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OUR REFERENCE

**C.H. EWING**jc

YOUR REFERENCE

**TO: The Independent Media Commission  
and Independent Telecommunications  
Authority, Multi-Party Negotiating  
Process**

**FAX NO: 397-2211**

**DATE: 12 July 1993**



(THE NUMBER OF PAGES TO FOLLOW THIS PAGE ARE: 8 )

**RE: FIFTH REPORT OF THE TECHNICAL COMMITTEE ON THE  
INDEPENDENT MEDIA COMMISSION AND INDEPENDENT  
TELECOMMUNICATIONS AUTHORITY**

Acting on the instructions of Argus Holdings Limited, and in conjunction with that company, we have prepared the submissions annexed hereto which are hereby submitted for consideration by the Technical Committee.

Yours faithfully,  
**CLIFFE DEKKER & TODD INC**  
per **C.H. EWING**

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**SUBMISSIONS MADE BY ARGUS HOLDINGS LIMITED IN REGARD TO  
THE INDEPENDENT BROADCASTING AUTHORITY BILL ("THE BILL")  
AS CONTAINED IN THE FIFTH REPORT OF THE TECHNICAL  
COMMITTEE ON THE INDEPENDENT MEDIA COMMISSION AND  
INDEPENDENT TELECOMMUNICATIONS AUTHORITY**

**IT IS SUBMITTED THAT**

**1. SECTION 1.1 - DEFINITION OF ASSOCIATE**

The definition of associate (which appears to include a company as a person) refers in sub-clause (c) to an associate company being one in respect of which the relevant person is in a position to exercise control.

When this definition is read with the deeming provision contained in clause 3(1) of schedule 4 to the Bill it is clear that if a company has company interests exceeding 15% in another company then that other company is its associate.

It is therefore clear that the question of control in Schedule 4 and accordingly in Sections 46 and 47 of the Bill is governed by an interest in excess of 15% (where, for example, a person acts together with an associate).

At the same time clause 47, in dealing with the question of cross-media control and cross-directorships in sub-sections 10, 11 and 12, uses the concept of "company interests exceeding 35%".

It seems clear that a holding of 16% in a vast number of instances will carry no rights whatsoever and, whilst the holder of the 16% will, in the absence of proof to the contrary, be deemed to be in control of the



relevant company and accordingly to be an associate thereof, it will be extremely difficult for such holder to prove the negative concept of non-control.

In the 1993 amendments to the Income Tax Act, Parliament reviewed and dealt with the whole question of "connected persons" and the concept of a 40% shareholding was introduced in determining connected persons.

It is submitted that the concept used in Section 47(10), (11) and (12), where company interests should not exceed 35%, should also be applied to the deemed control (and accordingly the question of associateship) as set out in clause 3(1) of Schedule 4.

It is further submitted (on the basis set out below) that a consistent percentage of 35% should be applied throughout the Bill in regard to "control", "associate" and "company interests".

## 2. DEFINITION AND USE OF "COMPANY INTERESTS"

The definition of company interests merely states that company interests means the percentage of an interest whatever form that interest may take.

Company interests are then used extensively in Section 47 of the Bill.

In using the term company interests in that Section no percentage is prescribed in a number of sub-sections e.g. sub-sections (7), (8), (9) and (11). The consistent use of a fixed percentage in relation to "control", "associate" and "company interests" would, it is submitted, lead to greater certainty and would not lead to any diminution in the achievement of the objects of the Bill.

A number of the major media organisations which presently exist have the expertise and financial ability which will be absolutely essential to new holders of private broadcasting licences in order to ensure the success of their ventures. Bearing in mind the policy set out in Section 3

of the Bill and in particular 3(7) and 3(8) it is submitted that the purpose of Section 47 should be to ensure control by persons from a diverse range of communities and to prevent over-concentration of media ownership and control.

Care should be taken to ensure that the control and over-concentration aspects are fully dealt with in the Bill whilst at the same time allowing for a proliferation of radio stations and newspapers, rather than restricting the growth of the broadcasting industry. As stated above, it may be essential for there to be a cross-ownership and consequent cross-subsidisation of certain aspects of the broadcasting industry in order to create viability.

It is submitted that Section 47, in regard to the use of the phrase company interests should also be read with Section 43(2)(c) to (f). If a company which has, for example, a newspaper with a circulation in excess of 300 000 and one private broadcasting licence is prepared to assist and be involved through a company interest of, say, 18% in order to enable the applicant to meet the provisions of Section 43(2)(c) to (f) then this may be the only way in which the applicant is able to meet the requirements of Section 43(2)(h).

In other words, situations will in all probability arise where the persons referred to in Section 43(2)(h) are unable to comply with sub-sections (c) to (f) unless the persons presently prohibited from having a company interest in the applicant (pursuant to Section 47) are permitted to provide the expertise referred to in sub-section (c) to (f) of Section 43(2).

It is accordingly submitted that the use of company interests (35% is suggested) in Section 47 should be subject to a defined percentage thereof or should be subject to control or deemed control of the company applying for the new private broadcasting licence.

It is accordingly submitted that there may be a number of circumstances where, provided certain criteria are met, it may be desirable for the provisions of Section 46 or Section 47 to be departed from, in the



interests of broadcasting and of the community as a whole. It may be possible to cater for such situations by granting to the Authority a relatively wide discretion in regard to limitations on control and cross-media control of private broadcasting services. It is accordingly submitted that the right of the Authority to waive compliance with Section 46 or Section 47 on good cause shown and after public hearings should be incorporated in the Bill.

### 3. **SUBSIDIARY COMPANIES**

There appears to be some difficulty in the application of the Bill to subsidiary companies and "sub-subsidiary" companies. The entire group concept where a number of levels exist in a pyramid of companies needs to be dealt with. In this regard annexe "A" hereto, being an extract from the law applicable to the Federal Communications Commission in the USA, in the paragraph marked (d), deals with the question of attribution of ownership interests that are held directly by any party through one or more intervening corporations. It is suggested that the concept referred to therein be considered for inclusion in the Bill.

### 4. **SECTION 5 AND SCHEDULE 1 - APPOINTMENT OF MEMBERS OF THE AUTHORITY**

There appears from the wording of Section 5 and of Schedule 1 to be a detailed examination of the qualifications of various nominees by the committee to be established in terms of Schedule 1 but neither the Section nor the Schedule refer to the creation of an authority which is balanced from the point of view of having expertise in various areas.

It is submitted that the authority will require certain members who have either financial or technical expertise and it is submitted that the Bill should attempt to direct the committee which conducts the hearings to ensure some form of balance in the authority from a financial and technical point of view.

## 5. SECTION 30

The Section provides for the Authority to designate certain areas as national, regional, metropolitan or local.

It appears to be likely that persons interested in obtaining broadcasting licences will themselves identify the areas in respect of which they wish to obtain such licences and such areas will be determined by the applicants because of their financial viability.

It is suggested that the issue of designation of licence areas be left open on the basis that the Authority may issue a national, regional, metropolitan or local licence depending on the contents of the application made by the person concerned.

It is further suggested that the Bill be amplified by the inclusion of definitions of "national", "regional", "metropolitan", "community" and "local". One of the reasons for this suggestion relates in particular to the question of community licences. Is it intended through the use of the word community to indicate a particular geographically concentrated community, or a community identified by language e.g. a Greek community, or by religious conviction, e.g. a Jewish community? The concern in this regard is that a community licence could lead to a transmission in the English language on a nationwide basis in order to reach all the members of that community.

## 7. AVERAGE OR COMBINED AVERAGE CIRCULATION - SECTION 47

The Act does not deal in any detail with the meaning of the circulation of a newspaper and the use of the phrase "average or combined average circulation" in various sub-sections of Section 47 is likely to lead to confusion and litigation.

We submit the following examples for consideration:



if a daily newspaper has an average circulation of 300 000 copies per day over a one month period but of 270 000 copies per day over a one year period, what is its average circulation?

if a weekly newspaper has an average circulation of 400 000 copies per week, is this divided by 7 in order to establish a standard rate of "daily circulation"? Should the Bill not contain some method of ensuring that weekly newspapers are not prejudiced in relation to daily newspapers.

It is accordingly submitted that a definition of average or combined average circulation is required for the sake of certainty.

#### 8. SECTIONS 47(3) & 47(4) - NEWSPAPER CIRCULATIONS

In regard to Section 47(3) it is once again suggested that the Section restricts the discretion of the Authority in what could be a harmful manner. The situation could arise where a newspaper has more than 50% of its circulation in an area and is the only newspaper in the area in which there is no local radio station. It may be in the interests of the inhabitants of that area to permit the newspaper, notwithstanding Section 47(4) to establish a radio station especially if no other person is willing to do so.

It is accordingly submitted that the Authority should have the discretion to waive the provisions of Section 47(4).

#### 9. TELECOMMUNICATIONS

There appears to be a worldwide trend for media organisations, either in the newspaper or in the broadcasting areas, to move into the field of telecommunications, for example, the provision of cellular telephone services.

The telecommunications industry is highly capital intensive and accordingly the barriers to entry are formidable.

Any person or organisation wishing to enter the telecommunications industry will require substantial capital and expertise and it is submitted that the provisions relating to cross-media control should not at this stage be extended to the telecommunications industry.

9. **FINAL REPRESENTATIONS**

It is submitted that once the next version of the Bill is made available, interested parties be given a final opportunity to make representations and submissions in regard thereto.

10. We confirm that Argus Holdings Limited and its representatives are available at any time for discussions in regard to the above documentation should the Technical Committee require any further explanation or motivation in regard thereto.



§ 73.3555

## Federal Communications Commission

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 or 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 interests 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 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, 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)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

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

(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 own-