DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

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

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

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

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

My other concern with the rules adopted today is that I am not persuaded that they are adequately supported by the record. Specifically, the selection of the 33% benchmark -- *with respect to both debt and equity* -- appears to lack the requisite record basis. *Cf. Motor Vehicles Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (administrative agencies must "examine the relevant data and articulate a satisfactory explanation

for its action, including a 'rational connection between the facts found and the choice made'") (citation omitted); *ATT v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (requiring that "conclusions reached [by an agency]have a rational connection to the facts found"). There is no record evidence of 33% being either less or more appropriate than, say, 25%, on the one hand, or 51%, on the other. Although the item *asserts* that "[t]he record in the broadcast attribution proceeding . . . reflects that holders of nonvoting stock and debt interests may be able to influence broadcast licensees in a significant manner," *supra* at para. 7, that does not mean, absent evidence to support the assertion, that this is true. Nor, more importantly, does it mean that 33% is the right place at which to draw the line for purposes of establishing significant influence. How large does a holding have to be before its possessor may be able to exert significant influence? There is little to no record evidence to guide this decision, just speculation and guesswork. Thus, as a matter of administrative law, the rules are difficult to defend against a charge of arbitrariness and/or lack of record support.

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

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