

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

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

FCC 84-115
34396

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of

Corporate Ownership Reporting and Disclosure by Broadcast Licensees.

Docket No. 20521

Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations.

Docket No. 20548

Amendment of Sections 73.35, 73.240, 73.636 and 76.501 of the Commission's Rules relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems.

BC Docket No.
78-239

Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities.

MM Docket No.
83-46
RM-3653
RM-3695
RM-4045

REPORT AND ORDER
(Proceedings Terminated)

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

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

I. Introduction

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

- (1) Raising the basic ownership benchmark for attribution to 5%, regardless of the size of the licensee (eliminating the distinction between "closely-held" and "widely-held" licensees);
- (2) Raising the attribution benchmark for "passive" investors to 10%;
- (3) Introduction of a "multiplier" in determining attribution in vertical ownership chains;
- (4) Clarification of the status of non-voting stock and limited partnership interests as non-attributable interests;
- (5) Clarification of the attribution of interests held in various kinds of trusts and other fiduciary capacities;
- (6) Provisions for the relief from attribution of officers and directors whose duties are not related to any licensee or its operations; and,
- (7) Modifications of existing ownership reporting requirements to reduce their burden and to conform them to the new attribution rules.

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

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

II. Historical Background

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

3. The Commission's first efforts at limiting the multiple ownership of broadcast facilities consisted of local and national restrictions adopted in the early 1940's.³ The current rule restricting ownership of broadcast entities on a national basis, the so-called "seven station" rule, was adopted in 1953. *Amendment of Multiple Ownership Rules* (Docket No. 8967), 18 FCC 288 (1953). In adopting this rule, the Commission stated that its fundamental purpose was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest." *Id.* at 291-92. In this initial effort to achieve diversification of ownership, the Commission stated that it would make no distinction between a controlling interest and a non-controlling, minority interest for purposes of applying the rule, reasoning that minority shareholders can have considerable voice in the control and management of a corporate licensee. *Id.* at 292-93. It consequently determined that for a "widely-held" corporation (fifty or more stockholders), an interest constituting 1% or more of the outstanding voting stock would be cognizable, whereas for a "closely-held" corporation (less than fifty stockholders), any voting interest would be cognizable. *Id.* at 294.⁴ It also

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. *Discussion of the Issues*

A. *Attribution Benchmarks*

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

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

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

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

(1) *Benchmark for Non-Passive Investors*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰ See para. 21, *infra*.

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

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

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

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

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

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

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

²⁵ 15 U.S.C. § 78p.

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

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

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

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

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

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

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

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

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

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

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

³⁰ See n.2, *supra*.

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

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

(2) *"Passive" Investors*

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

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

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

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

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

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

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

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

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

³⁴ *Id.*

³⁵ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Other Attributable Interests.

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

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

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

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

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

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

(1) *Non-voting Stock*

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

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

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

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

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

(2) Other "Convertible" Interests

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

⁵² *See, e.g., n.45, supra.*

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

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

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

(3) *Debt and Lease-Back Agreements*

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

(4) *Partnerships and Associations*

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

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

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

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

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

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

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

(5) Trusts

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

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

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

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

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

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

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

56. Where the power to sell voting stock is retained solely by the beneficiary or grantor, there is a potential for abuse which the Commission has recognized in past cases⁶³ and which has been reinforced by several parties to this proceeding. Retention of such a power will therefore constitute a cognizable interest if the trust assets exceed the benchmark established herein.⁶⁴ However, if power to sell the stock is held by the trustee or shared with the trustee, then only the trustee will have the interest attributed, as the trustee's fiduciary responsibility and independence of action should prevent the beneficiary from using the ability to sell stock to directly influence or control a licensee. In any case, if the beneficiary or grantor of a trust is to avoid attribution of the stock, the trustee must be an independent person with no familial or business relationship with the beneficiary or grantor. Moreover, the trust instrument must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities. Also, in order to ensure noninvolvement by the beneficiary or grantor, their entire holding in the licensee must be in trust to avoid attribution of the interest.⁶⁵

⁶¹ See n.50, *supra*.

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

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

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

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

D. Consideration of Officers and Directors.

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

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

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

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

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

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

E. Reporting of Interests.

60. All licensees are currently required⁶⁸ to name in their Ownership Reports (FCC Form 323) all officers and directors of the licensee, specifying their stock interest, citizenship, and dates of election, and all partners or stockholders (if more than fifty stockholders, only those with 1% or more of the outstanding stock) and their stock interests and citizenship. The Report also requires information on any other broadcast interest of the licensee and its principal parties (officers, directors, stockholders, partners), and any family relationships or business associations among the principals. Further, the Report requires a listing of all stock transactions since the previous Report, including date, amount paid, and the before and after stockholdings and votes of the transferor and transferee. These reports are required of licensees upon the grant of a construction permit, for each renewal application, and in conjunction with any transfer or assignment application. Additionally, widely-held licensees must file annually, while all other licensees are required to report, within 30 days, any change in their ownership information. A separate form is required for any other entity which directly or indirectly controls the licensee or which holds 25% of its stock.

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

⁶⁸ 47 C.F.R. § 73.3615

requirements for cable should remain distinct. *Notice 83-46, supra* at paras. 35-36, 39.

62. Several other proposals regarding ownership reporting remain outstanding from *Notice 20521, supra*. Therein, the Commission also questioned the accuracy of its attribution methods insofar as the large amount of stock held in nominee, street name and custodial accounts was concerned. It addressed other specific problem areas with the reporting system as well, including the plethora of monthly reports on minor stock transactions generated by existing filing requirements and the differences in reporting requirements on various Commission forms.⁶⁹ The Commission proposed the use of annual reports for widely-held licensees, which practice was subsequently adopted on an "interim" basis,⁷⁰ and a change in the definition of "widely-held" to include corporations with over 500 shareholders (instead of 50), which was subsequently rejected.⁷¹ It also proposed to adopt those parts of the Model Corporate Disclosure Regulations it considered appropriate for FCC purposes to resolve the long-standing problem of incomplete ownership information.⁷² These proposals were directed only to reporting requirements for widely-held licensees, and included: (1) a change to reporting the top thirty holders of voting shares, as aggregated,⁷³ of each licensee, and all other holders with 1% or more, (2) a separate annual chart for each parent or controlling company or other company with 10% of a licensee's stock, and (3) the filing of "intercorporate charts" graphically demonstrating the relationships between these entities. A listing of the past and present business interests of officers directors and shareholders was included. Also proposed was the reporting of long-term debt of \$1 million or more and short-term debt of \$10,000 or more, as well as financing lease arrange-

⁶⁹ The forms are: Application for Construction Permit for a Commercial Broadcast Station (Form 301), Application for Assignment of License (Form 314), Application for Transfer of Control of Corporation Holding Broadcast Station Construction Permit or License (Form 315), and Ownership Report (Form 323).

⁷⁰ *First Report and Order* in Docket No. 20521, FCC 76-541, released June 16, 1976, 41 Fed. Reg. 25002.

⁷¹ *Id.*

⁷² The Model Corporate Disclosure Regulations ("MCDR") were drafted by an interagency task force (including an FCC representative) assembled to study ways in which the reporting requirements of various federal agencies could be simplified, standardized, and made more effective to provide more meaningful information with less of a burden on the reporting parties and the agencies collecting the information. The task force was assembled in June, 1974 and released a set of model regulations in January 1975. Those model regulations were the basis for many of the Commission's proposals in Docket No. 20521.

⁷³ This aggregation process would require that any custodial holder appearing among the licensee's top thirty shareholders also report the top ten beneficial owners in the licensee for whom it holds stock in its custodial capacity.

ments. These proposals remain outstanding.⁷⁴

63. The reporting requirements and reporting forms must obviously be changed to correspond to the new attribution standards and methods adopted herein. Furthermore, the Commission's various forms requiring ownership information will be standardized, to the extent practical. There is information, however, which is relevant in some situations and not in others, and therefore need not be collected on a routine basis. Accordingly, the revised Ownership Report (FCC Form 323) will be used for annual filing as required by the new rules, and will also compose the core of the ownership information section of the applications for construction and acquisition of stations, with the additional information required in those cases reserved to those respective forms. The differences between the information required from and the reporting periods of widely-held and closely-held corporations will be eliminated, consistent with the elimination of that distinction in the rules themselves.

64. With the adoption of a 5% benchmark, the reporting of any smaller interests appears unnecessary.⁷⁵ Although some parties have claimed that the reporting of 1% interests is essential to the Commission's enforcement of its rules and provides generally useful information, those parties have made no such demonstration. As explained above, the Commission has carefully devised an attribution standard which should identify those parties with interests that should be subject to the multiple ownership restraints. In so doing, the Commission has leaned toward a relatively conservative standard to ensure that its coverage is fully complete. We can perceive no legitimate regulatory purpose to be served by the routine submission of information beyond the scope of this attribution benchmark, and we shall require none. In this connection, we have decided not to amend our reporting requirements in an attempt to better account for multiple sub-benchmark interests held through separate accounts by a single entity or individual which, when aggregated, exceed the relevant attribution levels. Short of requiring reporting of essentially all ownership interests, no feasible, comprehensive means appear to exist to reliably remedy this "horizontal" aggregation problem. We are simply not persuaded that the enormous burdens inherent in a total reporting obligation are justified by the limited number of additional cognizable interests which would be identified by such a system. However, we will

⁷⁴ In the interest of simplification and uniformity, the Commission refrained from action on these proposals pending outcome of the S.E.C.'s "beneficial ownership proceeding" (40 Fed. Reg. 4212). *First Report and Order* in Docket No. 20521, *supra*, n.69.

⁷⁵ We emphasize that our action herein with respect to ownership reporting requirements in no way affects the continued obligation of licensees to reasonably determine and certify compliance with the alien ownership restrictions of Section 310 of the Communications Act of 1934, as amended. 47 U.S.C. § 310. Such certification is now and will continue to be required in connection with the application process.

require licensees to report aggregable interests exceeding the benchmark standard where these interests are known to the licensee. Since licensees are likely to become aware of such interests if their holder undertakes to exert the influence they collectively confer, intentional attempts to anonymously affect licensees' programming judgments through "horizontal" holding schemes will often be revealed by this simple requirement.

65. In adopting this provision, we are rejecting the proposal to require the reporting of the top thirty shareholders of each licensee, and the top ten accounts of any custodial holding among those top thirty. Such a requirement would put a tremendous burden on all licensees and deluge the Commission with information for which it has no legitimate regulatory need. For the reasons detailed above, we have determined that a 5% benchmark will best identify those stockholdings which should be subject to the multiple ownership rules. The information collected under a "top 30/top 10" system would bear little resemblance to that, as it would include information on tens of stockholders for each licensee, and on thousands overall, who have no influence or control over any licensee. The regulatory function of this ownership information collection is limited to administering the multiple ownership rules, and the costly and tedious collection of vast amounts of data not related to that function cannot be justified, despite any uniformity with other agencies that would be achieved.⁷⁶

66. We will also reject the proposals from *Notice 20521* regarding the reporting of past broadcast interests of a licensee's principals. The collection of information on these parties' past broadcast interests was proposed to conform with the Commission's "long form" transfer application, which elicits information regarding past broadcast activities with a view to discovering conduct relevant to the transfer determination, such as "trafficking" in facilities by the respondent.⁷⁷ To the extent that information regarding an applicant's past broadcasting interests remains relevant to an application for facilities,⁷⁸ it appears both more appropriate

⁷⁶ Most licensees would not otherwise be required to file such information for any other agency, so that any such requirement by this Commission would be an additional burden for them. In any case, only the FCC, Interstate Commerce Commission, Civil Aeronautics Board, Federal Power Commission (now the Federal Energy Regulatory Commission), and the Securities and Exchange Commission began formal rulemaking proceedings based to some extent upon the Model Corporate Disclosure Regulations. Only the I.C.C. adopted a report based on MCDR, which it abolished after three years.

⁷⁷ The Commission's rules formerly prohibited the resale of a broadcast facility within three years of its purchase. *Applications for Voluntary Assignments for Transfer Control* (Docket No. 13864), 32 FCC 629 (1962).

⁷⁸ The three year holding period requirement was eliminated in 1982. *Report and Order in BC Docket No. 81-897*, 52 RR 2d 1081 (1982).

and efficient to require its provision in the context of the application proceeding rather than in conjunction with the periodic ownership reports.

67. We will also reject the various proposals to require information regarding the other present business interests of the licensee's principals,⁷⁹ and the other primary business interests and activities of the licensee. The proposal was advanced pursuant to MCDR's purpose of acquiring all information about relationships and interests which could have some effect on a company's activities. However, there are no rules restricting such interests and there is no Commission action which would be taken based on such information, and no other valid reason to collect such information has been advanced.

68. The reporting of all current broadcast interests of officers, directors and shareholders (or partners) will continue. This is the essence of enforcement of the multiple ownership rules. However, the instructions will be changed to specify reporting only for shareholders, officers and directors with attributable interests. We will require the reporting of only their interests in other broadcast and cable facilities and newspaper entities which meet our attribution standards, except for interests within the geographic limits of the cross interest policy, all of which will be reportable.

69. In compliance with the new attribution standards we are adopting, the submission of ownership reports by "holding companies" will be modified in a few respects. This proceeding has demonstrated the significance of 5% and greater voting interests, and has also clarified that our primary interest is in the voting of these interests. Therefore, information regarding any company which holds a 5% or greater voting interest in a licensee must be filed on a separate ownership report by the licensee. Consistent with our interest in the control of this holding, the separate form need include only the directors, "executive" officers,⁸⁰ any other officers with a relationship or responsibility to the licensee, and only those shareholders whose interest is cognizable after application of the

⁷⁹ In *Notice 20521* the Commission proposed to require information concerning the "broadcast-related" interests of all officers, directors and 1% or greater shareholders, and concerning all other business interests of "principal officers," directors and 3% or greater shareholders. "Broadcast-related" was not defined, but was described as including activities such as advertising representatives, recording companies, record promotion companies and programming and talent producers and suppliers.

⁸⁰ "Executive" officers are the president, vice president, secretary, and treasurer (or their equivalents) and any other officer whose authority includes voting the company's stock in the licensee or otherwise extends to the business of the licensee/subsidiary. These officers, as well as the directors, may be able to avail themselves of the disclaimer provisions, as explained above in paragraph 59.

"multiplier".⁸¹ Information regarding other broadcast, cable and newspaper interests of all parties so reported will also be required.

70. The filing of intercorporate charts, showing the relationship between related corporations, will be required where appropriate. Many widely-held companies already follow this practice, and it has proved very useful in clarifying relationships in complex organizations. The relatively minor burden which this requirement imposes is, in our view, more than offset by the significant benefits which it produces for both the Commission and the licensee.

71. The various proposals regarding the filing of short-term and long-term debt instruments and sizable financing lease arrangements advanced in *Notice 20521* will also be rejected. Any such provision would elicit information about a wide range of debts and leases which have no trappings of influence, are not appropriate for attribution, and therefore do not warrant reporting. That limited class of debts and leases which does have such rights attached to it as might affect the operation of a station are currently required to be filed by Section 73.3613, and will continue to be so under that rule.⁸² To the extent that any creditor does exercise influence or control over a licensee's activities through its debtholding or other contract, the licensee is required to report that company or person in response to Question 6 on the Ownership Report. We presume that a licensee will be inclined to do so in the interest of maintaining its discretion to act freely.

72. The balance sheet and income statement data proposed for collection in *Notice 20521* was relevant for some purposes at the time the notice was adopted, in that such information could have assisted the Commission's practice of independently analyzing a broadcast applicant's financial qualifications. However, since such financial analysis is no longer performed by the Commission,⁸³ any need for this information has now dissipated. Accordingly, such a provision will not be adopted.

73. There is no legitimate regulatory need for the reporting of income beneficiaries of trusts who hold no power over the trust. Such interests are not cognizable as they are of no significance to the enforcement of the multiple ownership rules. Our multiple ownership rules are not concerned with diversity of profit-sharing, and no such provision will be adopted. Only one network claims that the income beneficiary of a trust has some influence, if the trust is very large, but it does not support this statement with analysis or illustration. In any event, if a beneficiary of a trust does

⁸¹ If any such stockholder is yet another company, the same provisions will apply, requiring the reporting of its executive officers, directors, and cognizable shareholders.

⁸² Section 73.3613 requires the filing of copies of any agreement affecting, directly or indirectly, the ownership or voting rights of a licensee's stock. 47 C.F.R. § 73.3613.

⁸³ *Financial Qualifications Standards*, 87 FCC 2d 200 (1981).

exert influence in any manner, directly or indirectly, the trust will not provide effective insulation and the interest will be attributed directly to the beneficiary.

74. With the exception of sole proprietorships and 50/50 ownership arrangements, licensees will be required to file ownership reports on an annual basis. This merely continues the practice for formerly "widely-held" licensees. We see no need for collecting this information on a more frequent basis. Our information collection comprises primarily a monitoring function, which experience has proven to be sufficiently served by a yearly review. Annual reporting may overlook some cognizable and possibly violative holdings which may occur for short periods of time. However, such short-lived holdings do not represent the influence or control over a station with which the multiple ownership rules are concerned. On the other hand, less frequent reporting would permit violations to persist and become established in a manner contrary to the purposes of the multiple ownership rules and obtain a position such that their elimination might adversely affect the licensee and the public, as well as the offending shareholder.

75. For those licensees whose ownership information changes infrequently, the additional burden of more frequent filing is very slight, and will be further reduced by a new provision that any such licensee can simply file a letter stating that the licensee has reviewed its last complete ownership report and that no changes have occurred in the intervening year. This small imposition, even considered cumulatively, is justified in our view by the cumulative benefit obtained for more active licensees under this provision. The date for filing the new ownership reports will be the anniversary date of the licensee's renewal application. If a licensee has multiple stations so situated that their renewal anniversaries do not coincide, the licensee may choose which anniversary to use for its first Report and shall continue to use that date thereafter. We shall continue to require that the report be based on information as of a date not more than 30 days prior to its filing.⁸⁴

F. *Uniform Application of the Attribution Benchmarks.*

76. A separate issue emerging from *Notice 83-46* (and implicitly raised in *Notice 20548, supra*) is whether the new attribution rules should be universally applied. The attribution rules adopted herein will be applied to all of the Commission's multiple ownership rules. As has been explained, those rules are intended to promote diversity of broadcasting by ensuring diversity of ownership. They are designed to prevent any party from influencing the broadcasting practices of more than a predetermined number of outlets in various geographic configurations. The attribution

⁸⁴ 47 C.F.R. § 73.3615(a).

rules, in turn, are designed to measure what ownership interests will confer that amount of influence or control which must be limited. The determination that a certain stock interest or other position might confer such influence or control is equally valid regardless of the particular context of rule in which it is applied.⁸⁵ This power does not change according to the holder's incentive to use it, as some commenters imply.

G. Enforcement of the Multiple Ownership Rules.

77. In conjunction with this proceeding, several parties have urged the Commission to direct its future enforcement efforts against individual shareholders rather than against licensees. The Commission has long presumed the authority to order divestiture of stock to effect compliance with the multiple ownership rules, and has ordered individual stockholders to divest themselves of violative holdings on several occasions.⁸⁶ Sections 4(i) and 303(r) of the Act (47 U.S.C. § 4(i), 303(r)) provide the Commission with the "authority reasonably ancillary to the effective performance of its responsibilities" thereunder,⁸⁷ and Section 312 specifically provides for the issuance of cease and desist orders to a "licensee, permittee, or person involved . . ." in a rule violation. 47 U.S.C. § 312(c) (emphasis added).⁸⁸ However, while our authority to seek compliance with our rules and policies extends to individual shareholders, we do not believe it advisable to generalize as to the circumstances in which the exercise of this authority would be appropriate. Rather, we shall make this determination in the context of specific facts, as relevant cases arise.

H. Consolidation of the Multiple Ownership Rules.

78. Finally, as an administrative matter, in conjunction with these modifications of the attribution sections of the multiple ownership rules, we will consolidate the multiple ownership rules themselves. These rules, which are currently contained in separate Sections 73.35, 73.240, and 73.636, primarily repeat the same provisions as they apply to each broadcast service. They can be readily consolidated without affecting the

⁸⁵ While we have not performed a separate analysis of the stockholding distribution among cable and newspaper companies, we are reasonably certain that it is not sufficiently different from that in broadcasting to justify the adoption of a distinct benchmark.

⁸⁶ *Value Line Special Situations Fund, Inc.*, FCC 72-656, released July 19, 1972, 24 RR 2d 972, *recon. den.* FCC 72-790, released September 7, 1972, 25 RR 2d 265; *College Retirement Equities Fund*, FCC 72-527, released June 14, 1972, 24 RR 2d 841; *Keystone Custodian Funds, Inc.*, FCC 72-526, released June 14, 1972, 24 RR 2d 842.

⁸⁷ *U.S. v. Southwestern Cable Co. et al.*, 392 U.S. 157, 178 (1968).

⁸⁸ The forfeiture provisions of 503(b) of the Act (47 U.S.C. § 503) were amended in 1978 to similarly extend the Commission's forfeiture authority over "*any person* who is determined by the Commission . . . to have . . . [violated the Commission's rules]." (emphasis added) That section previously restricted the Commission's authority to "any licensee or permittee of a broadcast station." Pub. L. 95-234, approved February 21, 1978, 92 Stat. 33 § 2.

application or effects of the rules. While the multiple ownership rules themselves are not a subject of the instant rule making, this ministerial change is authorized pursuant to Section 553(b)(3)(A) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A). This change in no way affects the substance or scope of the multiple ownership rules.

79. Pursuant to the requirements of Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, a final regulatory flexibility analysis has been performed and is attached hereto as Appendix F.

Accordingly, IT IS ORDERED, That Parts 73 and 76 of the Commission's Rules and Regulations ARE AMENDED, effective June 6, 1984, as set forth in Appendices C, D and E.

IT IS FURTHER ORDERED, That FCC Forms, 301, 314, 315, 316, 323 and 325 WILL BE AMENDED by subsequent Commission action, in accordance with the provisions in this *Report and Order*.

IT IS FURTHER ORDERED, That all of the captioned proceedings included herein ARE TERMINATED.⁸⁹

IT IS FURTHER ORDERED, That the Petitions for Rule Making filed by First Manhattan Company (RM-3635) and by Centennial Fund (RM-4045) ARE DISMISSED.

IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Investment Company Institute (RM-3695), IS DENIED.

IT IS FURTHER ORDERED, That the Petition for Waiver filed by Ford Foundation IS DISMISSED.

IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE this *Report and Order* to be printed in the FCC Reports.

Authority for the actions taken herein is contained in Sections 4(i), 5(d), and 303 of the Communications Act of 1934, as amended.

⁸⁹ Several past Commission decisions have been conditioned on or made subject to the outcomes in various of the rule making proceedings concluded by this *Report and Order*. See, e.g., n.50, *supra*. Affected parties are reminded that they are now obliged either to comply with the new rules and requirements announced herein or to seek further relief from the Commission, as appropriate. In certain cases, the rule changes implemented by our actions today may render prior conditions moot. For example, in *WHYN Corp.*, 47 RR 2d 663 (1980), the Commission permitted Affiliated Broadcasting, Inc., to acquire a station in the same market as a station owned by the Washington Post Company, despite the fact that Berkshire Hathaway, Inc. indirectly owned 8.4% of API and 10.7% of Post. The subject assignment was explicitly conditioned on the outcome of the proceeding in Docket No. 20548. While the specific proposals initially advanced in that proceeding have not been adopted, under the amended rules, Berkshire would not be attributed with Affiliated's stations because the majority of Affiliated's stock was controlled by a single trustee. (Berkshire's interest may also have been relieved by the multiplier effect, depending on the sizes of the intervening interests.)

For further information concerning this *Report and Order*, contact Bruce A. Romano, Mass Media Bureau, (202) 632-9356.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendix B may be seen in FCC Dockets Branch.

Appendix A

1. The complete comments of all of the parties in all of the subject proceedings are summarized below. A list of the parties is attached in Appendix B.¹

Establishing a Benchmark

2. Several parties maintain that the marketplace has changed dramatically since the multiple ownership rules were originally adopted, while the attribution guidelines have not changed. Many of those parties point out that there are now many more broadcast outlets as well as new "high tech" programming outlets (e.g., MDS, DBS, LPTV, expanded cable), resulting in an inherent diversity that did not exist when the rules were established. Cox/Multimedia asserts that these changes have been recognized by the Commission in other recent and proposed deregulatory actions, and that the rejection of multiple ownership restrictions for the new technologies further demonstrates its recognition that increased competition calls for less restrictive ownership regulations. Several parties claim that these changes also have increased the "costs" of restricting investment, in that the advent of new technologies has sharply increased the competition for communications investment capital, with the new technologies, being unrestricted, enjoying an unfair advantage in raising capital.

3. Citizens responds that no evidence has been offered to indicate that the new technologies have been diverting capital and that, to the contrary, the availability of capital is demonstrated by the number of applicants for those facilities. Geller contends that the effects of the new and unrestricted technologies on capital availability is germane to a consideration of the multiple ownership rules themselves, not to the development of an attribution standard designed to reflect influence and control.

4. Several parties point out additionally that when the rules were developed there existed less institutional investing, the primary purpose of which is return on capital investment rather than direct involvement in the affairs of the companies. They contend that with the current predominance of institutional investing, the availability of capital is limited by unnecessarily restrictive attribution rules. Capital Research specifically asserts that broad-

¹ Comments were filed late on behalf of Allied Bank of Texas and of Great American Insurance Company and others. As Great American's comments represent the results of a lengthy economic study which could not have reasonably been concluded and analyzed in time for our filing deadline and which is relevant to several areas of our inquiry, they will be accepted. Allied's comments, on the other hand, are several months late with no such excuse. However, in the interest of best resolving these issues, Allied's remarks will be informally considered where they are particularly useful although Allied cannot be considered party to the proceeding.

The comments of Syndicated Communications, Inc., Citizens Communications Center, and American Council of Life Insurance in Docket No. 78-239 were each filed a few days late for various reasons. As the Commission and all parties have had ample time to consider them with no prejudice to their interests or the Commission's processes, they are accepted and considered herein.

cast investments readily become too much bother for an investment advisor to deal with. Licensees claim that restriction of capital is a particular problem for small companies, and that no other industry is so disadvantaged. These parties claim that a higher attribution benchmark may infuse the industry with new capital from these sources, which would promote the public interest.

5. Several parties contend that the multiple ownership rules' goal of diversity is not advanced by its application, and Gaylord contends that the Commission has suggested in other rulemakings that maximum diversification of views may not be automatically linked to maximum diversification of ownership.² These parties specifically contend that an increase in capital will increase diversity of ownership, programming, and media sources as money becomes available to entrepreneurs in exchange for equity. Great American contends that restriction of capital for new and small businesses is one of the most critical effects of a low benchmark. Other parties contend that the Commission's goal of enhancing minority ownership in particular would be advanced by the increased availability of capital that a higher benchmark would occasion.

6. Citizens counters that a low benchmark aids minorities and other new entrants by preventing monopolization by conglomerates, and that if the Commission is specifically interested in promoting minority ownership, it should adopt specific rules such as special waivers for SBICs and MESBICs and other secondary lenders. Citizens also contends that in *Notice of Proposed Rule Making* in MM Docket No. 83-46 ("Notice 83-46"), FCC 83-46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983), the Commission expressed its disenchantment with the present benchmark in purely economic terms, but that there is no evidence that needed capital is lacking in the broadcast and cable industries.³ ATC also takes issue with the various parties' assertions concerning the depressing effects of the current benchmark on investment, averring that institutional investment in the cable industry increased by 50% in 1980 and another 50% in 1981, and by a cumulative 200% in the last three years.⁴ Geller simply contends that no reason was given for proposing such a "drastic" shift in policy.

7. NAB advances the additional salutary effect a higher attribution standard would have in freeing licensee and Commission resources by reducing the ownership reporting burden. CapCities contends that simplification of the rules in general should be a corollary consideration in this proceeding. Bonneville, Gaylord, and Life flatly state that no harm would be done to competition and diversity by raising the benchmark, and CBS maintains that it would not affect the ownership patterns of most entities, and particularly of publicly-traded companies. NRBA stresses that those parties with the greatest interest in investing in the industry are current investors, who are restricted by the existing rules.

8. As for a more appropriate benchmark, several parties variously concede that no simple standard can be foolproof or rationally related to control, that whatever percentage is adopted will be arbitrary, and that the Commission must therefore exercise an "intuitive balance."

² Gaylord refers to remarks in a unpublished report by personnel from the Commission's Office of Plans and Policy to the effect that policies to maximize diversity may impose such costs as to have marginal value. O.P.P. Report of October 1980 on Policies for Regulation of Direct Broadcast Satellites, at p. 81.

³ Citizens refers to stories in various recent periodicals as indicative of the profitability and hence the desirability of broadcast and cable investments, including a prediction in the March 21, 1983, *Broadcasting* that broadcast revenues were expected to increase by 12% in 1983, despite the generally poor economy.

⁴ ATC cites W.P. Becker/A.P. Becker, "Survey of Historical and Projected Debt funds for the Cable TV Industry" (May 1982).

Gaylord and Licensees point out that the propriety of any given standard varies with the corporate structure of a particular licensee company. CBS asserts, for instance, that the preeminent position of William Paley in that corporation is a function of his involvement in the founding and development of the company, rather than his 5.6% stock ownership.

9. Gaylord urges the Commission to seek a standard which will result in the attribution of ownership only to those with *de jure* and *de facto* control, with a mechanism to police such control. It contends that there has been no showing that those with less control have an interest in or are capable of any meaningful control or influence over economic or broadcasting policies of the professionals in charge of day-to-day management. ABC recommends adopting a standard which will identify interests just below *de facto* or *de jure* control but above the "potential for a modicum of influence." Spanish International urges a standard aimed at defining the minimum level at which control must be presumed. Licensees propose that the standard should approximate an ownership level that results in some control over programming but that will not be unreasonably conservative for the majority of cases. Tribune contends that the standard should reflect a realistic potential for control. CapCities urges a standard representing the level at which a party has a "significant voice in management" rather than mere "influence." NRBA contends that a focus on "influence" would open a Pandora's Box of elements unrelated to ownership to be considered for attribution.

10. ATC contends that the Commission's interest in diversity extends beyond economic consequences and requires a closer scrutiny of any interest above *de minimis*. NBC, Geller, and Citizens point out that the Commission has traditionally been concerned with influence as well as control,⁵ and Citizens points out further that the Courts have recognized that influence can be an element of control, citing *Storer Broadcasting Co. v. United States*, 240 F. 2d 55 (D.C. Cir. 1955). Citizens also stresses that whatever benchmark is adopted, it will be impractical to attempt to reduce it at a later date, contending that the primary reason for the present exceptions for certain institutional investors was the Commission's desire to avoid divestiture of violative interests held at that time.⁶

11. Most of the commenting parties support a new attribution benchmark of 5%, 10% or 20%. Others argue for retention of the 1% benchmark generally or with respect to specific interests. Some of those supporting the higher benchmarks further propose separate benchmarks for different kinds of shareholders or forms of licensees.

12. Citizens calls for retention of the present 1% benchmark, contending that it limits not merely control of stations, but also the intangible influence which may be exerted by noncontrolling shareholders, citing *Storer Broadcasting Co. v. U.S.*, *supra*. In contending that 1% should be retained for co-located broadcast and cable operations, due to the particular incentive to influence in such a situation, ATC asserts that a person with a 1% interest can indeed influence a company's activities if sufficiently motivated to do so. Similarly, LIN contends that the 1% benchmark should be retained for production and distribution companies' interests in broadcasters due to their incentive to control programming and the resultant restriction of a licensee's discretion if they are permitted an influential interest (of 1%). Citizens also contends that the current 1% benchmark aids minorities and other new entrants to the industry by preventing monopolization by conglomerates.

13. Cox/Multimedia contends that a shareholder with less than 5% of a company's outstanding voting stock is generally not routinely able to influence corporate policy in

⁵ NBC and Citizens point to the rules themselves, 47 C.F.R. § 73.35(b)(1), 73.242(a)(2), and 73.636(a)(2).

⁶ Citizens cites *Report and Order* in Docket No. 15627, 13 FCC 2d 357, 369-370 (1968), and *Report and Order* in Docket No. 18751, 34 FCC 2d 889 (1972).

general or programming decisions in particular. CBS claims that most major investors seldom hold more than 5% as a matter of investment strategy, and adds that a 5% attribution benchmark would reflect only a modest increase in non-attribution holdings for individuals and none for institutions. NBC and Taft assert that a 5% holding is a significant interest, and often the largest single holding in a company.⁷ Geller asserts that the adoption of any higher standard would undermine the multiple-ownership and cross-interest policies and make evasion of the rules much easier. Several other parties express general support for a 5% attribution benchmark.

14. Numerous parties note that a 5% standard would parallel the Securities and Exchange Commission's standard set by Congress, which requires public disclosure of the acquisition of a "beneficial interest" of 5% or more of any class of voting stock of a publicly traded company.⁸ Metromedia asserts that the Securities and Exchange Commission is the expert agency in the field of corporate security and that its statute and regulations are entitled to deference in the area. CBS, NAB, Geller and Cox/Multimedia add that the difference in the missions of the two Commissions need not preclude a correlation of requirements as there is a correlation in their concerns, *i.e.*, identifying parties with the potential for influence and control. Cox/Multimedia additionally points out that the Investment Companies Act of 1940 provides that a person holding 5% of an investment company is an "affiliated person" with whom transactions must be registered by the Securities and Exchange Commission,⁹ and that the Bank Holding Company Act specifies the holding of 5% of voting stock as determinative of whether an entity has control of a bank.¹⁰

15. Citizens contends that it is inappropriate to link the Commission's multiple ownership rules and reporting requirements to the standards of another agency because of the unique First Amendment concerns relevant to telecommunications media. It contends that the SEC's standard is not applicable because it is aimed at protecting stockholders and investors, whereas Sections 303(r), 307, and 309 of the Communications Act¹¹ require protection of the public interest, including its interest in access to diverse ideas from antagonistic sources, citing *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969) and *N.B.C. v. U.S.*, 319 U.S. 190 (1943).

16. CapCities contends that the Securities and Exchange Commission standard is too low because it does not reflect the ability to have a "significant voice" in management. It is joined by several other parties in urging a 10% benchmark. Licensees contend that it is not reasonable to believe that a holder of anything less than 10% of outstanding voting stock has a "considerable voice" in the control or management of company.

17. Harte and Licensees assert that permitting a 10% level of ownership before making an interest cognizable does not threaten the multiple ownership rules because any takeover attempt by a holder of a smaller percentage of stock would be noticed by management

⁷ NBC states that its own examination of a "representative cross-section of thirty FCC annual ownership reports" reveals that in "mature" widely-held corporations, officers and directors seldom hold as much as 5% of the stock collectively, and that there are usually few or no individual holdings above 5%, except for institutions holding stock in custodial or fiduciary capacities. It further claimed that stock of those companies in which a single entity or group of persons (usually a family) still hold a significant block is inevitably becoming more widely distributed as a result of estate tax considerations and increasing dispersion among successive family generations.

⁸ 15 U.S.C. § 78m(d).

⁹ 15 U.S.C. § § 80a-2(a)(3), 80a-17.

¹⁰ 12 U.S.C. § § 1841(a)(2), (a)(3).

¹¹ 47 U.S.C. § § 303(r), 307, 309.

anyway, and Commission rules would continue to require application and prior approval of any such transfer of control. Licensees point out that a 10% ownership level is recommended by two investment entities as the maximum practical ownership limit for reasons unrelated to this Commission's regulatory concerns. Therefore, it concludes, setting the benchmark above 10% would not be likely to produce significantly greater capital investment. Tribune and CapCities also contend that a 10% benchmark would provide adequate investment opportunities, with the proviso that it can be raised later if experience proves that appropriate. Cox/Multimedia further contends that a 10% shareholding level should also be adopted for the attribution of interests in closely-held corporations and for voting or managing partnership interests. Several other parties generally express their support for a 10% of ownership attribution standard.

18. CapCities states that 10% voting stock ownership is presumed to constitute control by the Federal Aviation Administration,¹² and that 10% stockholders are considered "insiders" by the Securities and Exchange Commission, regardless of whether they actually possess inside information.¹³ In response to *Further Notice of Proposed Rule Making* in Docket No. 20548, 63 FCC 2d 832 (1977). Rust commented that a 10% benchmark "seems reasonable," and pointed out numerous federal statutes which use a 10% standard.¹⁴

19. Geller contends that since a 10% attribution benchmark was first proposed eight years ago in *Notice of Proposed Rule Making* in Docket No. 20548, 54 FCC 2d 331 (1975), (for local and regional multiple ownership rules) no support has been provided for that standard. ABC and Metromedia contended in response to the 10% proposal of *Further Notice 20548, supra*, that a 10% benchmark would be unnecessary and somewhat precipitous, whereas a 5% benchmark would be realistic and provide a beneficial impact on the degree of investment permitted while guarding against any undue concentration of media power.¹⁵ NCCB contended that a 10% benchmark could not be adopted without a strong justification, which had not been presented.

20. Among the parties supporting raising the attribution benchmark to 20%, Centennial claims that any holder of a lesser interest would still be "passive" in all respects relevant to the multiple-ownership rules. It further argues, with Gaylord and GCD, that the alien ownership limitations¹⁶ reflect a legislative determination that ownership of less than 20% of a broadcasting company's stock is not sufficient to result in control. Gaylord claims that this "Congressional guidance" relates to public interest concerns of greater significance than those represented by the multiple ownership rules, and that the capital availability considerations to temper the guideline are even less, and thus 20% would be a conservative benchmark. GCD stresses that 20% is the ownership level used in "equity accounting,"¹⁷ and that Section 80a-2(a)(9) of the Investment Company Act of 1940 uses a 25% ownership standard for presuming control. Northwestern claims that the Commission has often found in transfer of control cases that interests well above 20% do not result in control. Cox/Multimedia asserts that the *Final Report of the Advisory Committee in Alternative*

¹² 49 U.S.C. § 1378(f).

¹³ 15 U.S.C. § 78p.

¹⁴ Rust specified the Federal Aviation Act, the Federal Deposit Insurance Act, the Public Utilities Holding Company Act of 1935, the Investment Company Act of 1940, and the Communications Satellite Act.

¹⁵ Both parties also recommended that a disclaimer be required from any noninstitutional investor holding over 1% of a licensee's voting stock.

¹⁶ 47 U.S.C. § 310.

¹⁷ According to GCD, generally accepted accounting principals permit "equity accounting" where an investing corporation owns 20% of another corporation.

Financing for Minority Opportunities in Telecommunications recommends that entities with 20% minority ownership be permitted tax certificates, as that level of ownership provides sufficient control to reflect the minority interest. Gaylord contends that a rise to 20% is not "revolutionary" in light of the Commission's recognition that new channels eliminate the need for multiple ownership rules for the new media.

21. NRBA claims that if 20% were adopted, sufficient information would still be available under strict reporting requirements to challenge specific cases in which control is suspected. Institute proposes that a 20% level be permitted with the filing of a disclaimer. Gaylord concludes that parties recommending a benchmark below 20% offer only subjective opinions that 5% or 10% would represent a more acceptable risk of influence.

22. NBC asserts that ownership of 20% of outstanding voting stock is far above the level conferring potential for control and anti-competitive influence. ATC adds that negative control is possible well below a 20% ownership level, and Harte expresses concern that such a high level might encourage takeovers.

23. Several parties contend that the alien ownership standard is not relevant to determining attribution of ownership for purposes of the multiple ownership rules. Spanish International claims that there is no legislative history available as to why 20% specifically was chosen. Other parties assert that in adopting the statute, Congress was primarily concerned with military and wartime ramifications of ownership.¹⁸ They further contend that the statute differs in other respects, for instance, that it applies to all interests, not just voting interests, that it refers to total alien ownership, not the interests of the individual shareholders, and that the 20% standard is applied equally to all licensees, regardless of their business form. Citizens points out that the Commission has previously rejected arguments that the alien ownership limitation is an appropriate guide for the multiple ownership rules' attribution standard in *Report and Order* in Docket No. 15627, *supra* at 370. It further asserts that even the 20% standard provided by Congress has not been considered conclusive in determining control by aliens.¹⁹ Geller contends that Congress has necessarily been aware of the variance between the multiple ownership rules' attribution standards and the alien ownership rules for thirty years and has taken no action indicative of any dissatisfaction with them.

"Closely-held" vs. "Widely-held"

24. Cox/Multimedia urges the Commission to retain its use of distinct benchmarks for widely-held and closely-held corporations. It contends that there are differences in function and operation between the two type of companies. It further supports retention of the "50 or more shareholders" guideline for distinguishing the companies. It stresses that this distinction has long been used by the Commission so that its operation and effect are familiar, and that there has been no indication of any significant inadequacy of this standard. Citizens and Geller assert that a stockholder in a small corporation does wield more influence than in a large corporation, as the rule is designed to recognize. Several parties' comments regarding appropriate shareholding levels for attribution of ownership and for reporting of interests are restricted to widely-held corporations, without addressing the propriety of continuing this distinction.

¹⁸ Spanish International asserts that the Navy Department was concerned with alien access to communications carriers, citing *Hearings on S.2910*, 73d Cong., 2d Sess. at 170-71. Licensees cite *Noe v. F.C.C.*, 260 F.2d 739 (D.C. Cir., 1958); *Data Transmission Co.*, 52 FCC 2d 439 (1975).

¹⁹ Citizens refers to *Data Transmission Co.*, 59 FCC 2d 909 (1976), in which the Commission established a list of factors to be considered in case-by-case analysis of alien ownership questions.

25. Opposing parties assert that the distinction should be eliminated. They variously contend that there is no supporting rationale, that there is no legal or factual basis for the "50 or more shareholders" cut-off, and that the "dynamics of control" are not sufficiently different between closely- and widely-held corporations to support the distinction. ABC and Northwestern assert that the distinction makes no sense because a shareholder can hold such a small amount of stock that the number of other shareholders is irrelevant to the degree of influence or control he can exercise. Spanish International contends that the current distinction is applied backwards, *i.e.*, that the holder of a small interest in a closely-held corporation is likely to wield less influence or control than the holder of a similar interest in a widely-held corporation. It contends that the validity of the distinction has previously been questioned by the Commission in Dockets No. 8967 and 15627.²⁰

Use of Ad Hoc Rulings and Rebuttability of the Benchmark

26. Virtually all parties oppose a return to *ad hoc* rulings without a set benchmark for ownership attribution, variously characterizing such a procedure as "impractical," "an administrative nightmare," and a waste of resources. They contend that *ad hoc* rulings would increase uncertainty and slow down the completion of business transactions indefinitely. Gaylord also fears that this approach might encourage the pressing of frivolous charges, and CapCities fears that it may cause corporate in-fighting between management and shareholders trying to demonstrate their respective control or lack thereof. Citizens and Geller contend that case-by-case analysis of multiple ownership questions has already proven unworkable, and was rejected by the Commission in its adoption of a fixed overlap standard for the duopoly rule in *Report and Order* in Docket No. 14711, 45 FCC 1476, 1479 (1964). Only Spanish International supports the use of *ad hoc* rulings, suggesting the application of Section 310(d) case law.

27. There is some divergence of opinion on the related issue of whether a set benchmark should constitute a conclusive or rebuttable determination of "ownership" subject to the Commission's restrictions. NRBA and Bonneville propose that the attribution benchmark be used as a rebuttable presumption of a shareholder's influence or control, contending that this approach would provide sufficient uniformity without inflexibility, and that it would be relatively easy to administer, with few individual cases likely to arise. Gaylord contends that any "flexibility" is more theoretical than real because a possible rebuttal cannot be relied on in business planning, and is offset by the need for certainty and stability.

28. CBS, Great American, and Northwestern believe that only the presumption of control for holdings above the benchmark should be rebuttable, and CapCities contends that it should not be. Northwestern and GCD believe that rebuttal should be allowed up to 50% ownership. Metromedia believes that rebuttal should be allowed only up to 10% ownership, and only for "passive" investors.

29. CapCities contends that only the presumption of non-control for holdings below the benchmark should be rebuttable, while CBS contends that it should not be, as that would lead to uncertainty and deter investment by major investors. Tribune counters that a rebuttable presumption in such a case still permits sufficient certainty and suggests that the Commission use the various indicia proposed in *Notice 83-46*. NRBA suggests that a party with an interest below the attribution level should be permitted to submit a disclaimer of intent to control in order to make the presumption of noncontrol conclusive.

"Passive" Investors

30. Several parties urge the Commission to retain its separate consideration and benchmark for "passive" institutional investors, and propose various modifications of that

²⁰ *Amendment of Multiple Ownership Rules* (Docket No. 8967), 18 FCC 288 (1953); *Report and Order 15627*, *supra*.

classification. Harte advances the inclusion of pension funds, and is joined by Metromedia in advancing the inclusion of SBICs and MESBICs. They claim that the latter inclusion will help to advance minority ownership in broadcasting, and assert that the Commission's previous adoption of other special rules for advancing minority ownership demonstrates the propriety of such special consideration.²¹ ATC, which proposed retaining the 1% limitation on co-located media, would make an exception for SBICs, MESBICs and other bona fide investment entities if they do not have any representation on the board of or in the management of the subject company. Life contends that insurance companies should be included as passive investors, as they intend to invest passively and are restricted by state laws and by their obligation to their policy holders and beneficiaries regarding diversification of their portfolios and acceptable levels of investment in individual companies.²²

31. Several parties propose that the categories of "passive" investors be broadened generally, with Cox/Multimedia proposing a specific set of criteria to be used in place of an exclusive listing of types of institutions. GCD contends that any benchmark considered appropriate for SBICs and MESBICs should be extended to all passive investing institutions, as they are also possible investors in minority broadcasting enterprises. Cox/Multimedia stresses that the Commission has previously recognized the need to treat all similar institutions equally in Docket 20520 and other previous cases.²³

32. Capital Research contends that there should be no ownership limitation at all on passive investors, with the burden of proof on the Commission to demonstrate on a case by case basis that an investor is not truly passive as it claims, or in the alternative, that it be permitted to submit a disclaimer to achieve this unrestricted status.²⁴ ABC claims that the Commission's experience with a 5% level for institutions has shown that the level of ownership is too conservative unless coupled with directorship or senior management position.²⁵ Cox/Multimedia contends that at least 10% is an appropriate ownership level for passive investors and institutions because they are typically precluded from or not interested in influence or control of the companies whose stock they hold, making a prohibition unnecessary. It continues that this passivity is already recognized in the Commission's present attribution rules. Life presses for a benchmark of at least 10% for insurance companies, based on their passivity, regulated status and fiduciary responsibilities. ICI argues in RM-3695 that investment companies and investment advisors should be permitted a 10% benchmark. Harte proposes that the Commission accept a certification by the licensee

²¹ Harte refers to the Commission's distress sale policy and its minority ownership enhancement in its lottery procedures for LPTV and similar services.

²² Life also asserts that there should be a special exemption for an insurance company's temporary acquisition of securities pursuant to a recapitalization plan under state law.

²³ *Memorandum Opinion and Order* (Docket 20520), 65 FCC 2d 336 (1977); *College Retirement Equities Fund*, 35 FCC 2d 885 (1972); *New York Teachers Retirement System*, FCC 83-16, released Jan. 24, 1983, 52 RR 2d 1695.

²⁴ Capital Research contends that investment advisors specifically have neither the time, the inclination, nor the incentive to exercise control over their portfolio companies, that safeguards against their exercise of control, including severe sanctions, already exist, and that these safeguards and sanctions will have a stronger effect than any attribution percentage established by this Commission.

²⁵ Great American has attempted to demonstrate that the "preferred" stockholding level of large institutional investors is often greater than 5%. Great American's sample indicates that at least 12% of those institutional investors reporting to the S.E.C. in 1982 have several holdings above that level.

that no control is exercised by a passive investor in lieu of a disclaimer from the investor.²⁶

33. Several other parties respond that the distinction among different types of investors has not been justified and is dubious and unrealistic. Spanish International contends that an individual has no greater ability to exercise influence or control with a given level of ownership than an institution has. ABC asserts that individuals holding 1% to 5% of a company's stock shouldn't be assumed to be less passive than an institution holding the same amount. GE and Taft contend that raising the allowable amount of ownership will eliminate the need for any distinction. (GE supports a 10% benchmark; Taft supports a 5% benchmark.) Spanish International asserts that the concept of "passive" investment is flawed because the Commission has previously determined that the mere assignment of proxies to management constitutes an active, although limited, management role in a company,²⁷ and that the mere trading and voting of large blocks of stock has been found to wield influence.²⁸

34. Capital Research insists that the investment community itself is not homogenous and that venture capitalists, for instance, take an active role in the companies with which they are involved. Citizens asserts that the Commission has already rejected the inclusion of pension funds as passive investors²⁹ and remarks that some pension funds (for instance, the Teamsters Union) do have an additional incentive to exercise influence over some of their holdings beyond a mere income interest.³⁰

35. NASBIC claimed that SBICs are the largest source of venture capital available to new and small growing businesses in this country. It stated that SBICs are investors, not holding companies, although they often provide management and financial counseling to their debtors. It claimed that a combination of equity and long term loans with warrants and debentures, sometimes with conversion rights, is essential to provide SBICs the necessary profit opportunity to obtain their assistance. It was joined by NRBA and T.A. Associates in pointing out that Small Business Administration regulations and SBICs individual charters prohibit control of the companies in which they invest. These parties contended that SBICs should therefore be allowed to hold up to 10% of a companies' voting stock, noting that 10% ownership is the level which is scrutinized by the SBA pursuant to 13 C.F.R. § 107.901. SynCom countered that 10% of voting stock should only be permitted for MESBICs because it is not clear how SBICs promote diversity.

36. Citizens contended that there is no evidentiary showing that SBICs "illegal interest rates" have helped minority owners, and that they may have hurt them by creating untenable financial positions. It claimed that the risk of loss in broadcasting is not particularly high, citing the "inexhaustible demand" for facilities, and gave two examples of new entrants which used SBA financing without surrendering equity in their corporations.

Use of a "Multiplier" for Vertical Ownership

37. Most of the parties commenting on the application of a "multiplier" for assessing attribution in vertical ownership situations favor its use. Many claim that it would provide a more realistic representation of actual influence or control. CapCities asserts that the adoption of a multiplier would substantially reduce the burden of the rules and reduce the difficulties of reporting such indirect interests without threatening the goals of the rules.

²⁶ Harte points out that applicants for new and existing facilities are now permitted to certify rather than demonstrate their financial qualifications.

²⁷ *Report and Order 15627, supra*, at 369.

²⁸ *Report and Order 20520*, 59 FCC 2d 970, 975 (1976).

²⁹ *Report and Order 20520, supra*.

³⁰ Citizens suggests that the Teamsters Union, for example, could have a specific interest in the news or programming practices of any stations it would have an ownership interest in, at least insofar as affairs concerning the Union were represented.

Centennial asserts that use of a multiplier would further encourage investment, increase the diversity of outlets thereby achieving the rules' goals, and reduce antitrust concerns. Licensees add that exceptions should be made in anomalous cases.

38. NBC and Taft oppose the use of a multiplier, claiming that it would permit controlling interests to go unnoticed, although other parties contend that this concern can be relieved by strict reporting requirements. Citizens points out that the Commission has previously rejected the use of a multiplier, in *Report and Order 15627*, *supra* at 371.

Other Attributable Interests

39. In response to *Notice BC 78-239*, 68 FCC 2d 1302 (1978), several parties first remarked that there has been no showing of abuse or of a real threat to the Commission's ownership rules to justify a change in the general policy of not attributing ownership interests to the non-voting instruments at issue. Life specifically contended that any non-voting interest holds less likelihood of conferring power than a corresponding voting interest. Licensees pointed out that non-voting stock and voting trusts are not included in the provisions of the Investment Companies Act of 1940, the Bank Holding Company Act, the Small Business Administration, or the S.E.C.'s reporting requirements. Citizens countered that no public interest consideration was advanced for accepting the risks of influence pertaining to non-voting interests, and that any party holding a non-voting interest is obviously pursuing only profit and not the public interest, convenience, and necessity.

40. Several commenters noted the importance of non-voting stock in the financing schemes of many licensees. Licensees and Bank of America pointed out that non-voting stock is offered by companies to raise money without diluting control. Several other commenters averred that non-voting stock is often intentionally sought by investors because of its separation from control, and that preferred stock particularly represents an intentional exchange of control for return on investment. Thus, they contend, non-control is the clear desire and intention of both licensee and shareholder where non-voting stock is at issue. Any change, commenters concluded, would disrupt the capital market, imposing a significant cost of regulation with no demonstrable corresponding benefit.

41. Several parties noted that non-voting stock is an important financing tool in media acquisitions and is used as a "sweetener" for venture capitalists to increase their return potential to compensate them for the risk involved in providing "gap" financing. SynCom argued that attributing non-voting stock would result in "credit rationing" by venture capitalists, with a concentration on the largest multiple owners. Accordingly, several parties claimed, attribution of non-voting stock would result in a diminution of diversity as new entrants, those most in need of venture capital, are squeezed out of a critical source of financing, with the direst consequences for minority owners, who have the least broadcast experience and fewest alternative sources of funds.

42. C.I.C. argued that non-voting stock with contingent voting rights should not be attributed if the contingency is beyond the control of the holder, and should be considered on an *ad hoc* basis if the contingency may be within the power of the holder. It further contended that any change in the rules now could not only diminish the value of such stock, but also lock in current holdings, and thereby promote disinterested ownership of licensees. ABC argued that the power residing in non-voting stock depends on the amount of stock held. Most important, it insisted, is that a policy statement is necessary to guide businesses in structuring their arrangements.

43. Bankers contended that lease-back agreements and debt holdings carry no potential for influence or control, and Licensees argued that putting restrictions on the holding of pure debt would reduce the sources of capital available to broadcasters. Life claimed that insurance companies often use debt financing to provide regular income, and that insurance companies should be specifically reserved from the application of any rule adopted, as they are non-

entrepreneurial enterprises. In response to *Notice of Proposed Rule Making* in Docket No. 20521, FCC 75-710, released June 23, 1975, 40 Fed. Reg. 26543 (June 11, 1975), (regarding reporting requirements) several parties commented that the current rule calling for information regarding any contracts restricting licensees' discretion is sufficient (47 C.F.R. §73.3613), and that debt instruments without such provisions are not relevant to the Commission's purposes. Other parties pointed out that the significance of a given dollar amount of debt depended on the size of the corporation and its assets, that there was no need for the entire contracts, parts of which could include confidential information, and that the information would be useful only to the reporting licensee's competitors.

44. Numerous parties continued to insist, in response to *Notice 83-46*, that the Commission should continue to consider only voting rights when attributing the ownership of a company, asserting that parties with non-voting interests in a company do not have a voice in management, and reiterating that, this result is specifically intended by both the issuer and holder of the particular interests. Centennial additionally points out that this is the implication of Section 303(a) of the Uniform Limited Partnership Act of 1976,³¹ and claims that exclusion of limited partners from attribution could result in a substantial increase in capital availability. Spanish International, Northwestern, and Cox/Multimedia assert that a limited partner has no ability to influence or control the actions of a licensee and that such an interest should not be cognizable. They contend that this result would parallel attribution of corporation ownership, in that only voting interests are considered. Several commenters reiterate the traditional use and importance of non-voting interests in corporate financing and their effectiveness as insulators, and urge the Commission to codify its present policies regarding interests other than voting interests. Licensees contend that "convertible" interests should be attributed only after the conversion privilege is exercised. Cox/Multimedia contends that attribution should generally follow the power to vote for stock held in trust, and asserts that the power to sell stock in the corpus or to select or replace the trustee are not usually exercised in response to a programming decision of a licensee.

45. Most commenters specifically contended that the Commission should continue to consider trusts on an *ad hoc* basis, arguing that such treatment has sufficed to date and that trusts are so widely varied in form, whether as a result of state laws or individual needs, that any general rule will prove too restrictive. Several parties insisted that trusts can be structured to effectively insulate the trustee from the beneficiary or grantor, although not all trusts currently do so. They contended that trusts are often indispensable tools for managing personal affairs, describing their various uses, and that permitting them to date has not interfered with the Commission's underlying multiple ownership purposes.

46. Bankers declared that trusts are not established to insulate a party so much as to combine votes, and Bank of America stated that it has not encountered any trust used to achieve insulation. Citizens argued that if a voting trust does insulate effectively, the trustee is in the untenable position of owing a duty both to maximize profit and to serve the public interest, convenience, and necessity.

47. There was considerable disagreement among commenters as to what provisions of a trust are relevant in attributing ownership of the assets of the trust. Those parties that did address specific trust provisions generally agreed that a power to change trustees or to revoke the trust does warrant attribution of ownership. SynCom contended that a grantor's retention of the power to dispose of the trust stock indicates an unwillingness to abdicate control and interferes with the ability of the trustee to manage the trust; Harte claimed that the power to sell can adversely affect the market value of securities. Bonneville contended, on

³¹ That section states that "a limited partner is not liable for the obligation of a limited partnership unless . . . in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." 6 U.L.A. § 303(a).

the other hand, that the power to sell is irrelevant, as non-public stock cannot be readily sold and the sale of public stock to influence a company is subject to S.E.C. jurisdiction. It further claimed that reserving the power to sell is important to protect the value of the stock, and that if a threat to sell is used to influence a licensee, the licensee can turn to the Commission for recourse. Licensees argued that the beneficiary of a trust has no reasonable expectation of corporate influence or plausible opportunity to affect programming decisions and is unlikely to sell stock or change trustees based on programming decisions of a licensee. ABC contended that the size of a trust should determine whether an ownership interest is attributed to the beneficiary, stating that it is contrary to common sense to believe that a large interest can be effectively insulated, while a small interest is of little importance regardless of the voting power. It proposed the adoption of a 5% benchmark for trusts, rebuttable for larger holdings.

Officers and Directors

48. Several parties contend that the inclusion of a corporation's officers and directors among those with cognizable interests in that corporation restricts the availability of competent officers and directors, particularly those with media expertise. They continue that an insulation device should be developed or the use of a disclaimer permitted. CapCities asserts that there is no countervailing reason not to do so, and Stein claims that experience shows the willingness of affected parties to comply. Northwestern suggests that such a pledge could be included in the appropriate station's public file and its ownership file at the Commission. Citizens asserts, however, that such insulation would be at odds with the fiduciary responsibility of an officer, director, or partner.

49. Cox/Multimedia contends that the alternative of individual waiver rulings would cause unacceptable delay. Other parties support retention of the current policy of attributing interests to officers and directors, with the consideration of contrary showings, as they see no alternate, satisfactory general rule. Licensees assert that such showings are allowed regarding the alien ownership provisions, and CBS points out that the Securities and Exchange Commission's disclosure requirement does not include directorships, and that such contests would arise infrequently. It continues that the interests of a non-employee director of more than one licensee corporation should not be aggregated. Such interests represent no threat to the goals of the multiple ownership rules, it contends, as such persons have no specific business decision-making authority in a widely-held corporation (in CBS's experience). It also claims that the activities of an officer or director are restricted in any case by the interlocking director restriction of the Clayton Act.³² Life contends that at least the officers and directors of insurance companies should be excluded as insurance companies have only passive investment interests and insulation is provided by the basic investment character of insurance company's holdings. GCD proposes that directors from a parent company can attribution for the parent only when they constitute 25% of the board of the subject company, drawing on the parallel restriction of the alien ownership provision.³³

Reporting Requirements

50. In response to *Notice 20521, supra*, most parties welcomed the Commission's inclination to standardize the ownership information required on various forms, but a few pointed out that the various forms serve different purposes, and standardization is not desirable to the extent that it results in making all forms unnecessarily complex or inclusive for their purposes.

51. Most parties opposed the suggestion of submitting information on all of the top thirty shareholders in each corporation and the top ten holdings held by each custodial holder in the top thirty. They argued that the information was simply unnecessary in most cases, claiming

³² 15 U.S.C. § 19.

³³ 47 U.S.C. § 310(b).

that this requirement would result in the reporting of small and meaningless interests, many of which would be non-cognizable. They also contended that it is unfair to put the responsibility for the accuracy of the information on the licensee, since licensees do not hold the information themselves, but must rely on other parties who have historically been reluctant to cooperate. Comments filed by two different groups of licensees recommend retention of the 1% shareholder standard and suggest that the problem of correctly aggregating the interests of one person which are dispersed among several custodial holders can be resolved by requiring all parties with a reportable interest that is not obvious from stockholder records to report its interest to the licensee. They contended that most omissions of cognizable interests are inadvertent and that this requirement would remedy the problem. One of the licensee groups also recommended that the Commission require the reporting of all 0.25% interests held by custodial holders, for the purpose of aggregating accounts held with several nominees.

52. Virtually all commenting parties claimed that the other business interests of a licensee's principals are not relevant if not broadcast-related, and that past broadcast-related interests are not relevant beyond a few years, if at all. They contended that the proposed requirements were drawn too broadly and imprecisely, and that any such interest that may be relevant should only be reported if it amounts to a cognizable interest.

53. Most parties were opposed to the proposal for a separate complete report for all companies which held 10% or more of a licensee's stock, arguing that such reporting would produce voluminous unnecessary information and was not justified by a cost/benefit analysis. Cox/Multimedia more recently remarks that the 25% holding company requirement for a separate report responds to the alien ownership provisions. RKO and Rust argued that such companies should only be required to file a complete report if in clear control of the licensee while ABC contended that "control" is too imprecise a term, and the Commission should use a strict percentage guideline. RKO further suggested that in any case, the responsibility for the report should not stand with the licensee, as the information is not within the licensee's control.

54. Various parties contended that there is no need to report the income beneficiaries of trusts, contending that such interests are beyond the scope of the Commission's purposes in its multiple ownership rules, and that the information is very difficult to obtain in many cases.

55. Parties supporting the adoption of the complete MCDR included Senators Metcalf and Abourezk, Michigan State University, which claimed it needed the information for industrial research, and the Council on Economic Priorities and the Coalition for Responsible Investment, which were concerned with the social implications of their investments. Citizens for Cable Awareness in Pennsylvania and Philadelphia Community Cable Coalition generally argued that the Commission should act to discourage the advancement of institutional ownership in the media.

56. The question of whether the benchmark for reporting ownership should be the same as for determining attribution of ownership has emerged as a distinct issue in the analysis of several commenters responding to *Notice 83-46*. Gaylord maintains that the two benchmarks serve different purposes, with the reporting benchmark affecting the Commission's ability to assess and monitor *de facto* control. Citizens, Licensees and NRBA also maintain that reporting is essential to enforcement of the rules. NRBA specifically contends that retention of the current benchmark for reporting purposes would recognize the "acknowledged reality" that influence or control is not solely a function of ownership interests. Licensees further contend that it is especially important to have this ownership information following a drastic change in the rules, the consequences of which cannot be foreseen, and it points out that a 1% reporting benchmark can later be raised if it proves unnecessarily conservative.

57. Most other parties which specify a particular reporting benchmark as appropriate propose the adoption of a "5% of voting interest" standard, several in conjunction with their proposal for a 5% attribution benchmark and others as a separate benchmark for reporting, lower than that they propose for attribution of ownership. Those parties universally support the 5% figure in recognition of the Securities and Exchange Commission's disclosure requirements. They assert that this reporting level will relieve licensees of the burden of reporting unnecessary information with no adverse effect on the public interest. Metromedia and CapCities assert that a reporting level lower than 5% would perpetuate the current difficulties encountered when institutional shareholders are reluctant to disclose information on the parties for whom they hold stock, and CapCities maintains that the current reporting of these smaller interests is often inaccurate.³⁴ Gaylord comments that the reporting benchmark can later be raised if it proves unnecessarily conservative. Several parties counter that reporting non-attributable interests would be irrelevant and an unnecessary burden.

58. Several parties argue that the periodic and routine ownership reports required from widely-held corporations require a considerable effort with no corresponding public benefit. Capital Research asserts that they cause a diversion of the capital directed by investment advisors who are reluctant to assume this additional cost/burden when directing funds. Cox/Multimedia points out that information regarding alien ownership, which is a statutory concern, is only required with specific applications.

Effect on Cross Interest Policies

59. Some parties responding to *Notice 83-46* address themselves to the need for or desirability of uniformity of attribution levels and rules among the various multiple ownership and cross interest rules. Presuming that a higher attribution benchmark is adopted, CapCities and Tribune urge the uniform application of that benchmark. Cox/Multimedia contends that the various multiple ownership and cross interest rules have the same policy objective. It continues that a contrary conclusion would undercut the validity of a determination that a specific level of shareholding was appropriate to attribute the ownership of a licensee, and that uniformity of application is needed for understandability, predictability, and ease of administration of the rules. CapCities asserts that making a distinction for a special case would be arbitrary. In response to *Further Notice 20548, supra*, which proposed its modifications for only three of the multiple ownership rules, NCCB, Rust, and NAB contended that there was no reason given for separating the "seven station" rule from the others for attribution purposes. Rust and NAB contended that any new benchmark should be extended to broadcast/cable cross ownership rules as well.

60. Other parties contend that the various rules have different rationales. CapCities contends that the policy regarding cross interests requires separate consideration as far as interests in the same service are concerned, because these rules involve direct competition and preservation of arm's-length bargaining. ABC made essentially the same argument in response to *Further Notice 20548, supra*. ATC argues for special restrictive consideration for rules concerning co-located media, as they occasion the most incentive to exercise influence and the most potential for anti-competitive activity due to their unique relationships in local politics and franchising. LIN proposes retaining the present attribution rule for the broadcast/cable holdings of programming production and distribution companies, since such parties would have more incentive than others to control a licensee's programming and could thus present a serious restriction of a licensee's freedom in making programming selections/decisions.

³⁴ Several parties urge the adoption of the Securities and Exchange Commission's "beneficial owner" standard for determining what interests should be reported, and the use of the SEC's corresponding forms, particularly its "13(g)" provisions.

Enforcement of the Rules

61. Taft, NBC, and CapCities urge the Commission to direct its future enforcement efforts against shareholders rather than against licensees. They contend that a licensee cannot control who holds its stock or force a divestiture if a Commission rule is violated. They maintain that such enforcement has previously been employed by the Commission, pointing out various divestiture cases as examples, and NBC asserts that Sections 4(i) and 303(r) of the Communications Act (47 U.S.C. §§ 4(i), 303(r)) provide the Commission with the requisite authority. Cox/Multimedia contends that Section 503(b)(B) of the Act (47 U.S.C. § 503(b)(B)) was specifically added to provide just such an enforcement provision.

Appendix C

1. 47 C.F.R. Part 73 is amended by removing Section 73.35.
2. 47 C.F.R. Part 73 is amended by removing Section 73.240.
3. 47 C.F.R. Part 73 is amended by removing Section 73.636.
4. Section 73.3555 is added to 47 C.F.R. Part 73 to read as follows:
§ 73.3555 Multiple Ownership.

(a) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls one or more broadcast stations in the same service and the grant of such license will result in:

- (1) any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed AM stations, computed in accordance with § 73.183 or § 73.186; or
- (2) any overlap of the predicted 1 mV/m contours of the existing and proposed FM stations, computed in accordance with § 73.313; or
- (3) any overlap of the Grade B contours of the existing and proposed TV stations, computed in accordance with § 73.684.

(b) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls one or more such broadcast stations and the grant of such license will result in:

- (1) the predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the AM station; or
- (2) the predicted 1 mV/m contour of an existing or proposed FM station, computed in accordance with § 73.313, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the FM station.

(c) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in:

- (1) the predicted or measured 2 mV/m contour for an AM station, computed in accordance with § 73.186, encompassing the entire community in which such newspaper is published; or

(2) the predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(3) the Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(d) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other broadcast station in the same service, if the grant of such license would result in a concentration of control of broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The FCC, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party on any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven AM, seven FM, or seven TV broadcast stations (no more than five of which may be in the VHF band); or of three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations.

(e) The reference points which shall be used for city- to-city measurements are those listed in the Index to the *National Atlas of the United States of America*, United States Department of Interior, Geological Survey, Washington, D.C., 1970. (Future editions will supersede.) In the case of any community of license which is not referenced by the National Atlas, such as a newly established community, the point of reference shall be the main post office until such town is referenced. The National Atlas is available for reference at most public libraries and at the FCC in Washington.

(f) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM), or the only commercial TV station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required for aural stations if there is a separately owned, operated or controlled TV broadcast station licensed to serve the community.

(g) This section is not applicable to noncommercial educational FM and noncommercial educational TV stations.

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers 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 broadcast licensee, cable television system or daily newspaper 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 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 10% 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. 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 interest in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For 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% (0.1×0.25). 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 interest 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 broadcast licensee, cable television system or daily newspaper are subject to said trust.

(f) Holders of non-voting stock shall not be attributed an interest in the issuing entity. 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) Limited partnership interests shall not be attributed to limited partners if the relevant partnership agreement complies in all significant respects with the provisions of the Model Limited Partnership Act of 1976 (6 U.L.A. §101, *et seq.*) and the limited partners are not otherwise involved in any material respect in the management or operation of the licensee, cable television system or daily newspaper or its facilities, *provided* that the licensee or system concerned so certifies.

(h) Officers and directors of a broadcast licensee, cable television system or daily newspaper 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 broadcasting, cable television service or newspaper publication, 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 a broadcast licensee, cable television system or daily newspaper, 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 broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report]. The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

NOTE 3: In cases where record and beneficial ownership of voting stock is not identical (*e.g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

NOTE 4: Paragraphs (a)-(d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class IV stations, to applications for assignment of license or transfer of control filed in accordance with §§73.3540(f) or 73.3541(b) of this part, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled broadcast stations in the same service and if no new encompassment of communities proscribed in paragraphs (b) and (c) of this section as to commonly owned, operated, or controlled broadcast stations or daily newspapers would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other no greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) This section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television station that was commonly owned, operated, or controlled as of September 30, 1964; or to any broadcast application where grant of such application would result in the Grade A contour of an existing or proposed UHF station encompassing the entire community of license of an existing or proposed AM or FM broadcast station that is commonly owned, operated or controlled or would result in the entire community of license of such UHF station being encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated, or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 5: Paragraphs (a)-(d) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled "non-satellite" television stations with Grade B overlap or such commonly owned, operated, or controlled "non-satellite" television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 3. Nor shall any application for assignment or transfer concerning such "non-satellite" stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 3.

NOTE 6: For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

NOTE 7: For the purposes of the three station regional concentration provision of this section, (a) an application raising a regional concentration of control issue which involves overlap of or by one or more UHF television stations will be treated on a case-by-case basis, consistent with the precedents of UHF determinations made under the one-to-a-market proscriptions of this section, and (b) AM and FM broadcast stations licensed to communities which are within 15 miles (city reference point to reference point) and/or within the same urbanized area (as mapped by the U.S. Bureau of the Census), will be considered as a combination and counted as one station.

Appendix D

47 C.F.R. §73.3615 is amended by revising paragraph (a), subparagraphs (a)(2), (a)(3)(i), (a)(3)(iv), (a)(3)(iv)(A) and (B); by removing subparagraph (a)(3)(iv)(C); by revising paragraph (c) in its entirety; and by removing paragraph (d) in its entirety and marking it [RESERVED], as follows:

§ 73.3615 Ownership reports.

(a) Each licensee of a commercial AM, FM, or TV broadcast station which is not a sole proprietorship or 50/50 partnership shall file an Ownership Report on FCC Form 323 once a year, on the anniversary of the date that its renewal application is required to be filed. [Sole proprietorships and 50/50 partnerships will file ownership information in connection with the application process]. Licensees owning multiple stations with different anniversary dates need file only one Report per year on the anniversary of their choice, provided that their Reports are not more than one year apart. A licensee with a current and unamended Report on file at the Commission may certify that it has reviewed its current Report and that it is accurate, in lieu of filing a new Report.

Ownership Reports shall provide the following information as of a date not more than 60 days prior to the filing of the Report:

(1) * * *

(2) In the case of a partnership, the name of each partner and the interest of each partner. A limited partner need not be reported, regardless of the extent of its ownership, if the limited partnership conforms in all major respects with the Uniform Limited Partnership Act of 1976 (6 U.L.A. §101 *et seq.*) and if the limited partner is not otherwise involved in any material respect in the business of the licensee or the operation of the station;

* * * * *

(3) * * *

(i) The name, residence, citizenship, and stockholding of every officer, director, trustee, executor, administrator, receiver, partner, member of an association, and any stockholder which holds stock accounting for 5% or more of the votes of the corporation, except that an investment company, insurance company, or bank trust department need be reported only if it holds stock amounting to 10% or more of the votes, and the licensee certifies that such entity has made no attempt to influence, directly or indirectly, the management or operations of the licensee, and that there is no representation on the licensee's board or among its officers by any person professionally or otherwise associated with the entity. A licensee shall report any separate interests known to be held ultimately by the same person or entity if those interests, when aggregated, exceed the ownership benchmarks herein, whether those interests are held in custodial accounts or by individual holding corporations. If the majority of the voting stock of a corporate licensee is held by any single person or entity, no other stockholding need be reported for that licensee;

* * * * *

(iv) Full information with respect to the interest and identity of any person having any direct, indirect, fiduciary, or beneficial interest in the licensee or in its stock accounting for 5% or more of its votes. For example:

(A) Where A is the trustee of stock held for beneficiary B, A shall be reported if A votes the stock or has the sole or shared power to dispose of the stock; B or any other party shall be reported if B or such party votes the stock or has sole power to dispose of the stock or has the power to revoke the trust or replace the trustee at will;

(B) Where X corporation (or association or partnership) controls the licensee or holds stock accounting for 5% or more of the votes, another Report shall be filed for X; that Report shall include the same information as required of a licensee, but with respect to owners or shareholders of X, only those whose voting interest in X multiplied by X's voting interest in the licensee accounts for 5% or more of licensee's votes (10% for investment companies, insurance companies, and bank trust departments) shall be reported, as well as officers and directors; for those officers and directors with responsibilities not involving the licensee who wish to be relieved of attribution in the licensee, report the name, title and duties, and an explanation of why their duties do not involve the licensee. If one of the reportable stockholders or owners is yet another corporation, Y, the same procedure shall be followed with respect to Y corporation.

* * * * *

(c) Before any change is made in the organization, capitalization, officers, directors, or stockholders of a corporation other than licensee or permittee, which results in a change

in the control of the licensee or permittee, prior FCC consent must be received under §73.3540. A transfer of control takes place when an individual or group in privity, gains or loses affirmative or negative (50%) control. See instructions on FCC Form 323 (Ownership Report).

(d) [Reserved]

* * * * *

Appendix E

47 C.F.R. §76.501 is amended by revising Notes 1, 2 and 3 to read as follows:

* * * * *

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: In applying the provisions of this section, ownership and other interests in broadcast licensees and 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 broadcast 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 broadcast 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 10% or more of the outstanding voting stock of a corporate broadcast licensee or cable television system, or if any of the officers or directors of the broadcast 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 a broadcast 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 broadcast licensee or cable television system are subject to said trust.

(f) Holders of non-voting stock shall not be attributed an interest in the issuing entity. 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) Limited partnership interests shall not be attributed to limited partners if the relevant partnership agreement complies in all significant respects with the provisions of the Model Limited Partnership Act of 1976 (6 U.L.A. §101, *et seq.*) and the limited partners are not otherwise involved in any material respect in the management or operation of the licensee or cable television system or its facilities, *provided* that the licensee or system concerned so certifies.

(h) Officers and directors of a broadcast 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 broadcasting 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 a broadcast 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 broadcast 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 appropriate Ownership Report]. The officers and directors of a sister corporation of a broadcast licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

NOTE 3: In cases where record and beneficial ownership of voting stock is not identical (*e.g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

* * * * *

Appendix F

Regulatory Flexibility Analysis

I. *Need for and Objectives of the Rule.* This action was prompted by the Commission's desire to redefine and update its policies and rules that attribute broadcast, cable television and newspaper ownership interests to certain persons and entities for purposes of enforcing the Commission's multiple ownership rules. The current attribution rules were based on market and economic conditions of forty years ago, and had evolved individually in such a way as to be disjointed and inconsistent. The rules adopted herein are designed to be more relevant and effective in the current marketplace, to eliminate any unnecessary burden on licensees, and to make the rules clearer and more easily complied with, while still maintaining a viable attribution mechanism to support the multiple ownership rules.

II. *Issues Raised in Response to the Initial Regulatory Flexibility Analysis.* No issues were raised specifically in response to the initial regulatory flexibility analysis. Generally, commenters argued, and the Commission agreed, that the current rules restrict investment beyond the extent necessary to enforce the multiple ownership provisions, and in so doing, place an unwarranted and significant burden on licensees to report their ownership and to otherwise conform to attribution requirements. In response, the Commission increased the level of ownership interest necessary to confer on any party a cognizable interest in a licensee and specifically exempted certain kinds of non-voting ownership from attribution. Ownership reporting requirements were adjusted appropriately.

III. *Significant Alternatives Considered and Rejected.* The Commission considered maintaining the current 1% attribution benchmark, as well as adopting benchmarks higher than those adopted herein, such as 10% and 20%. These alternative benchmarks were determined to be less accurate than those adopted in identifying the interests of concern to the Commission in the context of its multiple ownership rules. Moreover, these alternative standards were found to provide no significant benefit sufficient to justify their use. The Commission also considered a variety of reporting requirements, including reporting of various non-attributable interests, but determined that information regarding these interests was not necessary because the interests themselves were found to be not significant for attribution purposes.

SEPARATE STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Report and Order In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licenses

This Report and Order continues the Commission's ill-advised piecemeal approach to revision of the broadcast multiple ownership rules. As I have previously said, "[p]icking off longstanding ownership rules one by one can only produce disjointed results, and give credence to criticism that this agency has abandoned its interest in promoting diversity of expression through effective structural restraints."¹ Not a single persuasive reason has been advanced to justify action in this proceeding before other pending ownership rule-making proposals are presented to the Commission for final decision.² Whatever one's philosophical leanings may be regarding the ultimate outcome if our ownership proceedings, to proceed in this

¹ *Notice of Proposed Rulemaking in the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licenses*, 48 Fed. Reg. 10082 (March 10, 1983) (Joint Concurring Statement of Commissioners Henry M. Rivera and Joseph R. Fogarty).

² The suggestion that immediate action in this proceeding will benefit minorities does not offer credible justification for the Commission's premature action. If the Commission were specifically interested in responding to the needs of prospective minority owners, it could have easily tailored rule changes to advance this narrow purpose.

The additional suggestion by some Commissioners that immediate action is called for to stimulate the flow of capital into the broadcast industry is equally specious. There is no record evidence that the broadcast industry, in general, is suffering from a lack of capital or that this Order would relieve any shortfall that may exist.

illogical, disjointed fashion makes no sense. When I asked why we were proceeding in this manner at the meeting at which this Report and Order was adopted, no one could explain. However, the Commission's insistence on changing ownership rules piecemeal, without reference to the cumulative impact of these changes on the structure of the broadcast industry, makes plain that this agency is no longer genuinely committed to maximizing diversity in the media.³

Regardless of how the other ownership rules are altered, the Commission's failure to consider the effect of these rule revisions in tandem with other ownership rule changes surely has set the stage for public policy errors. For example, if national and regional ownership rules are repealed, leaving only local ownership limitations, more restrictive or different attribution rules might be in order to assure maximum media diversity in "sacrosanct" local markets. By its premature decision here, the Commission makes any reasonable consideration of such interrelationships impossible.⁴

In the face of this handicap, I do not understand how a Commissioner can be expected to make an informed judgment about the merits of the revisions adopted herein. Therefore, with great regret, I abstain from participating in this decision.

³ It is no answer to say that these rules are merely procedural and, thus, can be revised without reference to substantive multiple ownership restrictions. The attribution rules are the engines powering the multiple ownership limitations. Depending on the ownership rule at issue, the FCC's attribution criteria may vary. See *Further Notice of Proposed Rulemaking*, 63 FCC 2d 834 832 (1977) (proposing separate attribution benchmark for seven station rule.)

⁴ Of course, further revision of the attribution rules is always theoretically possible, but as a practical matter it is most unlikely that the Commission will return to more conservative rules. Even if the FCC were disposed to do so, however, it surely would not require divestiture of stations acquired pursuant to liberalized attribution rules to bring owners into conformity with further rule changes.