary to accomplish this goal.

59. We will count attributed television LMAs toward all applicable broadcast ownership rules, which include the duopoly rule and the one-to-a-market, or radio-television cross-ownership rule. We have determined in the *TV National Ownership Order* that we will not count same-market LMAs towards the brokering licensee's national ownership limits, as that would constitute double-counting these LMAs. We will count inter-market time brokerage agreements attributable under EDP because they are accompanied by the requisite financial investment for purposes of the national ownership limits. Attribution is based on influence or control that should be considered cognizable and defines what we mean by ownership. Indeed, with the exception of radio LMAs, an exception which we eliminate today, our other current attribution rules apply across the board to all the relevant ownership limits. There is no reasonable basis for treating television LMAs any differently.

60. The record in this proceeding supports our decisions to attribute television LMAs and to count attributed radio LMAs toward all applicable radio ownership limits. Our analysis, above, of the information submitted by parties to television LMAs in response to our *Public Notice* indicates that television LMAs, or time brokerage agreements, may give the brokering station influence over the programming of the brokered station such as should be recognized as an attributable relationship. Moreover, we agree with most commenters, representing a variety of interests ranging from ABC to the public interest group MAP, that television LMAs, like radio LMAs, permit a degree of influence and control that warrants ownership attribution. We find it particularly noteworthy that commenters that opposed attributing television LMAs did not disagree that such LMAs confer substantial influence over brokered stations. Instead, these commenters argued that LMAs are beneficial and provide diversity benefits, an issue relevant to the question of how much common ownership should be permitted, consistent with our competition and diversity goals, rather than the cognizability of the interest. This issue is being considered in the TV Local Ownership and TV National Ownership proceedings.

61. We also note that, under the EDP rule, above, we will attribute an inter-market time brokerage agreement or LMA (or any other program supply arrangement) that brokers more than 15 percent of a station's programming (*i.e.,* a program supplier, as defined above) when held in combination with more than 33 percent of the total assets (debt plus voting, non-voting and preferred stock) of a station. Prior to the EDP rule, an inter-market LMA would not have been attributed regardless of the level of non-voting equity and debt interests held by the brokering station. With the exception of the EDP rule, we will not attribute television time brokerage agreements between stations in different markets. We disagree with Pappas, which asserted that our proposal to treat television LMAs as cognizable interests must also apply to television network

affiliation agreements and argued that, for attribution purposes, there is little substantive difference between an LMA and a network affiliation agreement, in that both involve the provision of television programming and the sale of television advertising time.

62. *In the Radio Rules Order,* the Commission stated that time brokerage agreements involving radio stations licensed to different markets ''raise little public interest concern; indeed they can be difficult to distinguish from network affiliation agreements, of which the Commission has long approved.'' Both LMAs and network affiliation agreements clearly confer some level of influence over the programming and commercial time of a licensee. Neither, however, taken alone, constitutes an attributable interest. It is the combination of ownership of a *local* competing media interest *and* programming and direct operational influence via a substantial same-market LMA that raises our concern and drives our decision to attribute such LMAs under our multiple ownership rules. This concern does not arise where there is no such combination of interests, as for example, network affiliation contracts or out-of-market LMAs unaccompanied by substantial investment in the programmed station. It is only when an out-of-market LMA provides more than 15 percent of a station's programming, in addition to holding an investment of more than 33 percent of total assets of the station, that we deem the level of influence sufficient to warrant attribution. Under those circumstances, where substantial investment in the licensee is combined with provision of substantial quantities of programming, we believe that the level of influence is sufficient to warrant attribution regardless of the fact that the programming provider is not a media entity in the same market. And, as we have noted, where the program supply agreement takes the form of a network affiliation agreement, the network, like the out-of-market LMA broker, will have its interest in its affiliate attributed if it invests in the affiliate above the EDP threshold.

63. *Modify radio rules.* In our *Attribution Further Notice,* we stated that if we adopt our proposal for attributing television LMAs, we would also consider similarly modifying the radio LMA rules (47 CFR 73.3555(a)(3)), because radio LMAs are currently considered only for purposes of applying the radio duopoly rule (47 CFR 73.3555(a)(1)), and invited comment on how the radio LMA attribution rules should be modified in this regard. Paxson, the only commenter to address this issue, generally argued against attributing radio or television LMAs for purposes of ownership restrictions other than the duopoly rules. We have decided to adopt our proposal to attribute same-market radio LMAs for purposes of applying our other multiple ownership rules that are applicable to radio stations, including, for example, the daily newspaper cross-ownership rule, and the one-to-a-market (or radio-television cross-ownership) rule. The other attribution rules apply across the board, and there is no reason not to apply attribution of radio LMAs consistently to all applicable radio ownership rules. Accordingly, we will modify our radio LMA attribution rules to reflect this change.

64. *Requirement to File TV LMAs.* In our *Attribution Further Notice,* we incorporated from the *TV Local Ownership Further Notice* the tentative proposal that attributable television LMAs be filed with the Commission in addition to being kept at the stations involved in an LMA. In the *Radio Ownership Order,* the Commission required that all radio time brokerage contracts be placed in the public inspection files of the stations involved, and that local time brokerage agreements be filed with the Commission within 30 days of execution. The Commission noted that these requirements would impose only a minimal burden on licensees but would permit it and others to monitor time brokerage agreements to ensure that licensees retain control of their stations and adhere to the Communications Act, Commission Rules and policies and the antitrust laws. We believe that these same reasons are valid today with respect to television time brokerage agreements.

65. We will require stations involved in television time brokerage agreements (inter-market as well as intra-market agreements) to keep copies of those agreements in their local public inspection files, with confidential or proprietary information redacted where appropriate, and require the licensee that is the brokering station to file with the Commission, within 30 days of execution of such agreement, a redacted copy of any time brokerage agreements that would result in the arrangement being attributed in determining the brokering licensee's compliance with the multiple ownership rules. We will amend our rules accordingly. We note that these provisions impose an affirmative obligation on licensees to determine, in the first instance, whether a particular LMA is attributable (either under the per se rule or the EDP rule), and to file the agreement with the Commission if it is.

66. *Programming responsibility safeguards.* In our *Attribution Further Notice,* we emphasized, as we did in our radio ownership proceeding, ''that the licensee is ultimately responsible for all programming aired on its station, regardless of its source,'' and invited comment on what, if any, specific safeguards we should adopt with respect to television LMAs to ensure a brokered station's ability to exercise its programming responsibility. We believe that attribution of same-market television LMAs, along with our new filing requirements, will subject LMAs arrangements to sufficient scrutiny by competitors, the public and the Commission, that brokering stations will have strong incentives to avoid unauthorized acquisition of control of the brokered station. We remind all parties to LMAs that, as we noted in the *Radio Ownership Order,* ''our rules require the licensee to maintain control over station management and ultimate programming decisions, regardless of any time brokerage agreements that may exist.''

67. *Simulcasting.* In our *Attribution Further Notice,* we stated that we would resolve the issue, raised in the *Local Ownership Further Notice,* as to whether the program duplication or simulcasting limits that apply to commonly owned or time brokered radio stations should apply to television LMAs. No commenters addressed this particular question, although some argue generally that LMAs result in duplicative programming. Other commenters disagree, pointing out that, from the perspective of a time broker, time brokerage agreements pay off through the ability to attract additional, new audiences to the brokered station. A duplication of programming would not attract additional audiences, but would merely divide the audience currently enjoyed by the time broker's owned station with the audience of the brokered station.

68. With respect to radio broadcasting, ''simulcasting,'' or program duplication, refers to the simultaneous broadcasting of a particular program over co-owned stations serving the same market, or the broadcasting of a particular program by one station within 24 hours before or after the identical program is broadcast over the other station. In the *Radio Ownership Order,* the Commission limited simulcasting on commonly owned stations in the same service serving substantially the same area to 25 percent of the broadcast schedule, stating that it saw no benefit to the

public from permitting commonly owned same-service stations in the same market to substantially duplicate programming. The Commission reasoned that the limited amount of available radio spectrum could be used more efficiently by other parties to serve competition and diversity goals, and that substantial same-service simulcasting would not aid economically disadvantaged stations because the audience for the programming in question would be shared by two or more stations.

69. At this time, we will not apply simulcasting limits to television LMAs. We are not aware that broadcasters involved in television LMAs are simulcasting their programming to any significant extent. Moreover, we believe such simulcasting is unlikely to occur because it would most likely work to the disadvantage of the stations engaged in the LMA. We note that television coverage differs from radio, in that there are fewer television stations per market, and those stations cover a larger market area than do radio stations. We assume that if television stations commonly operated under an LMA in the same market simulcast programming, they would split the audience for that programming between themselves, losing the audience for alternative programming to other television stations in that market. Because stations' advertising revenues are generally based on audience share, revenue and basic profits would be negatively affected by such practices. There consequently appears to be a significant market disincentive against simulcasting in the context of same-market television LMAs. To the extent that simulcasting occurs, it may reflect the owner's (or broker') attempt to maximize the audience reach within the DMA. As indicated above, we received no comments specifically addressing this question, nor have we seen any evidence that the concerns with respect to simulcasting by commonly owned or time brokered radio stations apply to television stations operating under LMAs. Should we find evidence to the contrary at a future date, we may, of course, revisit this decision.

70. *Grandfather Existing LMAs.* In our *Attribution Further Notice,* we stated that if we decided to attribute television LMAs as we proposed in this proceeding, we intended to resolve the issues of grandfathering, renewability and transferability of existing TV LMAs in the separate TV Local Ownership proceeding so that we could evaluate the extent to which grandfathering might be needed based on the nature of the local ownership rules we adopt. These issues are outside the scope of this proceeding, and, as we noted in the *Attribution Further Notice,* will be resolved in the *TV Local Ownership Order.*

D. Cross-Interest Policy

Background

71. *Overview.* The cross-interest policy has been applied to preclude individuals or entities from holding an attributable interest in one media property (broadcast station, newspaper, cable system) and having a ''meaningful'' albeit nonattributable interest in another media entity serving ''substantially the same area.'' This policy originally developed as a supplement to the multiple ownership ''duopoly'' rule which prohibited the common ownership, operation, or control of two stations in the same broadcast service serving substantially the same area. Ownership, operation or control as contemplated by this rule was originally defined as actual control or ownership of 50 percent or more of the stock of a licensee. Since this definition did not encompass minority stock ownership, positional interests (such as officers and directors), and limited partnership interests, the cross-interest policy was developed to address the competitiveness and diversity concerns created when a single entity held these types of otherwise permissible interests in two (or more) competing outlets in the same market. In essence, the cross-interest policy filled gaps in our attribution criteria that had become apparent through our case-by-case application of the ownership rules.

72. Through case-by-case adjudication, the following relationships came to be viewed as constituting ''meaningful'' interests subject to the cross-interest policy: key employees, joint ventures, nonattributable equity interests, consulting positions, time brokerage arrangements, and advertising agency representative relationships. The cross-interest policy did not prohibit these interests outright, but required an *ad hoc* determination regarding whether the nonattributable interests at issue in each case would be permitted.

73. In 1989, after a comprehensive review to assess the continuing need for the cross-interest policy, the Commission issued a *Policy Statement* limiting the scope of the cross-interest policy so that it would no longer apply to consulting positions, time brokerage arrangements and advertising agency representative relationships. The Commission decided that it no longer needed to apply the cross interest policy to those relationships because: (1) the need for the policy had decreased based on new attribution provisions that had superseded it; (2) the costs to the public and the Commission of administering the policy were difficult to justify given the reduced need for continued oversight of these relationships; (3) growth of media outlets had undercut the notion that any single individual or entity could skew competition through the cross-interests at issue; and (4) alternative safeguards, such as antitrust laws, fiduciary duties and private contract rights were available to curb anti-competitive conduct.

Comments

74. *Current Aspects of the Cross-Interest Policy.* After the *Policy Statement,* three aspects of the cross-interest policy remain in effect:

(1) *Key employee relationships.* The cross-interest policy has generally prohibited an individual who serves as a key employee, such as general manager, program director, or sales manager, of one station from having an attributable ownership interest in or serving as a key employee of another station in the same community or market. The application of the cross-interest policy in these situations is premised on the potential impairment to competition and diversity and the apparent conflict of interest arising from the ability of key employees to implement policies to protect their substantial equity interest in the other station.

(2) *Nonattributable equity interests.* The cross-interest policy has also typically proscribed an individual who has an attributable interest in one media outlet from holding a substantial nonattributable equity interest in another media outlet in the same market. The Commission's concern with these relationships has been that the individual could use the attributable interest in one media outlet to protect the financial stake in the other media outlet, thus impairing arm's length competition. (Two or more separate non-attributable interests in a market are not proscribed by this policy, as neither gives rise to the potential to influence station operations that would concern us.)

(3) *Joint venture arrangements.* The cross-interest policy has prevented two local broadcast licensees from entering into joint associations to buy or build a new broadcast station, cable television system, or daily newspaper, in the same market. These joint ventures have triggered cross-interest scrutiny because the successful operation of the joint venture was thought to require a

cooperative relationship between otherwise competing stations, and this would impair competition in the local market.

75. *Prior Notices.* In the *Cross-Interest Notice,* we asked for comments as to whether we should retain our cross-interest policy in these three areas—key employees, non-attributable equity interests, and joint ventures. We also invited comment as to whether we should amend the attribution rules to incorporate the key employee portion of the cross-interest policy. We sought further comment on whether retention of the remaining named components of the cross-interest policy was necessary to prevent anticompetitive practices, whether alternative deterrent mechanisms exist to assure competition and diversity, and whether continued regulation of relationships not specifically addressed by the Commission's attribution rules is necessary. We also questioned whether regulatory oversight of one or more of these interests should be limited to geographic markets with relatively few media outlets. Five comments and reply comments were filed in response to the *Cross-Interest Notice.* The majority of commenters urged the Commission to eliminate the cross-interest policy as it applies to all of these relationships. One commenter, CFA/TRAC, urged the Commission to retain the policy. In the *Attribution Notice,* we sought to update the record with respect to retention of the cross-interest policy in light of changes in the multiple ownership rules and additional changes we were proposing to the attribution rules. In the *Attribution Further Notice,* we sought additional comment as to the effect on our cross-interest policy of our proposed equity/debt plus approach, which would apply to cases raising concerns of competition and diversity normally reflected in the cross-interest policy. We also sought comment on whether the equity/debt plus approach would be preferable to a case-by-case approach, which is used to administer the cross-interest policy. We specifically noted that the bright line approach could provide certainty and minimize regulatory costs.

76. Most commenting parties expressly discussing this issue favored eliminating at least portions, if not all of the cross-interest policy.

77. A few commenters either opposed elimination of the cross-interest policy, or urged the Commission not to change the rules.

Decision

78. We will eliminate the above noted remaining components of the cross interest policy. Our goals in initiating this proceeding include maximizing the clarity of the attribution rules, providing reasonable certainty and predictability to parties to allow transactions to be planned, and easing application processing. As discussed above, commenters have argued that the vagueness and uncertainty imposed by the *ad hoc* application of the cross-interest policy have chilled investment. As CalPERS argues, this uncertainty impedes the ability of broadcasters to enter into transactions because the policy can be invoked to prohibit a seemingly permissible transaction.

79. Today, we have revised the attribution rules to adopt the EDP rule, a bright line test, which we believe will increase regulatory certainty and reduce regulatory costs. In adopting that rule, we will reach those situations involving formerly nonattributable interests that raised the most concern with respect to issues of competition and diversity, some of which were previously addressed in administering the cross-interest policy. We agree with commenters who argue that adoption of the EDP rule, as well as the existence of the other attribution rules, provides additional grounds for elimination of the cross-interest policy.

80. We note that the EDP rule directly covers concerns treated under the non-attributable interests prong of the cross-interest policy, as it would attribute a substantial nonattributable interest by a media entity in a second media outlet in the same market. We recognize, however, that the EDP rule does not cover all the areas encompassed by the cross-interest policy. It would not cover key employees, for example. We nonetheless believe, as commenters have pointed out, that internal conflict of interest policies, common law fiduciary duty, and contract remedies provide adequate substitutes for our administration of the policy with respect to key employees. In addition, many key employees are also officers and directors and are thus already covered by the attribution rules. In any event, we believe that the very small risk of harm to competition by a key employee in an instance not covered by any of these other regulations and remedies is greatly outweighed by the benefits of minimizing our case-by-case approach to transactions and applying bright line tests, such as the EDP test and our other attribution rules.

81. With respect to joint ventures, we believe that application of a cross-interest policy is unwarranted. The ownership and attribution rules define the level of combined ownership that is permissible in the local market. Many joint ventures are already covered by the attribution/ownership rules, and they may also be covered to some extent by the EDP rule. Accordingly, a joint venture between two licensees in a market to acquire additional broadcast entities in the same market may be subject to the radio-television cross-ownership rule or the relevant duopoly rule. As CBS contended, to continue to regulate these interests under a separate policy when many are covered by the attribution rules is redundant. In addition, according to CBS, the *ad hoc* application of the cross-interest policy has ''clouded the future of potential joint ventures with uncertainty'' regarding their eventual approval by the Commission. We agree that the cross-interest policy as applied to joint ventures is largely subsumed by the application of the current multiple ownership rules. To the extent that the cross-interest policy is not so subsumed, we believe that it should be eliminated. We have made a judgment to limit combined local ownership to certain degrees, as delineated in our local ownership rules. Accordingly, it makes no sense to have a routine additional layer of case-by-case review for those joint ventures that fully comply with those rules. In these cases, the burdens of case-by-case review are not justified for transactions that already comply with the multiple ownership rules. Furthermore, as other commenters noted, the application of the antitrust laws should prevent or remedy any abuses of joint venture relationships not already subject to the multiple ownership rules.

82. In sum, we believe that the regulatory costs and the chilling effects of the cross-interest policy and the benefits of applying a clear and discernable standard outweigh any risks of potential abuses in eliminating the policy. Moreover, many remaining aspects of the cross-interest policy are subsumed under our attribution rules, as revised herein.

E. Joint Sales Agreements (JSAs)

83. *Background.* In the *Attribution Notice,* we requested comment on whether, through multiple cooperative arrangements or contractual agreements, broadcasters could so merge their operations as to implicate our diversity and competition concerns. We noted, however, that we did not intend to reopen our earlier decisions permitting joint sales practices in radio and television. These decisions had allowed joint sales agreements (''JSAs'') (i.e., agreements for the joint sales of broadcast commercial time), subject to compliance with the antitrust laws.

84. After issuing the *Attribution Notice*, the staff was presented with cases involving joint sales agreements that raised diversity and competition concerns. These cases raised questions as to whether non-ownership mechanisms such as JSAs that might convey influence or control over advertising shares should be considered attributable under certain circumstances. Accordingly, in the *Attribution Further Notice* we invited additional comments on the potential effects of JSAs among same-market broadcasters on diversity and competition. We also sought comment on whether we should attribute JSAs among licensees in the same market, including both radio and television licensees, irrespective of whether they are accompanied by the holding of debt or equity. In addition, we sought general information concerning the typical contractual terms of JSAs.

85. *Decision*. We will not attribute JSAs. Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be attributed. We define JSAs as contracts that affect primarily the sales of advertising time, as distinguished from LMAs, which may affect programming, personnel, advertising, physical facilities, and other core operations of stations. We note that in our *DTV 5R&O*, we stated that we would look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology. JSAs may be one such joint business arrangement. We recognize the significant competitive concerns about same-market radio JSAs raised by DOJ, but we also note that the factors considered by DOJ and the Commission in analyzing business arrangements may differ in some respects. Although both DOJ and the Commission are concerned about the competitive consequences of business agreements such as JSAs, our concerns are not identical. DOJ's comments explicitly recognize that in addition to competition issues, the Commission is also concerned with issues of diversity and reducing unnecessary administrative burdens. Some JSAs may actually help promote diversity by enabling smaller stations to stay on the air. Furthermore, to reduce administrative burdens, we will not require the routine filing of JSAs with the Commission.

86. Accordingly, after weighing competition, diversity, and administrative concerns, we decline to impose new rules attributing JSAs as long as they deal primarily with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs. We will retain our current policies concerning JSAs. Furthermore, in the absence of specific evidence of widespread abuse of JSAs by broadcasters, we also decline to adopt the general disclosure and reporting requirement for radio JSAs recommended by DOJ in its comments. We will, however, require broadcasters who have entered into JSAs to place such agreements in their public inspection files, with confidential or proprietary information redacted where appropriate. This requirement will facilitate monitoring of JSAs by the public, competitors and regulatory agencies. We do, however, retain discretion, in any event, to review cases involving radio or television JSAs on a case by case basis in the public interest, where it appears that such JSAs do pose competition or other concerns. Finally, we emphasize that all JSAs are of course still subject to antitrust laws and independent antitrust review by the Department of Justice.

F. Partnership Interests

87. *Background*. Under the Commission's current attribution rules governing partnership interests, general partners and non-insulated limited partnership interests are attributable, regardless of the amount or percentage of equity held. An exception from attribution applies only to those limited partners who meet the Commission's insulation criteria and certify that they are not materially involved in the management or operations of the partnership's media interests.

88. The *Attribution Notice* asked for comment on whether the insulation criteria remain effective and specifically whether the insulation criteria needed to be tightened or relaxed to meet the needs of certain new types of business entities. For example, widely-held limited partnerships, and in particular business development companies, may be required by federal and state statutes to grant voting rights to limited partners in such matters as the selection and removal of general partners. However, the insulation criteria require that such voting rights be restricted, except under certain circumstances, in order to support a presumption of partner non-involvement in the management of the partnership. The Attribution Notice inquired whether the insulation criterion should be relaxed to remove this potential conflict with state law, or whether equity benchmarks combined with a more limited relaxation of the insulation criteria should be applied to these widely-held limited partnerships. We noted that commenters in response to the *Capital Formation Notice* had argued that allowing specific voting rights would not compromise our attribution rules since: (1) the remaining insulation criteria are sufficient to prevent material involvement of a partnership member in media operations; and (2) the dispersed interests in a widely-held limited partnership would preclude member involvement in management and operations.

89. In addition, the *Attribution Notice* asked whether an equity benchmark, such as 5 percent, should be used to establish attribution with respect to all ''widely-held'' limited partnerships, and if so, how should the Commission define widely-held limited partnerships, and what factors could be used to guarantee that these entities remain widely-held. More generally, the *Attribution Notice* asked whether an equity benchmark, under which investments below the threshold would be exempted from the insulation criteria and would be held non-attributable, should be applied to all partnership forms, widely-held or not. In this latter case, the *Attribution Notice* asked whether we should set the equity benchmarks for partnership interests along lines similar to those used for voting corporate equity interests. We stated, however, that, based on the record thus far, we were not inclined to apply an equity benchmark to limited partnerships but would instead retain the insulation criteria, and that parties that disagreed must provide us with more data and analysis to demonstrate that our earlier decision to apply the insulation criteria is no longer justified. We also asked for information on the financial and legal structures of limited partnerships to enable us to determine whether there is a uniform equity level below which we need not be concerned with the application of the insulation criteria.

90. *Comments*. No commenters favored adding to the current list of insulation criteria.

91. *Decision*. We see no reason to revise our previous decision to treat limited partnership interests as distinct from corporate voting equity interests, and therefore elect not to adopt equity benchmarks for limited partnership interests. As we stated in the *Attribution Further Reconsideration*, ''[t]he partners in a limited partnership, through contractual arrangements, largely have

the power themselves to determine the rights of the limited partners.'' Therefore, the insulation criteria adopted by the Commission serve to identify those situations within which it is safe to assume that a limited partner cannot be ''materially involved'' in the media management and operations of the partnership. As we also stated therein, the powers of a limited liability holder to exert influence or control are not necessarily proportional to their equity investment in the limited partnership, since the extent of these powers can be modified by the contractual arrangements of the limited partnership. In the *Attribution Notice*, we stated our disinclination to change our approach of applying insulation criteria in favor of an equity benchmark, and we have not been provided sufficient evidence to revise that view and to indicate that these original reasons for declining to adopt an equity benchmark for limited partnerships are no longer valid.

92. We also see no need at this time to add to, relax, or otherwise revise our limited partnership insulation criteria. Some commenters suggested that the insulation criteria should be modified to eliminate conflicts with state law, or that RULPA or other relevant standards should be used in their place. However, in our Attribution Reconsideration, the Commission decided for several reasons to abandon the use of RULPA, combined with a no material involvement standard, as a standard for judging whether limited partners were exempt from attribution. First, we judged the joint use of these two disparate standards for determining limited partner exemptions from attribution to be unnecessarily complicated. Second, we noted that there was a lack of uniform interpretation of the RULPA provisions, and that the scope of permissible limited partner activities was not statutorily set by RULPA, but rather was determined by the limited partnership agreement itself. Third, we determined that reliance on the RULPA provisions did not provide sufficient assurance that limited partners would not significantly influence or control partnership affairs. We are convinced that these conclusions remain valid today, and therefore we see no reason to revise our insulation criterion in favor of a RULPA standard. We also feel that similar considerations apply to state laws that regulate limited partnership activities, since these statutes may vary significantly from state to state, and may fail to provide sufficient assurance that the limited partner will lack the ability to significantly influence or control the partnership's media activities.

93. We will not create exceptions for widely-held limited partnerships, such as Business Development Companies, from the current insulation criteria applicable to limited partnerships or otherwise revise those insulation criteria. The essential character of these new business forms for determining attributable interests is the contractual flexibility they allow in setting up and managing the association. Therefore, we believe that the insulation criteria are needed for these business forms to insure ''lack of material involvement'' on the part of investors. This would imply that in some limited number of cases, interests may not be insulated because of state laws that require investor rights that conflict with the insulation criterion. However, commenters have not provided sufficient evidence concerning the number or importance of such instances that would compel the Commission to create special exemptions for these specialized business forms. Since these entities are allowed greater contractual flexibility under state law than are limited partnerships, we believe that greater caution is warranted in dealing with these novel forms. Further, we have not been presented with evidence to demonstrate that the current insulation criteria are no longer valid or effective in achieving their goals.

94. A number of commenters have asked us to clarify certain issues with respect to the scope or other aspects of the insulation criteria. We do not believe that this is the proper forum for declaratory rulings as to the scope of the insulation criteria. Indeed, the questions raised by commenters as to the application of the criteria to specific activities are best resolved by the Commission on a case-by-case basis based on the facts of the case. In addition, some of the proposed clarifications would, in effect, amount to a relaxation of the criteria. For example, Capital Cities/ABC asked the Commission to confirm that an insulated limited partner's interest in a licensee does not preclude the interest holder from also holding an affiliation agreement with the licensee. However, a contractual arrangement to provide programming would be inconsistent with the insulation criterion that ''the limited partner may not perform any services for the partnership materially relating to its media activities,'' and therefore would not allow insulation of the limited partner's interest. As discussed, we decline to relax the insulation criteria. Moreover, we believe that the insulation criteria have worked effectively in the past, and that there is no need for further clarification on a general basis in this Report and Order. Any issues that may arise as to the application of the criteria to particular transactions will be resolved on a case-by-case basis.

G. LLCs and Other Hybrid Business Forms

95. *Background*. In the *Attribution Notice*, we sought comment as to how we should treat, for attribution purposes, the equity interest of a member in a limited liability company or LLC, a then relatively new form of business association regulated by state law, or in other new business forms, such as Registered Limited Liability Partnerships (''RLLPs''). LLCs are, in general, unincorporated associations that possess attributes of both corporations and partnerships. The specific attributes of LLCs may vary, since their form is regulated by state statutes. LLCs are, however, generally intended to afford limited liability to members, similar to that afforded by the corporate structure, while also affording the management flexibility and flow-through tax advantages of a partnership, without many of the organizational restrictions placed on corporations or limited partnerships. Depending on the requirements of the applicable state statute, LLCs afford their members broad flexibility in organizing the management structure and permit members to actively participate in the management of the entity without losing limited liability. Thus, with some variation depending on the applicable statute, LLCs may be organized with centralized management authority residing in one or a few managers (who may or may not be members) or decentralized management by members.

96. In the *Attribution Notice*, we tentatively proposed to treat LLCs and RLLPs like limited partnerships and adopted that proposal as an interim processing policy. Thus, membership in an LLC or RLLP would be attributed unless the applicant certifies that the member is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the LLC or RLLP. We proposed that such certification should be based on our limited partnership insulation criteria and invited comment on whether those insulation criteria developed with respect to limited partnerships are sufficient to insulate members of LLCs and RLLPs or whether other criteria would be more effective. We also tentatively concluded that we were not prepared to adopt an equity benchmark

for non-insulated LLC interests, but we invited comment on that conclusion. In addition, we invited comment on whether, if we adopt the certification approach, we should, either routinely or on a case-by-case basis, require parties to file copies of the organizational filings and/or operating agreements with the Commission when an application is filed. Finally, we asked whether we should differentiate our treatment of LLCs based on whether their management form is centralized or decentralized.

97. *Decision*. We adopt our tentative conclusion in the *Attribution Notice* to treat LLCs and other new business forms including RLLPs under the same attribution rules that currently apply to limited partnerships. The insulation criteria that currently apply to limited partnerships would apply without modification to these new business forms. Therefore, LLC or RLLP owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations of the media-related activities of the LLC or RLLP based on existing insulation criteria. We will not distinguish among LLCs based on whether they adopt a more centralized or decentralized form.

98. We believe that this decision is justified for the reasons discussed in the *Attribution Notice*, which are supported by the record. State laws grant more liberal organizational powers to LLCs and RLLPs than to limited partnership forms. Thus, equity holders can retain their limited liability even though they participate in the management of the entity. Under these circumstances, we believe that it is important to apply the insulation criteria to assure that those equity holders that purport to be insulated from management are in fact so insulated. In addition, even when an LLC adopts a ''corporate form'' of organization, there is still sufficient discretion afforded by state law so that the owners of the enterprise may retain some level of operational control on their own part. The organizational restrictions applicable to corporations do not necessarily apply. The Commission could also apply a control test to determine attribution, or require these companies to incorporate insulation criteria directly into their governing documents. However, these case-by-case solutions would reduce regulatory certainty and delay processing of applications. We also believe that using equity benchmarks would be inappropriate for reasons similar to those discussed above in terms of limited partnerships. In addition, we have been applying the interim processing policy, it has worked well and effectively, and we see no reason to change it.

99. We agree with those commenters who argued that business associations, such as LLCs, are similar to partnership forms in terms of organizational flexibility, and we will treat them comparably for attribution purposes. Indeed, the greater flexibility in governance granted such entities under state law, to elect either a ''corporate form'' or a ''partnership form'' of governance, underscores the need for caution in our approach to the attribution of new business forms. The current insulation criteria serve to directly address our concerns over the influence of an interest holder. Creating specialized attribution standards for new business forms as they arise will serve only to complicate the attribution rules, without better addressing our core concerns over the potential influence exerted by the owners of a particular entity, however organized.

100. To reduce paperwork burdens, we will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will require the same ''non-involvement'' statement for LLC members who are attempting to insulate themselves from attribution that we require for limited partners who are attempting to insulate themselves. We will also require LLC members who submit the foregoing statement to submit a statement that the relevant state statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Attribution Notice*, that may arise if we require filing of organizational documents.

H. Cable/MDS Cross-Ownership Attribution

101. *Background*. The *Attribution Further Notice* considered changes to the cable/Multipoint Distribution Service (''MDS'') cross-ownership attribution rule, For purposes of this item (MDS also includes single channel Multipoint Distribution Service (''MDS'') and Multichannel Multipoint Distribution Service (''MMDS'')). Section 21.912 of the rules, which implements § 613(a) of the Communications Act, generally prohibits a cable operator from obtaining an MDS authorization if any portion of the MDS protected service area overlaps with the franchise area actually served by the cable operator's cable system. In addition, § 21.912(b) prevents a cable operator from leasing MDS capacity if its franchise area being served overlaps with the MDS protected service area. For purposes of this rule, the attribution standard used to determine what entities constitute a ''cable operator'' or an MDS licensee, is generally defined by the Notes to § 76.501. In sum, we presently consider a cable operator to have an attributable interest in an MDS licensee if the cable operator holds five percent or more of the stock in that licensee, regardless of whether such stock is voting or non-voting. We also attribute all officer and director positions and general partnership interests. However, unlike the broadcast attribution standard, our current cable/MDS standard contains no single majority shareholder exception, and attributes limited partnership interests of five percent or greater, notwithstanding insulation.

102. As we recognized in the *Attribution Further Notice*, the strictness of the existing attribution standard severely limits investment opportunities that would advance our goals of strengthening wireless cable and providing meaningful competition to cable operators. We also saw no reason to have different attribution criteria for broadcasting and MDS, and reiterated our previous observation that the broadcast attribution criteria could be used for the purpose of determining attribution in the context of cable/MDS cross-ownership. Thus, in the *Attribution Further Notice*, we invited comment on whether we should apply broadcast attribution criteria, as modified by this proceeding, in determining cognizable interests in MDS licensees and cable systems. In addition, we sought comment as to whether we should add an equity/debt plus attribution rule where the competing entity's holding exceeds 33 percent or some other benchmark. We further stated our belief that these proposed modifications of our attribution rules would increase the potential for investment and further diversity, while preventing cable from warehousing its potential competition.

103. *Decision*. After reviewing all of the comments submitted on our proposals to relax the cable/MDS attribution rules, we are persuaded that the broadcast attribution criteria, as modified by this proceeding, should be applied in determining what interests in MDS licensees and cable systems are cognizable. We continue to see no reason, and none has been suggested by

any of the commenters, that would warrant different attribution criteria for broadcasting and MDS. As we have discussed here and in the *Attribution Further Notice*, 60 FR 6483, February 2, 1995, investment opportunities critical to the development of MDS as a competitive service to cable have been severely limited by the current attribution standard.[1] Therefore, continued application of the current cable/MDS attribution standard would frustrate our goals of strengthening wireless cable, providing meaningful competition to cable operators and benefitting the public interest by offering consumers more choice in their selection of video programming providers. In view of these considerations and the record before us, we conclude that the public interest would be better served if the modified broadcast attribution criteria were employed for the purpose of determining attribution in the context of cable/MDS cross-ownership. Such modification of our existing attribution standard will increase investment possibilities without adversely affecting competition. Thus, we believe this attribution standard will identify ownership interests with the potential to exert significant influence on a licensee's management and operations, and the cross-ownership provision by its very nature will address the concern that common ownership of different multichannel video programming distributors may reduce competition and limit diversity. We are persuaded, moreover, that relaxing our current attribution standard will have genuine meaning for institutional investors who, though not involved in the day-to-day activities of either cable or MDS companies, have been precluded from making investments in MDS due to pre-existing or anticipated investments in cable.

104. The Wireless Association also fails to persuade us that it would be unfair to impose a debt limitation on cable/MDS cross-ownership when no such limitation has been placed on cable/LMDS cross-ownership. We consider it significant that, unlike our recently adopted cable/LMDS cross-ownership rules, the cable/MDS cross-ownership rule implements a statutory prohibition, Section 613(a) of the Act. Therefore, in revisiting our cable/MDS attribution standard, we must consider both the rule and the statutory implications. As we tentatively concluded in the *Attribution Further Notice*, the potential exists:

> For certain substantial investors or creditors to have the ability to exert significant influence over key licensee decisions through their contract rights, even though they are not granted a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much or more influence or control over some corporate decisions as voting equity holders whose interests are attributable.

That tentative conclusion has been affirmed here, and we believe applies with equal force to our competitive concerns underlying cable/MDS cross-ownership. We have also determined that our broadcast attribution rules will be triggered when the aggregated debt and equity interests in a licensee exceed a 33 percent benchmark. Our EDP broadcast attribution provision is intended to address our concerns that multiple nonattributable interests could be combined to exert influence over licensees such that they should be attributable. Based on the same reasons, we likewise regard the 33 percent EDP provision as an appropriate addition to the modified cable/MDS attribution standard. Furthermore, by adopting the 33 percent EDP provision for cable/MDS attribution, we believe that we are acting in a manner consistent with the statutory directive by furthering congressional intent to promote competition among video providers.

105. Accordingly, we will adopt the broadcast attribution criteria, as modified in this proceeding, for determining cognizable interests in MDS licensees and cable systems. The modified attribution criteria will also apply to the cable/MDS and cable/ITFS cross-leasing rules. A supplemental note will follow those cross-leasing rules and state that the attribution standard applicable to cable/MDS cross-ownership also applies to them. In addition, given the considerations discussed above, and for the same reasons we are adopting the 33 percent EDP provision for the broadcast attribution standard, we will adopt the 33 percent EDP provision as part of the cable/MDS attribution standard. A description of the resulting changes to our existing cable/MDS attribution standard follows.

106. In assessing cable/MDS attribution, we will distinguish passive investors from non-passive investors, applying the voting stock attribution benchmark applicable to each. As a preliminary matter, the definition of ''passive investors'' will be identical to that used in the context of broadcast attribution, and thus limited to bank trust departments, insurance companies and mutual funds. Passive investors will be subject to the same 20 percent voting stock benchmark as we adopt today for broadcast passive investors. With regard to a non-passive voting equity benchmark, we have already determined that shareholders with a five percent or greater ownership interest still have the ability to wield significant influence on the management and operations of the firms in which they invest. Therefore, we will continue to apply our five percent benchmark to determine the attributable interests of non-passive investors. We believe that employing a more liberal voting stock benchmark for passive investors than that used for non-passive investors will provide the MDS industry with increased access to much needed investment capital, while maintaining the Commission's ability to apply its ownership rules to influential interests.

107. Though positions such as officers and directors will remain attributable interests, we will further relax the current cable/MDS standard by exempting from attribution minority stockholdings in corporations with a single majority shareholder and non-voting stock, to the extent permitted by the other rule changes made in this proceeding. However, here as in broadcasting, we will carefully scrutinize cases to ensure that nonattributable minority or non-voting shareholders are not able to exert greater influence than what their attribution status should allow.

108. We further note that adoption of the EDP attribution rule for cable/MDS will limit, under certain circumstances, the availability of the single majority shareholder and non-voting stock exemptions from attribution. Under the EDP rule as adopted for cable/MDS attribution, where a cable franchise area and an MDS protected service area overlap, we will consider an investor (including a cable operator or MDS licensee) that has already invested in either the cable operator or MDS licensee, to have an attributable interest in the other entity if that interest exceeds 33 percent of the total assets of that entity. Thus, when the investor's total investment in the other entity, aggregating all debt and equity interests, exceeds 33 percent of all investment in that entity (the sum of all equity plus debt), attribution will be triggered. We

[1] We have recently taken additional steps to expand investment opportunities to further strengthen MDS. Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, 13 FCC Rcd 19112 (1998), recon., FCC 99–178, released July 29, 1999.

will use total assets as a base in aggregating the different classes of investment, equity and debt, and will presume that nonvoting stock should be treated as equity. We will set the threshold at 33 percent for the cable/MDS EDP rule because we see no reason to have a different benchmark than that which will be used for the broadcast EDP rule.

109. We will also modify the existing cable/MDS attribution standard with respect to partnership interests and new business forms, such as LLCs and RLLPs, consistent with our treatment of such entities in the broadcast context. First, we will continue to hold all partnership interests attributable, regardless of the extent of their equity interests, unless they satisfy the insulation requirements. However, we will not attribute sufficiently insulated limited partnership interests when the limited partner certifies that it is not materially involved, directly or indirectly, in the management or operation of the partnership's cable or wireless cable activities. Nor will we adopt voting equity benchmarks for limited partnership interests. A limited partnership interest will not be attributable if the limited partner meets the Commission's insulation criteria and makes the requisite certification. Second, consistent with our earlier findings, we will subject widely-held limited partnerships, such as Business Development Companies, to the same set of attribution rules as limited partnerships. We will also treat LLCs and other new business forms, including RLLPs, under the same attribution rules that currently apply to limited partnerships. We believe that these changes, which generally relax our existing cable/MDS attribution standard and make them consistent with the broadcast attribution rules, will afford increased opportunities for investment in the wireless cable and cable industries.

I. Broadcast-Cable Cross-Ownership Attribution Rules

110. In the *Attribution Further Notice*, we stated that we would address, in this proceeding, the attribution criteria applicable to the broadcast-cable cross-ownership rule, § 76.501(a) of the Commission's rules. While we recognized that the attribution standards used in a number of other cable rules were implicitly or explicitly based on § 76.501 of the Commission's rules, we stated that we were considering establishing a separate proceeding to modify the attribution criteria for the other cable multiple ownership rules.

111. Accordingly, we will modify the attribution criteria applicable to the cable/broadcast cross-ownership rule to conform to the new broadcast attribution criteria adopted in this *R&O*. In this manner, all the broadcast attribution criteria will remain consistent. When we revised the cross-ownership attribution rules in 1984, we stated that there did not seem to be a justification for separate benchmarks as applicable to cable systems. We did not receive comments in this proceeding to justify treating the cable/broadcast cross-ownership attribution rules differently from the other broadcast attribution rules at issue in this proceeding. We reiterate that the attribution revisions made herein apply only to the cable/broadcast and the cable/MDS cross-ownership rules (and cable/ITFS cross-leasing rules) and that revisions to the other cable attribution rules will be addressed CS Docket No. 98–82. We also note that because these cross-ownership rules apply where the entities at issue are in the same market, these entities will always be subject to the EDP rule assuming that the requisite financial interest is held.

J. Transition Issues

112. *Background*. In the *Attribution Notice*, we stated our concern that any action taken in this proceeding not disrupt existing financial arrangements, and accordingly invited comment as to whether we should grandfather existing situations or allow a transition period for licensees to come into compliance with the multiple ownership rules if we adopted more restrictive attribution rules. As we stated in the *Attribution Further Notice*, commenters who addressed this issue in response to the *Attribution Notice* overwhelmingly urged the Commission to grandfather existing interests indefinitely if it adopted more restrictive attribution rules because of the disruptive effect and the unfairness to the parties of mandatory divestiture.

113. *Decision*. We conclude that any interests acquired on or after November 5, 1996, the date of adoption of the *Attribution Further Notice* in this proceeding, should be subject to the rules adopted in this *R&O*. We believe this cutoff date is reasonable and appropriate. We proposed the new EDP rule in the *Attribution Further Notice*, and it was therefore then that parties were on notice of the proposed new rule and that any interests acquired on or after that date could be subject to any rule changes. Thus, we believe that the November 5, 1996 grandfathering date is more reasonable than the earlier grandfathering date we proposed. While we tentatively concluded in the *Attribution Notice* that any interests acquired on or after December 15, 1994 should be subject to the final rules adopted in the *R&O* in this proceeding, we have decided to use the date of adoption of the *Attribution Further Notice* as the grandfathering date. Accordingly, any interests (other than radio LMAs) newly attributable pursuant to this *R&O* that would result in violations of the ownership rules, will be grandfathered if the triggering interest was acquired before November 5, 1996. Except in the case of TV and radio LMAs, such grandfathering will be permanent until such time as the grandfathered interest is assigned or transferred.

114. In this *R&O*, we have decided to count attributable radio LMAs for purposes of applying all applicable multiple ownership rules, including the one-to-a-market rule and the radio-newspaper cross-ownership rule, not just the radio duopoly rules. As discussed, we will treat grandfathering of radio LMAs on case-by-case basis. The issue of grandfathering television LMAs is resolved in the television local ownership proceeding.

115. We will apply the November 5, 1996 grandfathering date to interests, newly attributable under our EDP rule, that would result in new violations of the multiple ownership rules. Such grandfathering will be permanent so long as the interest is not transferred or renewed. Thus, if an inter-market LMA triggers the EDP rule, grandfathering will be for the term of the LMA, since the LMA cannot be renewed. Grandfathering will apply only to the current holder of the attributable interest. If the grandfathered interest is later assigned or transferred, the grandfathering will not transfer to the assignee or transferee. New owners cannot demonstrate the same equitable considerations that prompt us to grandfather existing owners whose current interests are now unavoidably placed in violation of the multiple ownership rules based on adoption of the EDP rule. Such new owners will be given a year to come into compliance with the multiple ownership rules.

116. For non-grandfathered interests that are now attributable, *i.e.*, those acquired on or after November 5, 1996, and which must be divested to comply with our multiple ownership rules, we believe that a twelve-month period should be sufficient for parties to identify buyers. Accordingly, parties holding such non-grandfathered interests must come into compliance, filing an appropriate application if necessary, within 12 months of the date

of adoption of this *R&O*. We recognize that we have specified a different divestiture period in some of the cases that have been conditioned on the outcome of this proceeding. In all of these cases, we will apply the one-year divestiture period. Thus, in a case conditioned on the outcome of this proceeding, where, for example, a six-month divestiture period is specified, the twelve-month period specified herein would nonetheless be operative.

117. We note that grandfathering treatment of television LMAs that result in violations of the multiple ownership rules varies depending on whether they are intra-market LMAs that are attributable under the *per se* LMA attribution rule or inter-market LMAs that are attributable under the EDP rule because they are accompanied by a financial investment that exceeds the 33 percent threshold. For intra-market LMAs, the grandfathering period is as discussed in the *TV Local Ownership R&O*. Grandfathering for interests newly attributable under the EDP rule is permanent, and, accordingly, for inter-market LMAs attributable under EDP, grandfathering will last for the length of the LMA term since no renewal or transfer is permitted.

K. Ownership Report, Form 323

118. We intend to modify the Ownership Report form, Form 323, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this *R&O*. We direct the Mass Media Bureau to make the necessary modifications to the form to reflect these changes. Further, the Mass Media Bureau is delegated authority to revise the Ownership Report rule, § 73.3615, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this *R&O*. Thereafter, we will issue a public notice with the revised Ownership Report Form and Ownership Report rule to reflect and incorporate these changes.

IV. Administrative Matters

119. *Paperwork Reduction Act of 1995 Analysis.* This *R&O* contains either new or modified information collections. Therefore, the Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (''OMB'') to comment on the information collections contained in this *R&O* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due November 16, 1999. Comments should address: (a) whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1–C1804, 445 12th Street S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, N.W., Washington, DC 20503, or via the Internet to fain__al.eop.gov.

120. For additional information concerning the information collections contained in this *R&O* contact Judy Boley at 202–418–0217.

121. Pursuant to the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601 *et seq.*, the Commission's Final Regulatory Flexibility Analysis included in this *R&O*.

Final Regulatory Flexibility Analysis

122. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPR* in MM Docket Nos. 94–150, 92–51, & 87–154, 11 FCC Rcd 19895 (1996) (''*Attribution Further Notice*''). The Commission sought written public comment on the proposals in the *Attribution Further Notice*, including comment on the IRFA. The comments received are discussed. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

I. Need For, and Objectives of the Report and Order

123. The attribution rules seek to identify those interests in or relationships to licensees or media entities that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions. The attribution rules are used to implement the Commission's broadcast multiple ownership rules. Our goals in this proceeding are to maximize the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees, ease application processing, and provide for the reporting of all the information we need in order to make our public interest finding with respect to broadcast applications. While our focus is on the issues of influence or control, at the same time, we must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry. The rules adopted meet these goals.

II. Summary of Significant Issues Raised by the Public in Response to the IRFA

124. One comment, filed specifically in response to the IRFA contained in the *Second Further Notice of Proposed Rulemaking* in MM Dockets 91–221 and 87–8, 61 FR 66978, December 19, 1996, addressed an issue relevant to all the Commission's proceedings dealing with the mass media multiple ownership rules.

125. Other commenters did not specifically respond to the IRFA, but did address small business issues.

III. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

1. Definition of a ''Small Business''

126. Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3), generally defines the term ''small business'' as having the same meaning as the term ''small business concern'' under the Small Business Act, 15 U.S.C. 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA''). According to the SBA's regulations, entities engaged in television broadcasting Standard Industrial Classification (''SIC'') Code 4833—Television Broadcasting Stations, may have a maximum of $10.5 million in annual receipts in order to qualify as a small business concern. Similarly, entities engaged in radio broadcasting, SIC Code 4832—Radio Broadcasting Stations, have a maximum of $5 million in annual receipts to qualify as a small business concern. 13 CFR 121.101 *et seq.* This standard also applies in determining whether an entity is a small business for purposes of the RFA.

127. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA and after

opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' While we tentatively believe that the foregoing definition of ''small business'' greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the new rules on small television and radio stations, we did not propose an alternative definition in the IRFA. Accordingly, for purposes of this *R&O,* we utilize the SBA's definition in determining the number of small businesses to which the rules apply, but we reserve the right to adopt a more suitable definition of ''small business'' as applied to radio and television broadcast stations and to consider further the issue of the number of small entities that are radio and television broadcasters in the future. Further, in this FRFA, we will identify the different classes of small radio and television stations that may be impacted by the rules adopted in this *R&O.*

2. Issues in Applying the Definition of a ''Small Business''

128. As discussed, we could not precisely apply the foregoing definition of ''small business'' in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

129. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We were unable at this time to define or quantify the criteria that would establish whether a specific television or radio station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any television or radio station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We attempted to factor in this element by looking at revenue statistics for owners of television stations. However, as discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

130. With respect to applying the revenue cap, the SBA has defined ''annual receipts'' specifically in 13 CFR 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

131. Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 CFR 121.104(d)(1). The SBA defines affiliation in 13 CFR 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 CFR 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 CFR 121.103(a)(2). Instead of making an independent determination of whether radio and television stations were affiliated based on SBA's definitions, we relied on the data bases available to us to provide us with that information.

3. Estimates Based on Census Data

132. The rules amended by this *R&O* will apply to full service television and radio licensees and permittees, potential licensees and permittees, cable services or systems, MDS and ITFS, and newspapers.

Radio and Television Stations

133. The rules adopted in this *R&O* will apply to full service television and radio stations. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.

134. There were 1,509 television stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,594 operating television broadcasting stations in the nation as of June 1999. For 1992 the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments. The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

135. The rule changes will also affect radio stations. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number. The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. As of June 1999, official Commission records indicate that 12,560 radio stations are currently operating.

136. Thus, the rule changes will affect approximately 1,594 television stations, approximately 1,227 of which are considered small businesses. Additionally, the rule changes will affect 12,560 radio stations, approximately 12,057 of which are small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

Cable Services or Systems

137. SBA has developed a definition of small entities for cable and other pay television services (SIC 4841), which includes all such companies generating $11 million or less in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services, and 1,423 had less than $11 million in revenue.

138. The Commission has developed its own definition of a small cable company for the purposes of rate regulation. Under the Commission's rules, a ''small cable company,'' is one serving fewer than 400,000 subscribers nationwide. Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules proposed in this *R&O*. The Commission's rules also define a ''small system,'' for the purposes of cable rate regulation, as a cable system with 15,000 or fewer subscribers. We do not request nor do we collect information concerning cable systems serving 15,000 or fewer subscribers and thus are unable to estimate at this time the number of small cable systems nationwide.

139. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' Section 76.1403(b) of the Commissions' rules defines a small cable system operator as one which serves in the aggregate fewer than 617,000 subscribers, and whose total annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS and ITFS

140. Other pay television services are also classified under Standard Industrial Classification (SIC) 4841, which includes cable systems operators, closed circuit television services, direct broadcast satellite services (DBS), multipoint distribution systems (MDS), satellite master antenna systems (SMATV), and subscription television services.

141. The Commission refined the definition of ''small entity'' for the auction of MDS as an entity that together with its affiliates has average gross annual revenues that are not more than $40 million for the preceding three calendar years. This definition of a small entity in the context of the Commission's *R&O* concerning MDS auctions that has been approved by the SBA.

142. The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (''BTAs''). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MDS is an especially competitive service, with approximately 1573 previously authorized and proposed MDS facilities as of 1996. Information available to us indicates that no MDS facility generates revenue in excess of $11 million annually. We tentatively conclude that for purposes of this IRFA, there are approximately 1634 small MDS providers as defined by the SBA and the Commission's auction rules.

Newspapers

143. Some of the rule changes may also apply to daily newspapers that hold or seek to acquire an interest in a broadcast station that would be treated as attributable under the rules. A newspaper is an establishment that is primarily engaged in publishing newspapers, or in publishing and printing newspapers. The SBA defines a newspaper that has 500 or fewer employees as a small business. Based on data from the U.S. Census Bureau, there are a total of approximately 6,715 newspapers, and 6,578 of those meet the SBA's size definition. However, we recognize that some of these newspapers may not be independently owned and operated and, therefore, would not be considered a ''small business concern'' under the Small Business Act. We are unable to estimate at this time how many newspapers are affiliated with larger entities. Moreover, the rule changes would apply only to daily newspapers, and we are unable to estimate how many newspapers that meet the SBA's size definition are daily newspapers. Consequently, we estimate that there are fewer than 6,578 newspapers that may be affected by the rule changes in this *R&O*.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

144. The *R&O* imposes compliance with the amended attribution rules set forth in the *R&O*. Compliance will require licensees to file with the Commission amended Ownership Report Forms (FCC Form 323) to reflect interests attributable under the amended attribution rules. Compliance will also require licensees that have entered into Joint Sales Agreements (JSAs) to place such agreements in their public inspection files with confidential or proprietary information redacted where appropriate. In addition, pursuant to the new rules, certain television time brokerage agreements will be required to be filed with the Commission where they are intra-market agreements or are inter-market agreements that come under the equity/debt plus attribution standard adopted by the *R&O*. Finally, compliance may require some licensees whose ownership interests under the amended attribution rules violate the multiple ownership rules, to divest the prohibited interests within the time periods specified in the *R&O*.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

145. The *R&O* retains the current 5 percent active voting stock attribution benchmark. We believe that our original decision to set a 5 percent benchmark to capture influential interests remains valid and will not unduly restrict capital availability. Further, we note that our concerns over capital availability that originally prompted the proposal to increase the active voting stock benchmark have eased somewhat, particularly in light of the increasing strength shown by the communications sector and financial markets in general over the past several years. This increase in capital spending occurred within the context of our current attribution rules, and therefore provides us with strong evidence of the continued availability of capital in the

communications industry. And, to the extent that there are still concerns about not impeding capital flow to broadcasting, we believe that they will be adequately addressed since the increases the passive investor benchmark.

146. The *R&O* increases the voting stock benchmark from 10 to 20 percent for passive investors. We believe that increasing the passive investor benchmark to 20 percent will give broadcasters increased access to investment capital, while preserving the Commission's ability to effectively enforce its ownership rules. This decision takes into account the special nature of the passive investor category, in terms of the legal and fiduciary requirements that constrain passive investors' involvement in the management and operational affairs of the firms in which they invest. In addition, passive investors have become an increasingly important source of investment capital to the corporate sector. Finally, the Commission recognizes that the pace of technological change within broadcasting, particularly the transition to DTV, might require access to such new sources of investment capital.

147. Further, we note that the record strongly supports an increase in the passive investor benchmark and supports our belief that such an increase will help assure that the attribution changes adopted herein will reinforce the trends in broadcast investment and growth in passive investment levels noted above, particularly at a time when television broadcasters are undertaking the conversion to digital television. We believe that increasing the passive investor benchmark is a relatively safe way to increase capital flows into broadcasting, without compromising the ability of our attribution rules to capture influential interests. The *R&O* retains the current definition of ''passive investors,'' which is limited to bank trust departments, insurance companies and mutual funds.

148. The *R&O* does not eliminate the single majority shareholder or nonvoting stock exemptions, but, rather, to address the concerns that we raised in the *Attribution Notice* and *Attribution Further Notice,* we will adopt our equity and/or debt plus (''EDP'') attribution proposal, as a new rule that would function in addition to the other attribution rules. Under this new EDP rule, where the investor is either (1) a ''major program supplier,'' as defined herein to include all programming entities (including networks and time brokers) that supply over 15 percent of a station's total weekly broadcast programming hours, or (2) a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators, and newspapers), its interest in a licensee will be attributed if that interest exceeds 33 percent of the total asset value (equity plus debt) of the licensee. The *R&O* refers to total asset value as ''total assets.'' In the case of a major program supplier, the investment will be attributable only if the investment is in a licensee to which the requisite triggering amount of programming is provided.

149. The targeted approach embodied in the EDP rule reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions. The bright-line EDP test will provide more regulatory certainty than a case-by-case approach that requires review of contract language. Thus, the EDP rule will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs.

150. In the *Attribution Further Notice,* we invited comment on the impact of a 33 percent EDP threshold on small business entities, particularly on whether there would be a disproportionate impact on small or minority entities. While some parties have argued that adoption of an equity/debt plus proposal would deter capital flow to broadcasting generally and, in particular, for digital television, others have argued strongly that this is not the case. We have no basis to conclude or reason to believe that the EDP rule would unduly deter investment. The equity/debt plus proposal does not preclude investment by any entity; rather, it caps nonattributable investment levels for entities that have the potential to influence licensees. The limit does not apply to all entities that might invest or help fund the transition to digital television or otherwise invest in licensees. Additionally, to help assure that our actions today do not unduly impede capital flow to broadcasting, we have raised the passive investor benchmark. As discussed above, we believe that because of the nature of passive investors, we may raise that benchmark consistent with our goal of maximizing the precision of the attribution rules. In addition, we will consider individual rule waivers in particular cases where compelling evidence is presented that the conversion to digital television would otherwise be unduly impeded or that a waiver would significantly expedite DTV implementation in that particular case.

151. While some commenters strongly argued that applying the EDP rule to program suppliers would curb investment in broadcast stations and possibly hurt weaker UHF stations and might deter investment that would facilitate the conversion to DTV, they do not provide empirical evidence to support this argument. We also note that the rule does not preclude investment, but merely provides that investments over a certain level will be deemed presumptively attributable. Networks are therefore free to invest in their affiliates, subject of course to the applicable multiple ownership rules. Moreover, the EDP rule does not attribute investments, even those by networks in their affiliates, which fall below the 33 percent threshold. Thus, a major program supplier may hold 32 percent of the total assets of a station to which it supplies programming in excess of the 15 percent standard. This would comply with all EDP limits and the interests would not be attributable. In addition, the EDP rule does not affect investments by entities other than major program suppliers or same-market media entities. Under these circumstances, we believe that the EDP rule will not curb investment, deter new entry, or curb the conversion to DTV.

152. The *R&O* also adopts a new rule to attribute television LMAs, or time brokerage of another television station in the same market, for more than fifteen percent of the brokered station's broadcast hours per week and to count such LMAs toward the brokering licensee's local ownership limits. We believe that the rationale for attributing LMAs set forth in the *Radio Ownership Order,—i.e.,* to prevent the use of time brokerage agreements to circumvent our ownership limits—applies equally to same-market television LMAs.

153. The record in this proceeding supports our decisions to attribute television LMAs and to count attributed radio LMAs toward all applicable radio ownership limits. We agree with most commenters, representing a variety of interests ranging from ABC to the public interest group MAP, that television LMAs, like radio LMAs, represent a degree of influence and control that warrants ownership attribution and that, to decide otherwise, based on the precedent of the attribution of radio LMAs, would be inconsistent.

154. We will require stations involved in television time brokerage agreements (inter-market as well as intra-market agreements) to keep copies of those agreements in their local public inspection files, with confidential or proprietary information redacted where appropriate, and to file, with the Commission, within 30 days of execution, a copy of any local time brokerage agreements that would result in the arrangement being counted in determining the brokering licensee's compliance with the multiple ownership rules. We note that these provisions impose an affirmative obligation on licensees to determine, in the first instance, whether a particular LMA is attributable (either under the *per se* rule or the EDP rule), and to file the agreement with the Commission if it is.

155. This also eliminates the cross interest policy. Our goals in initiating this proceeding include maximizing the clarity of the attribution rules, providing reasonable certainty and predictability to parties to allow transactions to be planned, and easing application processing. Commenters have argued that the vagueness and uncertainty imposed by the *ad hoc* application of the cross-interest policy have chilled investment. As CalPERS argues, this uncertainty impedes the ability of broadcasters to enter into transactions because the policy can be invoked to prohibit a seemingly permissible transaction.

156. We note that the EDP rule directly covers concerns treated under the non-attributable interests prong of the cross-interest policy. In adopting that rule, we will reach those situations involving formerly nonattributable interests that raised the most concern with respect to issues of competition and diversity, some of which were previously addressed in administering the cross-interest policy. We recognize, however, that the EDP rule does not cover all the areas encompassed by the cross-interest policy. It would not cover key employees, for example. We nonetheless believe, as commenters have pointed out, that internal conflict of interest policies and common law fiduciary duty and contract remedies provide adequate substitutes for our administration of the policy with respect to key employees. In addition, many key employees are also officers and directors and thus already covered by the attribution rules. In any event, we believe that the very small risk of harm to competition by a key employee in an instance not covered by any of these other regulations and remedies is greatly outweighed by the benefits of minimizing our case-by-case approach to transactions and applying bright line tests, such as the EDP test and our other attribution rules.

157. With respect to joint ventures, we believe that application of a cross-interest policy is unwarranted. The ownership and attribution rules define the level of combined ownership that is permissible in the local market. We recognize that the cross-interest policy as applied to joint ventures is mostly, if not completely, subsumed by the application of the current multiple ownership rules. To the extent that it is not so subsumed, we believe that it should be eliminated. We agree that the burdens of case-by-case review are not justified for transactions that already comply with the multiple ownership rules. Furthermore, as other commenters noted, the application of the antitrust laws should prevent or remedy any abuses of joint venture relationships not already subject to the multiple ownership rules.

158. The *R&O* declines to attribute JSAs. Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be fully attributed. We define JSAs as contracts that affect primarily the sales of advertising time, as distinguished from LMAs, which may affect programming, personnel, physical facilities, and core operations of stations. We note that in our *DTV 5R&O,* we stated that we would look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology. JSAs may be one such joint business arrangement. Although both DOJ and the Commission are concerned about the competitive consequences of business agreements such as JSAs, our concerns are not necessarily identical. DOJ's comments explicitly recognize that in addition to competition issues, the Commission is also concerned with issues of diversity and reducing unnecessary administrative burdens.

159. Accordingly, upon considering and weighing competition, diversity, and administrative concerns, we decline to impose new rules attributing JSAs as long as they are truly JSAs that deal with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs. We will retain our current policies concerning JSAs. Furthermore, in the absence of specific evidence of widespread abuse of JSAs by broadcasters, we also decline to adopt the general disclosure and reporting requirement for radio JSAs recommended by DOJ in its comments. We will, however, require broadcasters who have entered into JSAs to place such agreements in their public inspection files, pursuant to 47 CFR 73.3526 and 73.3613(e) of the Commission's Rules, with confidential or proprietary information redacted where appropriate. This requirement will facilitate monitoring of JSAs by the public, competitors and regulatory agencies. We do, however, retain discretion, in all events, to review cases involving radio or television JSAs on a case-by-case basis in the public interest, where it appears that such JSAs do pose competition, diversity, or administrative concerns. Finally, we emphasize that all JSAs are of course still subject to antitrust laws and independent antitrust review by the Department of Justice.

160. We see no reason to revise our previous decision to treat limited partnership interests as distinct from corporate voting equity interests, and therefore elect not to adopt equity benchmarks for limited partnership interests. As we stated in the *Attribution Further Reconsideration,* ''[t]he partners in a limited partnership, through contractual arrangements, largely have the power themselves to determine the rights of the limited partners.'' Therefore, the insulation criteria adopted by the Commission serve to identify those situations within which it is safe to assume that a limited partner cannot be ''materially involved'' in the media management and operations of the partnership. As we also stated therein, the powers of a limited liability holder to exert influence or control are not proportional to their equity investment in the limited partnership, since the extent of these powers can be modified by the contractual arrangements of the limited partnership. In the *Attribution Notice,* we stated our disinclination to change our approach of applying insulation criteria in favor of an equity benchmark, and we have not been provided sufficient evidence to revise that view and to indicate that these original reasons for declining to adopt an equity benchmark for limited partnerships are no longer valid.

161. We also see no need at this time to add to, relax, or otherwise revise our limited partnership insulation criteria. Some commenters suggested that the insulation criteria should be modified to eliminate conflicts with state law, or that RULPA or other relevant standards should be used in their place. However,

in our *Attribution Reconsideration*, the Commission decided for several reasons to abandon the use of RULPA, combined with a no material involvement standard, as a standard for judging whether limited partners were exempt from attribution. First, we judged the joint use of these two disparate standards for determining limited partner exemptions from attribution to be unnecessarily complicated. Second, we noted that there was a lack of uniform interpretation of the RULPA provisions, and that the scope of permissible limited partner activities was not statutorily set by RULPA, but rather was determined by the limited partnership agreement itself. Third, we determined that reliance on the RULPA provisions did not provide sufficient assurance that limited partners would not significantly influence or control partnership affairs. We are convinced that these conclusions remain valid today, and therefore we see no reason to revise our insulation criterion in the direction of a RULPA standard. We also feel that similar considerations apply to state laws that regulate limited partnership activities, since these statutes may vary significantly from state to state, and may fail to provide sufficient assurance that the limited partner will lack the ability to significantly influence or control the partnership's media activities.

162. We will not create exceptions for widely-held limited partnerships, such as Business Development Companies, from the current insulation criteria applicable to limited partnerships or otherwise revise those insulation criteria. The essential character of these new business forms for determining attributable interests is the contractual flexibility they allow in setting up and managing the association. Therefore, we believe that the insulation criteria are needed for these business forms to insure the ''lack of material involvement'' on the part of investors. This would imply that in some limited number of cases, interests may not be insulated because of state laws that require investor rights that conflict with the insulation criterion. However, commenters have not provided sufficient evidence concerning the number or importance of such instances that would compel the Commission to create specialized exemptions for these specialized business forms. Since these entities are allowed greater contractual flexibility under state law than are limited partnerships, we believe that greater caution is warranted in dealing with these novel forms. Further, we have not been presented with evidence to demonstrate that the current insulation criteria are no longer valid or effective in achieving their goals.

163. We adopt our tentative conclusion in the *Attribution Notice* to treat LLCs and other new business forms including RLLPs under the same attribution rules that currently apply to limited partnerships. The insulation criteria that currently apply to limited partnerships would apply without modification to these new business forms. Therefore, LLC or RLLP owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations of the media-related activities of the LLC or RLLP. We will not distinguish among LLCs based on whether they adopt a more centralized or decentralized form.

164. We believe that this decision is justified for the reasons discussed in the *Attribution Notice*, which were also supported in the record and fully discussed in the *R&O*. In addition, we have been applying the interim processing policy, and it has worked well and effectively, and we see no reason to change it.

165. We will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will require the same ''non-involvement'' statement for LLC members who are attempting to insulate themselves. We will also require LLC members who submit the foregoing statement to submit a statement that the relevant state enabling statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Attribution Notice*, that may arise if we require filing of organizational documents.

166. After reviewing all of the comments submitted on our proposals to relax the cable/MDS attribution rules, we are persuaded that the broadcast attribution criteria, as modified by this proceeding, should be applied in determining cognizable interests in MDS licensees and cable systems. We continue to see no reason, and none has been suggested by any of the commenters, to warrant different attribution criteria for broadcasting and MDS. As we have discussed here and in the *Attribution Further Notice*, investment opportunities critical to the development of MDS as a competitive service to cable have been severely limited by the current attribution standard. Therefore, continued application of the current cable/MDS attribution standard would frustrate our goals of strengthening wireless cable, providing meaningful competition to cable operators and benefitting the public interest by offering consumers more choice in their selection of video programming providers. In view of these considerations and the record before us, we conclude that the public interest would be better served if the modified broadcast attribution criteria were employed for the purpose of determining attribution in the context of cable/MDS cross-ownership. Such modification of our existing attribution standard will increase investment possibilities and further diversity, while preventing cable from warehousing its potential competition. We are persuaded, moreover, that relaxation of our current attribution standard will have genuine meaning for institutional investors who, though not involved in the day-to-day activities of either cable or MDS companies, have been precluded from making investments in MDS due to pre-existing or desired investments in cable.

167. The *R&O* also adopts a 33 percent equity or debt provision as an appropriate addition to the modified cable/MDS attribution standard. Furthermore, by adopting the 33 percent ''equity or debt plus'' provision for cable/MDS attribution, we believe that we are acting in a manner consistent with the statutory directive, as well as furthering congressional intent to promote competition and prevent warehousing by cable operators. Accordingly, we will adopt the broadcast attribution criteria, as modified in this proceeding, for determining cognizable interests in MDS licensees and cable systems. The modified attribution criteria will also apply to the cable/MDS and cable/ITFS cross-leasing rules.

168. The *R&O* adopts grandfathering and transition measures for interests that become newly attributable pursuant to the new rules adopted. Grandfathering and transition measures for TV LMAs are discussed in the *TV Local Ownership Order*.

169. We intend to modify the Ownership Report form, Form 323, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this *R&O*.

VI. Report to Congress

170. The Commission shall send a copy of the *R&O* in MM Docket Nos. 94–150, 92–51, and 87–154, including this

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 shall send a copy of the *R&O* in MM Docket Nos. 94–150, 92–51, and 87–154, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *R&O* in MM Docket Nos. 94–150, 92–51, and 87–154 and FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

Ordering Clauses

171. Accordingly, *it is ordered* that, pursuant to sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934 as amended, 47 U.S.C. 154(i), (j) 303(r), 307, 308, and 309, part 73 of the Commission's rules is amended as set forth.

172. *It is further ordered* that, pursuant to the Contract with America Advancement Act of 1996.

173. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, *shall send* a copy of this *R&O* in MM Docket Nos. 94–150, 92–51, and 87–154, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

174. *It is further ordered* that the new or modified paperwork requirements contained in this R&O.

175. *It is further ordered* that this proceeding is hereby terminated.

List of Subjects

47 CFR Parts 21, 73 and 74

Television broadcasting; radio broadcasting.

47 CFR Part 76

Cable television.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 21, 73, 74 and 76 as follows:

PART 21—DOMESTIC PUBLIC FIXED RADIO SERVICES

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

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

2. Section 21.912 is amended by revising the section heading and Note 1 to § 21.912 to read as follows:

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

* * * * *

Note 1: In applying the provisions of this section, ownership and other interests in MDS licensees or cable television systems will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate MDS licensee or cable television system will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate MDS licensee or cable television system in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate MDS licensee or cable television system, or if any of the officers or directors of the MDS licensee or cable television system are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interests in an MDS licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of ''Licensee,'' then X's interest in ''Licensee'' would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in ''Licensee'' would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in ''Licensee'' would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant MDS licensee or cable television system are subject to said trust.

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

(g)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company (''LLC'') or Registered Limited Liability Partnership (''RLLP'') shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership and the licensee or system so certifies.

(2) In order for a licensee or system that is a limited partnership to make the certification set forth in paragraph (g)(1) of this **Note**, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership. In order for a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (g)(2) of this **Note**, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83–46, 50 FR 27438, July 3, 1985, as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83–46, 52 FR 1630, January 15, 1987. Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the MDS or cable television businesses of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the licensee or system seeking installation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(h) Officers and directors of an MDS licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of MDS or cable television service, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of an MDS licensee or cable television system, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the MDS licensee or cable television system subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the Licensee Qualification Report.] The officers and directors of a sister corporation of an MDS licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

(i) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through ''passive investors'' is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through ''passive investors'' is equal to or exceeds 5 percent; or

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

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

(1) the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (all equity plus all debt) of that MDS licensee or cable television system; and

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

(k) The term ''area served by a cable system'' means any area actually passed by the cable operator's cable system and which can be connected for a standard connection fee.

(l) As used in this section ''cable operator'' shall have the same definition as in § 76.5 of this chapter.

* * * * *

PART 73—BROADCAST RADIO SERVICES

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

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

4. Section 73.3526 is amended by revising paragraph (e)(14) and adding (e)(16) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

* * * * *

(e) * * *

(14) *Radio and television time brokerage agreements.* For commercial radio and television stations, a copy of every agreement or contract involving time brokerage of the licensee's station or of another station by the licensee, whether the agreement involves stations in the same markets or in differing markets, with confidential or proprietary information redacted where appropriate. These records shall be retained as long as the contract or agreement is in force.

* * * * *

(16) *Radio and television joint sales agreements.* For commercial radio and commercial television stations, a copy of agreement for the joint sale of advertising time involving the station, whether the agreement involves stations in the same markets or in differing markets, with confidential or proprietary information redacted where appropriate.

5. Section 73.3555 is amended by removing paragraphs (a)(3) and (a)(4)(iii), redesignating paragraph (a)(4) as paragraph (a)(3), by revising Notes 2(b), 2(c), 2(f), 2(g), and 2(i) and by adding Notes 2(j) and 2(k) to read as follows:

§ 73.3555 Multiple ownership.

* * * * *

Note 2:

* * * * *

(b) Subject to paragraph (j) of this Note, no minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee, cable television system or daily newspaper in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned.

* * *

* * * * *

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

(g)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company (''LLC'') or Registered Limited Liability Partnership (''RLLP'') shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(2) In order for a licensee or system that is a limited partnership to make the certification set forth in paragraph (g)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. In order for a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (g)(1) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 85–252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 86–410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

* * * * *

(i) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through ''passive investors'' is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through ''passive investors'' is equal to or exceeds 5 percent; or

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

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

(1) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

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

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, ''market,'' will be defined as it is defined under the specific multiple or cross-ownership rule that is being applied, except that for television stations, the term ''market,'' will be defined by reference to the definition contained in the television duopoly rule contained in paragraph (b) of this section.

(k) ''Time brokerage'' is the sale by a licensee of discrete blocks of time to a ''broker'' that supplies the programming to fill that time and sells the commercial spot announcements in it.

(1) Where the principal community contours (predicted or measured 5 mV/m groundwave contour for AM stations computed in accordance with § 73.183 or § 73.186 and predicted 3.16 mV/m contour for FM stations computed in accordance with § 73.313) of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(2) Where two television stations are both licensed to the same market, as defined in the television duopoly rule contained in paragraph (b) of this section, and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(3) Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b) through (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) if the brokering station is a radio station.

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

§ 73.3613 Filing of contracts.

* * * * *

(d) *Time brokerage agreements:* Time brokerage agreements involving radio stations, where the licensee (including all parties under common control) is the brokering entity, there is a principal community contour overlap (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) overlap with the brokered station, and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving television stations where licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both licensed to the same market as defined in the television duopoly rule contained in § 73.3555(b), and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving radio or television stations that would be attributable to the licensee under § 73.3555 Note 2(j). Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

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

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

6. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, and 554.

7. Section 74.931 is amended by adding Note 1 to § 74.931(i) to read as follows:

§ 74.931 [Amended]

Note 1: In applying the provisions of paragraphs (h) and (i) of this section, an attributable ownership interest shall be defined by reference to the Notes contained in § 21.912.

* * * * *

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

9. Section 76.501 is amended by adding Note 6 to read as follows:

§ 76.501 Cross-ownership.

* * * * *

Note 6: In applying the provisions of paragraph (a) of this section, Notes 1 through 4 shall apply, provided however that:

(a) The attribution benchmark for passive investors in paragraph (c) of Note 2 shall be 20 percent and the benchmarks in paragraph (i)(1) and (i)(3) of Note 2 shall be 20 percent;

(b) An interest holder in a Limited Liability Company or Registered Limited Liability Partnership shall be subject to the provisions of paragraph (g) of Note 2 in determining whether its interest is attributable; and

(c) Notwithstanding paragraphs (b), (f), and (g) of Note 2, the holder of an equity or debt interest or interests in a broadcast licensee or cable television system (''interest holder'') shall have that interest attributed if:

(1) The equity (including all stockholdings, whether voting or nonvoting, common or

preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (defined as the aggregate of all equity plus all debt) of that media outlet; and

(2)(i) The interest holder also holds an interest in another broadcast licensee or cable television system which operates in the same market and is attributable without reference to this paragraph (c); or

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held.

[FR Doc. 99–23694 Filed 9–16–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket Nos. 96–222, 91–221, 87–8; FCC 99–208]

Broadcast Television National Ownership Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's rules regarding how to calculate a group station owners national audience reach for purposes of determining compliance with the broadcast television national ownership rule. This action is necessary to respond to changes in the underlying rule mandated by the Telecommunications Act of 1996, as well as to changes in the Commission's satellite rules and changes in the broadcast television market.

DATES: Effective November 16, 1999.

FOR FURTHER INFORMATION CONTACT: Kim Matthews, (202) 418–2120, Policy and Rules Division, Mass Media Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (''*R&O*''), FCC 99–208, adopted August 5, 1999; released August 6, 1999. The full text of the Commission's *R&O* is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room TW–A306), 445 12th St. S.W., Washington, D.C. The complete text of this *R&O* may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857–3800, 1231 20th St., N.W., Washington, D.C. 20036.

Synopsis of Report and Order

1. On November 7, 1996, the Commission released a *Notice of Proposed Rule Making* (''*Notice*''), 61 FR 66987, December 19, 1996, in this proceeding, seeking comment on how to calculate a broadcast television station group owner's aggregate national audience reach for the purposes of determining compliance with the national broadcast television multiple ownership rule, which limits that reach to 35%. Based on the record before us, we conclude that the public interest would be served by counting a market only once when calculating an entity's national ownership reach, even if that entity has an attributable interest in more than one television station in that market. As specific applications of this policy, we are: (1) narrowing the application of the ''satellite exemption,'' under which we disregard satellite station ownership in measuring aggregate national ownership; (2) not incorporating same-market local marketing agreements (''LMAs'') into the calculation of the brokering station's national audience reach; and (3) replacing our use of Arbitron's Areas of Dominant Influence (''ADIs'') to define geographic television markets with the use of Nielsen's Designated Market Areas (''DMAs'').

Background

2. Pursuant to section 202(c)(1) of the Telecommunications Act of 1996 (the ''1996 Act''), the Commission amended its national broadcast television ownership rule. Before passage of the 1996 Act, the Commission generally prohibited entities from having an attributable interest in more than 12 broadcast television stations. Further, the Commission generally prohibited an entity from having an attributable interest in a station if it would result in that entity's having an attributable interest in television stations with an aggregate national audience reach exceeding 25%. However, pursuant to section 202(c)(1) of the 1996 Act, the Commission eliminated the 12-station cap and raised the 25% aggregate national audience reach limit to 35%.

3. Pursuant to § 73.3555(e)(2)(i) of the Commission's Rules, a station's audience reach is defined as consisting of the total number of television households within the television market for that station. The television market, in turn, is currently defined as the Area of Dominant Influence (ADI) used by Arbitron, a commercial audience-rating service, to analyze broadcast television station competition. For purposes of calculating this aggregate audience reach under the rules, UHF stations are attributed with only 50% of the audience within their ADI (the UHF discount), a policy that is under careful review in the biennial ownership review. In addition, satellite stations generally are not counted at all in the national audience reach calculation (the satellite exemption). Neither the 1996 Act nor our Order implementing its national television ownership provisions addressed how to measure a licensee's national audience reach, thus leaving undisturbed the process prescribed earlier in connection with the 25% limit. In light of the modified national ownership rule and the new competitive and regulatory structure of the video marketplace brought about by the 1996 Act, we initiated this proceeding to update the record on measuring national television audience reach for purposes of the new national ownership limit.

Discussion

The Satellite Exemption

4. *Background*. A television satellite is a full-power terrestrial broadcast station authorized under part 73 of the Commission's Rules to retransmit all or part of the programming of another station (most commonly the parent station). Satellite stations are operated by the same party that operates the parent station. The Commission does not authorize satellite operation unless it is demonstrated that the frequency would likely go unused otherwise. As a result, satellite stations typically operate in areas that are likely to provide television broadcasters relatively little opportunity for growth and profit when compared with larger markets. Pursuant to 47 CFR 73.3555, Note 5, the Commission's multiple ownership rules do not apply to satellite stations. The Commission exempted TV satellites from the national multiple ownership rules when it adopted the 12-station cap and the 25% audience reach limitation. The Commission believed that this would encourage the provision of television service to smaller communities. It also noted that satellite stations and stations operating primarily as satellites were already exempt from the Commission's duopoly rule because they generally did not originate programming. In 1991, we abolished the 5% ''limit'' on the amount of local programming that a satellite could originate, which we had used as a benchmark for determining whether a station was still a satellite.

Same-Market Satellites

5. *Background*. The national multiple ownership rule, as amended by the 1996 Act, is concerned with a station's potential audience rather than with its actual viewership. Also, we are not concerned with the specific number of television stations owned by a group owner, since the 1996 Act eliminated