

Bureau that its interest in Entravision is below the 33% threshold equity/debt plus ("EDP") ratio. In fact, Univision failed to make any such showing.

Univision's December 9, 2002 letter was filed in response to a November 29, 2002 Commission request for further information. The Commission was responding to a NHPI showing, that Entravision had outstanding debts owed to Univision. Univision had previously represented to the Commission that "Univision has no debt interest in Entravision."¹ The Commission ordered Univision to "explain the origin and nature of such accounts." It further ordered Univision to, "[p]rovide an audited financial statement to support any factual assertion, and a detailed showing demonstrating compliance with the Equity/Debt Plus Rule."²

In response to the Commission's letter, Univision submitted certain documentation, which it claimed showed that it was in compliance with the Commission's EDP rule. However, the evidence Univision provided was incomplete and not audited.³ As NHPI stated in its December 16, 2002 letter:

"Univision has again misled the Commission and has failed to be forthcoming and candid in its representations to the Commission. * * * Entravision's DEF 14A shows that "Andrew Hobson, Executive Vice President of Univision, holds 211,136 Class A shares of Entravision. The DEF 14A also shows that Michael D. Wortsman, Co-President of Univision Television Group, Inc., holds 56,136 Class A shares of Entravision.

"Entravision's DEF 14A reports stock ownership of (1) persons or entities known to be the beneficial owners of more than 5% of the outstanding shares of stock, (2) each of its directors, and (3) certain key executives of the company. Mr. Hobson and Mr. Wortsman's share holdings were reported because, at the time, they were members of Entravision's board of directors. Entravision's DEF 14A does not require it to report shares held by Univision insiders unless their individual holdings exceed 5% of the outstanding shares. Thus, in addition to Mr. Hobson and Mr. Wortsman, it is quite possible that other Univision officers and directors hold Entravision shares. There may also be other Entravision debts owed to Univision that are not reported in SEC filings. Had an independent audit been conducted, an honest and complete answer could have been provided."

For the Commission to make a bright-line determination concerning compliance with the EDP rule, it must know the percentage of equity and debt a party holds. In this case, the commission knows that Entravision has outstanding debts owed to Univision. What the Commission does not know, is the amount and percentage of Entravision's debt owed to Univision. Also unknown, is how many shares of Entravision's stock are held by Univision's officers and directors. See, Section 73.3555, note 2. Here again Univision

has refused to provide this information. Without knowing the extent of equity, and the extent of debt Univision, its officers and directors hold in Entravision, the FCC cannot determine whether Univision complies with the EDP rule.

Univision's failure to produce information, which is easily obtained and uniquely within its control, permits the Commission to draw the negative conclusion that if the information were produced it would show that Univision, post-merger, will still have an attributable interest in Entravision. *Tendler v. Jaffe*, 203 F.2d 14, 19 (D.C. Cir. 1953) ("The omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause."); *International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the * * * document, if brought, would have exposed facts unfavorable to the party.") (quoting J. Wigmore, *Evidence* § 284, 3rd ed. 1940); *United States v. Robinson*, 233 F.2d 517, 519 (D.C. Cir. 1956) ("[u]nquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered a circumstance against him and may raise presumption that the evidence would not be favorable to his position"); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952-53 (Rev. Bd. 1988); *Thornell Barnes v. Illinois Bell Telephone Co.*, 1 FCC 2d 1247, 1274 (Rev. Bd. 1965). Univision's failure to produce evidence permits the Commission to include that Univision's interest in Entravision is attributable as a matter of law.

Univision does not meet the FCC's bright-line EDP test. Even if Univision could demonstrate that its interest in Entravision is below the 33% debt/equity threshold, its relationship with Entravision is such that it would still be able to continue to exert significant influence over key licensee decisions. As the Commission has said:

"In adopting the EDP rule, we affirm our tentative conclusion * * * that there is the potential for certain substantial investors or creditors to exert significant influence over key licensee decisions, even through they do not hold a direct voting interest * * * which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much, if not more, influence or control over some corporate decisions as voting equity holders whose interests are attributable."⁴

Univision's relationship with Entravision is significantly different from previous relationships that the FCC has found to be non-attributable. For this reason, the cases Univision cites in support of its claim that its interest in Entravision, will be nonattributable are inapposite.

Univision debt and equity interests in Entravision have historically been attributable interest. Univision has a long relationship with Entravision as a business partner, program supplier, creditor and financial backer. In return for Univision's support, Entravision has granted Univision significant rights, including the right to appoint two directors to its board and the right to influence its core operations. As Entravision's SEC 10K acknowledges, "*Univision has significant influence over our business.*" Univision proposes to convert its voting shares into non-voting shares and to give up its rights to appoint directors, to Entravision's board. This, however, will not change the fundamental well-established relationship between Univision and Entravision.

In none of the case Univision cites, did the Commission permitted an applicant to convert a long-standing attributable relationship with another party into a non-attributable interest. For example, General Electric's purchase of Telemundo fully complied with the multiple ownership rules without the need to convert previously held attributable interests into non-voting, non-attributable interests.⁵ If, for example, General Electric's proposed purchase of Telemundo did not comply with the FCC's multiple ownership rules and General Electric proposed to convert its attributable interest in NBC into a non-voting interest, and further, if the FCC had permitted such a transaction, then Univision would have a case on point.

Univision's letter has little to say about its plan to retain the exclusive right to make national sales on behalf Entravision. Section 73.658(i) prohibits a television network from representing individual stations, affiliated with the network, for the sale of non-network time. In the 1970s, Univision's predecessor entity argued that, as fledgling network, a waiver of this rule was required to enhance the development of Spanish language television.⁶ Univision's letter merely states that Telemundo was given the "exact same waiver." Here again the situation is quite different. In *Telemundo II*, there was no issue concerning Telemundo's inappropriate exercise of control over its affiliates. In this case, the central question is, will Univision's exclusive right to make national sales on behalf of Entravision give Univision the right to influence Entravision's core operations, especially its radio station holdings?

Univision's letter cites, with approval, the Commission's statement, "[t]he mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a

¹ Univision Opposition to Petition to Deny, at p. 11.

² FCC letter dated November 29, 2002.

³ Univision letter dated December 9, 2003.

⁴ *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Report and Order*, 14 FCC Rcd 12559, 12582-3 (1999) ("Attribution Order").

⁵ *Telemundo Communications, Group, Inc.*, 17 FCC Rcd 6958 (2002). *Telemundo II*.

⁶ *Amendment of § 73.658(i) of the commission's Rules*, 5 FCC Rcd 7280 (1990).