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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
Implementation of Sections 11 and 13 )  
of the Cable Television Consumer )  
Protection and Competition Act of 1992 )  
Horizontal and Vertical Ownership )  
Limits, Cross-Ownership Limitations )  
and Anti-trafficking Provisions )

MM Docket No. 92-264

**Comments of Turner Broadcasting System, Inc.**

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## SUMMARY

The Commission cannot -- and should not -- consider its implementation of Section 613 in a vacuum. TBS urges the Commission to consider carefully the extent to which any channel limitations it imposes under Section 613 would in fact hinder development of diverse video programming, tilt the playing field toward far larger television programming competitors, including the broadcast networks, and prevent entrepreneurs such as Ted Turner from continuing to develop programming which enhances diversity. These larger companies are typically far more "vertically-integrated" into the distribution side of television than is TBS, but are not covered by Section 613. While "vertically-integrated cable networks" such as TNT and The Cartoon Network are now faced with restructuring that threatens them vitally, "vertically-integrated broadcast networks" are being progressively deregulated, and are, in fact, being given additional benefits under the 1992 Cable Act. Further, in light of the constitutional issues inherently raised by any limits, the Commission should make every effort to rely on the statute's behavioral restraints to the maximum extent possible.

The Commission should apply the clear language of Section 613. Any limit established should be expressed in terms of each video programmer. It makes no sense to claim in the interest of diversity that a cable operator can only choose some of the offerings of Discovery, BET, The Family Channel and TBS, all distinct speakers, and that "diversity" is served in some way by withholding those services from portions of the public.

The channel occupancy limits should only be applied in connection with the particular cable systems with which a video programmer is affiliated. The regulation should indicate that

a video programmer cannot occupy more than a specified proportion of **all channels** on a cable system owned by an operator who has an attributable interest in the programmer.

If the FCC imposes unreasonable limits under Section 613, programmers such as TBS, The Family Channel, BET and others will be punished for having taken advantage of their best sources of risk capital and therefore of the ability to develop programming to cater to the specialized needs of viewers. It would be an anomalous result indeed if, for example, the residents of Arlington and Fairfax, Virginia and Montgomery County, Maryland are free to receive all the diversity provided by The Cartoon Network, BET, The Discovery Channel and The Family Channel, since their cable systems are not vertically-integrated with program services, while under some approaches to Section 613, the residents of the District of Columbia might be prevented from gaining access to some of these services.

We know that the Commission realizes the sensitive constitutional ground over which it is asked to tread by Section 613. Any broad limitations that structurally inhibit TBS's and other vertically-integrated programmers' ability to gain access to cable systems and to make an increased commitment to new programming, on this record, would clearly be unconstitutional.

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**Comments of Turner Broadcasting System, Inc.**

Turner Broadcasting System, Inc. ("TBS"), by its attorneys, hereby submits initial comments on the FCC's Notice of Proposed Rulemaking ("NPRM") concerning the adoption of rules limiting the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest pursuant to Section 613 of the Communications Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). TBS is not commenting at this time on other aspects of the NPRM.

**Introduction**

Section 613(f)(1)(B) directs the Commission, within one year after enactment, "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." In directing the Commission to establish such reasonable limits, Congress also required the Commission, "not [to] impose limitations which would impair the development of diverse and high quality video programming" and to "account for any efficiencies and other

benefits that might be gained through increased ownership or control." Section 613(f)(2)(G), (D).

TBS firmly believes that based on the record that exists today, it would be both inconsistent with the fundamental goals of diversity and competition and unconstitutional for the FCC to take any action that would structurally inhibit TBS's ability to innovate and to speak. TBS seeks to continue to use its resources to enhance consumer choice by innovating and creating video programming. TBS's vitality and its ability to do so, however, may be threatened if the Commission adopts rules pursuant to Section 613 which have the effect of limiting available channel space for TBS's existing and potential services on major cable systems.

TBS thus submits that public policy, the Constitution, and the plain language of Section 613 support a solution whereby the Commission adopts a regulation implementing Section 613 which states that a single video programmer cannot occupy more than a specified proportion of all channels on a cable system owned by an operator which has an attributable interest in the programmer.

**I. The Commission Should Adopt Limitations Which Permit Programmers to Innovate and Create Programming and Which Do Not Tilt the Playing Field in Favor of Broadcast Networks and Other Programmers With Which Affiliated Cable Programmers Directly Compete**

As noted above, Congress expressly directs the Commission not to impose channel limitations which would impair the development of diverse and high quality video programming. Section 613(f)(2)(G). The Commission cannot -- and should not -- consider its implementation of Section 613 in a vacuum. TBS urges the Commission to consider carefully the extent to which any channel limitations it develops would in fact hinder the development of such

programming, tilt the playing field toward far larger television programming competitors, including the broadcast networks, who also vie for consumer acceptance and advertising revenue, and prevent entrepreneurs from creating and developing programming which enhances diversity. These larger companies are typically far more "vertically-integrated" into the distribution side of television than is TBS, but are not covered by Section 613. Further, in light of the constitutional issues inherently raised by any limits, the Commission should make every effort to rely upon the statute's behavioral restraints to the maximum extent possible.

**A. The Vertically-Integrated Cable Networks Subject to Section 613 are Far Smaller and Less Powerful Than Their Competitors Who are Increasingly Less Regulated**

The vertically-integrated cable networks potentially subject to Section 613 are not the dominant forces in the television marketplace. Although TBS is now the most substantial vertically integrated "basic" cable programmer, its size, and the size of other basic cable programmers, is small compared to its broadcast competitors. Taken together, basic cable networks still garner only a quarter of television viewing, compared to over half earned by the three broadcast networks. Moreover, the three broadcast networks, in their programming budgets, outspend all cable programmers combined by a ratio of 3 to 1. And, significantly, the broadcast networks still earn more than four times the advertising revenue of the cable networks. In 1992 alone, for example, the broadcast networks earned over \$10 billion dollars in advertising revenue while all of the advertiser-supported cable networks together earned slightly over \$2.4 billion dollars.<sup>1/</sup> Because of this disparity in size and competitive strength, the FCC must not

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<sup>1/</sup> NCTA, Cable Television Developments, at 9-A.

implement Section 613 in such a way that weakens those networks and decreases program diversity.

The 1992 Cable Act mandates channel limitations despite the fact that the broadcast networks operate in a manner which is functionally identical to the way TBS's networks operate and directly compete with TBS's networks and other affiliated cable networks for viewers, advertising and programming, as Congress<sup>2/</sup> and the Commission have recognized on numerous occasions.<sup>3/</sup> Like cable networks, broadcast television networks provide programming to their affiliates for retransmission to viewers. This programming consists of original programming produced for such networks, news, sports, motion pictures, and series. Both broadcast networks and TBS's "basic" cable networks are dependent on wide access to American households and the advertising revenues which they obtain as a result of this access to defray the cost of obtaining the programming most desired by television viewers. In the battle for viewership,

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<sup>2/</sup> See, e.g., 1992 Cable Act, Section 2(a)(13), (14) (noting marked shift in market share from broadcast television to cable television and the increasing competition between cable systems and broadcasters for advertising revenues).

<sup>3/</sup> See, e.g., Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd 3094, 3099 (1991) (Report and Order) (noting erosion of networks' television audience in the face of a flourishing cable industry) (subsequent history omitted); Review of Rules and Policies Concerning Network Broadcasting by Television Stations, 4 FCC Rcd 2755, 2757 (1989) (Report and Order) ("[t]he broadcast networks and their affiliates now face, and will increasingly face in the future, the need to compete aggressively both for programming and for viewers with nonbroadcast networks"); Amendment of § 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales, 3 FCC Rcd 2746, 2751 (1988) (Further Notice of Proposed Rulemaking) (recognizing competition between cable and broadcast networks in advertising); Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules, 94 FCC 2d 1019, 1064 (1983) (Tentative Decision and Request for Further Comments) (recognizing that cable networks compete with broadcast networks in the acquisition of programming).

TBS' cable networks and other networks being distributed by cable and other media are succeeding,<sup>4/</sup> in large part because the programming offered is, in our view, more diverse, more family-oriented, educational and innovative, and less gratuitously violent than the programming produced for broadcast networks.

However, while "vertically integrated cable networks" such as CNN, TNT and the Cartoon Network are now faced with restrictions that threaten their vitality, "vertically integrated broadcast networks" are being progressively deregulated, and are, in fact, being given additional benefits such as must carry and retransmission consent under the 1992 Cable Act. Commission policy has been to remove the regulatory constraints on the broadcast networks. For example, the Commission recently relaxed its cable/network cross-ownership rule, noting that the modified rule is in the public interest because it will permit broadcast networks to gain access to new revenue streams to help them compete more effectively with multichannel video providers.<sup>5/</sup> Such a modification, the Commission asserted, "could benefit the viewing public by enabling the networks to allocate additional funds to develop a greater diversity of programming."<sup>6/</sup> The Commission has also sought to substantially modify or eliminate its financial interest and syndication rules, and under direction from the courts may do so even further (if not eliminate them entirely). This will result in expanding the broadcast networks' opportunities to participate in the market for video programming, justified in part on the loss of total television audience

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<sup>4/</sup> See 1992 Cable Act, Section 2(a)(13) (noting the shift in market share from broadcast television to cable services).

<sup>5/</sup> Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 7 FCC Rcd 6156, 6163 (1992) (Report and Order).

<sup>6/</sup> Id.

by the three major networks and because the broadcast networks "now face much stronger competition for viewers and programming than when the financial interest rule was adopted."<sup>7/</sup>

Additionally, the Commission has sought to otherwise deregulate these networks by relaxing or eliminating other broadcast rules. For instance, the FCC recently (1) proposed repeal of the dual network rule in light of the current "multiplicity of network and other program sources," and its belief that repeal of the rule "might expand the flexibility available to existing broadcast program providers;"<sup>8/</sup> (2) proposed elimination of the rule prohibiting network ownership of stations where there are few television stations, premised on the "significant competition" which the FCC asserts exists even in the smallest markets;<sup>9/</sup> (3) proposed relaxation of the national multiple ownership rule which limits the number and audience reach of television stations in which an entity (including a broadcast network) may hold an attributable interest, citing the efficiencies of group ownership as well as the proliferation of programming outlets and sources;<sup>10/</sup> and (4) requested comments on alternatives for relaxing the duopoly rule

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<sup>7/</sup> Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd 3094, 3108 (1991) (Report and Order), recon. granted in part and denied in part, 7 FCC Rcd 345 (1991), vacated, Schurz Communications, Inc. v. FCC, Nos. 91-2350 et al., slip op. (7th Cir., November 5, 1992) (modified, December 7, 1992). The FCC on remand issued a further NPRM to reexamine the record in this proceeding with a view toward reconciling new or revised financial interest and syndication rules with the court's concerns. See Second Further Notice of Proposed Rulemaking in MM Docket No. 90-162 (released December 31, 1992).

<sup>8/</sup> Review of the Commission's Regulations Governing Television Broadcasting, 7 FCC Rcd 4111, 4118 (1992) (Notice of Proposed Rulemaking) ("Television Broadcasting NPRM"). The dual network rule prohibits a network from simultaneously operating more than one network of television stations in identical or substantially overlapping geographical areas.

<sup>9/</sup> Television Broadcasting NPRM at 4118.

<sup>10/</sup> See Television Broadcasting NPRM at 4113. The current rule, which limits ownership to 12 stations and the ability to reach 25% of total television households through these stations, reached its present form in 1985. Id. at 4113 n.18.

and for relaxing or eliminating the one-to-a-market rule, citing the changing video marketplace.<sup>11/</sup> Further, the Commission considered the competitive effects of cable networks on the broadcast networks when in 1985 it initially relaxed its rules for multiple ownership of broadcast stations<sup>12/</sup> and abolished the Fairness Doctrine.<sup>13/</sup>

Given the greater size, marketplace presence, and the ongoing deregulation of TBS's principal competitors, there is no policy rationale to effectively inhibit TBS's ability to innovate by imposing unreasonable limitations on the number of channels that it can occupy on a system that owns equity in TBS. To place such a limitation on a company like TBS that has advanced the goals of diversity and competition for 20 years is particularly perverse.

The record should also reflect that USA Network, which is not "vertically integrated" in the Section 613 sense, and is a major competitor, has grown and prospered; USA has also launched a new network, the Sci-Fi Channel, which has had success comparable to TBS's newest venture, The Cartoon Network. Similarly, ESPN, also a major competitor, is the most widely distributed cable network even though it is not vertically-integrated under the terms of Section 613.

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<sup>11/</sup> Television Broadcasting NPRM at 4115, 4116-17.

<sup>12/</sup> See Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 74, 82-83 (1985) (Memorandum Opinion and Order) (recognizing cable as an "important and viable substitute[]" for broadcast outlets in the information marketplace and emphasizing that cable and other media "compete with broadcast outlets for the provision of information").

<sup>13/</sup> See Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d 145, 208-11 (1985) (Report) (recognizing cable television as a competitor to broadcasting).

**B. TBS's Commitment to Program Innovation and Creation Has Advanced Congress' and the Commission's Goals of Enhancing Diversity and Competition**

For more than twenty years, TBS has sought to enhance consumer choice and competition by developing a wide range of programming alternatives. These alternatives include the various types of specialized sports, informational and entertainment programming envisioned by the earliest observers of the cable industry. TBS's program services, which are distributed via cable systems as well as by alternate technologies, include TBS SuperStation, Turner Network Television ("TNT"), Cable News Network ("CNN"), Headline News ("HN"), and the Cartoon Network. TBS is also a partial owner, and the operator of SportSouth, a regional sports network.

Ted Turner, TBS' chairman, founded TBS in 1970 when he paid \$2.5 million to acquire WJRJ, an Atlanta UHF broadcast station in a financially precarious position. The call letters of WJRJ were changed to WTCG<sup>14/</sup> and later to WTBS. WTBS -- now known in its national incarnation as TBS SuperStation -- succeeded through perseverance, active promotion of its signal, extensive efforts to obtain programming and to expand consumer choice on its signal, and a willingness to accept the increased costs of distributing programming nationally. Today, TBS SuperStation, the top-rated basic cable channel, is carried by over 11,500 cable systems. Its programming budget has grown steadily to approximately \$142 million in 1993. TBS SuperStation now carries a blend of award-winning sports, entertainment and informational programming, including a variety of original programming. This programming, which targets viewers of all ages, includes such newly developed programs as "News for Kids", a weekly half-

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<sup>14/</sup> The call sign WTCG stood for "watch this channel grow."

hour news program for children airing on WTBS and being syndicated nationally, and other acclaimed shows, such as the award-winning National Geographic Explorer.<sup>15/</sup>

TBS SuperStation became the platform from which the Company has continued to expand and innovate on other programming fronts. On June 1, 1980, TBS launched CNN, despite much skepticism and cynicism about the ability of a 24-hour cable-delivered news service to be either professional or profitable. TBS suffered major losses before it experienced any gains with CNN, first borrowing more than \$100 million to launch CNN and then absorbing \$77 million in losses between 1980 and 1985. TBS's commitment to quality programming was vindicated, however, when CNN began garnering the viewership, recognition and profits that Ted Turner long ago anticipated.

CNN, which in its first year was seen in 1.7 million homes, now reaches more than 61 million homes, constituting more than 66% of American homes and over 11,000 systems,<sup>16/</sup> in addition to 62 million overseas subscribers in 125 countries. Although CNN spends less on newsgathering than the broadcast networks, and has an average audience of only 200,000 people, CNN has become the network of record, not only in the United States, but world-wide. CNN has been heralded for its coverage not only of daily news and political events but also of

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<sup>15/</sup> In 1993, TBS SuperStation won ACE awards for its National Geographic Explorer series and for its "Network Earth Summit Special." Similarly, in 1992, its National Geographic Explorer series won ACE awards for cable excellence, News and Documentary Emmy Awards, International Film and TV Festival of New York Awards, The Ark Trust's Genesis Award and an award from the Chicago International Film Festival. Also garnering awards in 1992 were TBS's "Captain Planet and the Planeteers," "Portrait of Castro's Cuba", and its "1992 Black History Minutes."

<sup>16/</sup> This number does not include SMATV, but the total homes served includes some non-cable distribution.

domestic and world crises as they happen,<sup>17/</sup> as well as for its other informational programming, including shows such as "Larry King Live" and "Crossfire". Headline News, which commenced on January 1, 1982, has similarly grown, and now reaches over 51 million homes (55 % of all TV households) on over 5000 systems.

Ted Turner's commitment to enhancing consumer choice and to program innovation also resulted in the launch of Turner Network Television ("TNT") in October, 1988. TBS's programming decisions with respect to TNT reflect its commitment to diverse and quality programming. TNT's estimated investment in programming will top \$300 million in 1993. TNT has underwritten and distributed such critically-acclaimed and award-winning programs as "Heat Wave", "The Trials of Life", "MGM: When The Lion Roars", "The Court Martial of Jackie Robinson", "Crazy From the Heart", "Crazy in Love" and "Fonda on Fonda". TNT, which reached 17 million viewers when it launched in 1988, now reaches just under 9000 systems and over 58 million households, over 63 % of all television households in the country.

Most recently, TBS inaugurated its newest network, the Cartoon Network, a 24-hour cable channel offering hundreds of cartoon favorites from one of the largest and most diverse animation libraries in the world. As with its other networks, TBS developed this network as a means of reaching out to viewers with specialized interests. TBS plans to program the Cartoon Network not only with programming from its animation library, but also, as with TNT, to begin

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<sup>17/</sup> CNN's impact has been recognized not only in the press, see, e.g., "What New Worlds to Conquer" Forbes, January 4, 1993 at 82-87, but also by Congress in its deliberations on the 1992 Cable Act, see, e.g., 138 Cong. Rec. S657 (daily ed. Jan. 30, 1992) (statement of Sen. Timothy Wirth) ("CNN has brought world events much closer to us. We have become used to seeing historic events such as the gulf war and dramatic developments in the Soviet Union and Eastern Europe as they happen rather than seeing brief film clips after the fact").

developing and originating programming specifically for that network. The Cartoon Network reaches only 4 million homes, and its future will be directly affected by the outcome of this proceeding.

TBS's ability to innovate, create and introduce new and diverse programming services resulted in large part because it was able to distribute its networks over cable and, consequently, to reach the critical mass of subscribers it requires to survive. **We are not out of ideas.** TBS is concerned, however, that the imposition of channel occupancy limits, if unreasonably applied, could strangle its ability to expand existing services and to develop new programming services by hampering its ability to achieve the mass penetration that only cable systems can provide.

**C. The Imposition of Restrictive Channel Occupancy Limits that Penalizes Past Operator Investment Will Harm TBS's Ability to Create Innovative Programming and Thus Also Harm the Public**

TBS's success in launching and sustaining its networks has resulted from its ability to purchase programming and program rights, to expend the costs necessary to produce original programming, and to gain access to delivery systems providing wide distribution, as well as from its willingness to endure losses in order to ultimately achieve success, and to obtain investment capital from MSOs. In 1986, TBS paid approximately \$1.4 billion for the MGM film library and extensive rights to the Warner Bros. and RKO libraries. And most recently, TBS purchased Hanna-Barbera with its library of cartoons, as well as its production company. The Turner libraries, now housed in our Turner Entertainment Company subsidiary, collectively comprise one of the largest feature film libraries in the world, with over 3300 motion pictures and 1700 hours of television programming.

TBS views purchases of this nature as crucial to its survival, to its ability to solidify the financial health of its networks, and to its ability to continue to offer innovative programming. Given the importance of these purchases, TBS was therefore willing in 1986 to finance the MGM acquisition with what amounted to short-term "bridge" financing and to seek financial support from MSOs. Until long-term financing could be obtained, the company's independence was very much at stake. To restructure this short-term debt, in June, 1987, TBS sold a minority interest (36% of equity and 16% of voting shares) to a group of more than two dozen cable industry investors. The two most substantial investors were Time, Inc. with 11.5% of equity and Telecommunications, Inc. ("TCI") with 8.0% of equity. TBS Chairman Ted Turner retained 51% of equity and 68% voting control. The cable investors were guaranteed seven seats on the fifteen member TBS board. A "supermajority" of 12 board members is required to approve certain matters, including major financial questions.<sup>18/</sup>

TBS selected this cable investor group because the group was prepared to provide long-term equity while preserving the company's independence. While the operators' investments have proved more than sound, at the time the operators were perceived as taking a major risk, one that others would not undertake at comparable terms.

It is readily apparent why these cable operators were willing, more than other potential investors, to take risks in order to support TBS. The success of these cable systems is closely linked to the attractiveness of cable programming; the potential benefit to their core business gave the operators an incentive that others did not have to make what was a relatively risky

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<sup>18/</sup> Ted Turner retains 28.2% of equity and 53.6% of voting control. TCI and its affiliates own 22.5% of equity and the merged Time-Warner, Inc. owns 18.8% (on a fully diluted basis, and assuming conversion of all convertible instruments and exercise of all options).

investment in programming ventures. This incentive, moreover, can be seen operating not just in TBS but also with other networks such as BET, The Family Channel, MTV, VH-1, Nickelodeon, the Comedy Channel, Bravo, CNBC and others, in addition to a number of pay networks.

If the government effectively limits MSO investment in program services by imposing unreasonable limits under Section 613, programmers such as TBS, The Family Channel, BET, and others, will be punished for having taken advantage of their best sources of risk capital and therefore of the ability to develop programming designed to cater to the specialized needs of viewers. Moreover, and most significantly, the viewing public will be deprived of programming that is generally more innovative and more educational than the programming produced for broadcast networks.<sup>19/</sup> While it is obviously in TBS's interest to utilize its investment in programming, like our cartoon library, it does not serve diversity to deprive subscribers of that programming because their cable operators had in the past invested risk capital in TBS. Although the Commission has long recognized that the warehousing of programming is not in

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<sup>19/</sup> See H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 ("Other witnesses before the Committee testified that vertical relationships strongly promote diversity and make the creation of innovative, and risky, programming services possible. These witnesses point to C-Span, CNN, [BET], Nickelodeon, and the Discovery Channel as examples of innovative programming services that would not have been feasible without the financial support of cable system operators."); 138 Cong. Rec. S627 (daily ed. Jan. 30, 1992) (statement of Sen. Barbara Mikulski) ("The elderly, those shut in their homes, rely on cable as their links to the world. They rely on CNN or the weather channel. Many use it as a form of companionship... We have great programming like the Discovery Channel put together in the State of Maryland."); 138 Cong. Rec. S14610 (daily ed. Sept. 22, 1992) (statement of Sen. John F. Kerry) ("cable's success... has come with a lot of hard work by industry leaders. It has come with a lot of investment in innovative programming, coupled with a commitment to high quality and responsiveness to the viewing desires of the public.")

the public interest,<sup>20/</sup> the net effect of depriving certain operators' subscribers of networks like The Cartoon Channel is the same as warehousing.

**II. The Commission Should Apply The Clear Language Of Section 613 And Adopt A Rule Which Permits Vertically Integrated Programmers to Continue Developing and Improving Programming**

**A. The Limit Should Be Expressed In Terms Of Each Video Programmer**

As indicated above, TBS strongly urges the Commission to avoid adopting channel occupancy limits that will constrain the ability of programmers to continue to launch and develop new cable networks. We believe that any such result can be avoided by adopting a regulation exactly along the lines of what Section 613 tells the Commission to do -- to place a reasonable limit on the number of channels "that can be occupied by a video programmer in which a cable operator has an attributable interest." The Commission's obligation is to execute the words of the statute itself. When Congress' "will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Section 613 does not speak of limiting the channels video programmers in which the operator has an interest may occupy, but of establishing a reasonable limit for a video programmer. As Section 613 is written, an approach that establishes limits in terms of each video programmer is the only way the Commission may proceed.<sup>21/</sup>

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<sup>20/</sup> See Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd at 3132-3136.

<sup>21/</sup> Thus, the approach hypothesized under Paragraph 47 of the NPRM cannot be squared with the language of Section 613. We recognize that the Senate Committee Report talks in the terms

Not only is the above the only legal approach to Section 613, it is the only sensible policy approach as well. It makes no sense to claim in the interest of diversity that a cable operator can only choose some of the offerings of Discovery, BET, The Family Channel, and TBS, all distinct speakers, and that "diversity" is served in some way by withholding those services from portions of the public.

**B. The Channel Occupancy Limits Should Only Be Applied In Connection With The Particular Cable Systems With Which A Video Programmer Is Affiliated**

To ensure that it does not impose limitations which impair the development of diverse programming, the Commission should narrowly tailor its channel occupancy limits. Consistent with its tentative conclusion, the Commission should apply channel occupancy limits only to video programmers in which the particular cable system has an attributable interest. NPRM at ¶ 50. As acknowledged in the NPRM, such an interpretation comports with Congress' directive to ensure the development of diverse, high quality programming<sup>22/</sup> and, in addition, to "account for any efficiencies and other benefits that might be gained through increased ownership or control".<sup>23/</sup>

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of the NPRM's approach, but it is not supported by the statute's plain language and is not the way the more relevant Conference Report addresses Section 613.

<sup>22/</sup> Section 613(f)(2)(G).

<sup>23/</sup> Section 613(f)(2)(D).

Applying the limitations in this manner recognizes the public interest benefits which flow from the vertical integration of cable operators and programmers. Congress,<sup>24/</sup> the Commission,<sup>25/</sup> the Department of Justice,<sup>26/</sup> and NTIA<sup>27/</sup> have all recognized the role of vertically integrated programmers in expanding viewing options. As the FCC itself recognized in 1990, vertical integration has contributed to program diversity by providing financial support for faltering program services, by promoting the introduction of new services into the increasingly competitive programming services market, by providing needed capital and a ready subscriber base for such services, and by improving the quality of existing program services.<sup>28/</sup>

Finally, even if the language of Section 613 did not conclusively mandate such a conclusion, this approach recognizes not only that a cable operator simply has no incentive to favor a programmer with which it is not affiliated (integrated or not), but also more narrowly addresses Congress' concern in adopting this provision, *i.e.*, to ensure that cable operators do not impede the flow of video programming to consumers, favor their own programming over

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<sup>24/</sup> See H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 ("witnesses before the Committee testified that vertical relationships strongly promote diversity and make the creation of innovative, and risky, programming services possible").

<sup>25/</sup> See In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5008-5010 (1990) ("1990 Cable Report").

<sup>26/</sup> See Reply Comments of the Department of Justice, MM Docket No. 89-600, April 2, 1990, p. 6 ("vertical integration can reduce both transaction costs and the risk of introducing new services").

<sup>27/</sup> See Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233 at 106 (1988) ("[c]ommon ownership between programming services and cable systems appear[s] to have produced substantial benefits," and has not "adversely affected diversity or the supply of basic and cable programming").

<sup>28/</sup> 1990 Cable Report at 5009.

unaffiliated services, or unreasonably restrict the flow of affiliated programming to other video distributors.<sup>29/</sup>

**C. Whatever Percentage Limit Is Adopted By the Commission Must Be Sufficiently Liberal to Permit Programmer Growth**

The Notice requests comment on how it should determine what constitutes a reasonable channel occupancy limit. TBS urges that whatever limits the Commission adopts must be sufficiently liberal to give programmers like TBS the flexibility and ability to continue to expand and gain access to the maximum number of subscribers possible. Specifically, the limit should take into consideration the entire channel capacity of the system, in part because, as the Commission correctly notes, each of these channels compete with vertically integrated programmers for viewership and provide potential outlets for unaffiliated video programmers. NPRM at ¶ 48. As the Commission recognizes, moreover, cable programmers should not be further penalized by subtracting out of this calculation channels that it may be required to fill with leased access providers, PEGs, or with over-the-air broadcasters. *Id.* Since all of these services provide diversity, to leave them out of the calculations would only exacerbate the constitutional problems that already exist with respect to the imposition of these limits.

In setting channel occupancy limits for a video programmer, the Commission, moreover, should take into consideration the structural and behavioral restraints required to be imposed by

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<sup>29/</sup> Section 613(f)(2)(A), (B). The Commission also requests comments on whether the limits it adopts should be phased out in communities where effective competition has developed. TBS supports the phasing out of such limits where effective competition exists. As recognized by the Commission, in such circumstances the non-vertically integrated programmer clearly has alternative outlets for programming and there is no incentive for the operator to favor its own programming over unaffiliated programming. NPRM at ¶ 54.

Sections 12 and 19 as well as by Section 9, the leased access provisions of the 1992 Cable Act. These sections are designed to address the same principal concerns as Section 613, *i.e.*, the ability and incentive of cable operators to favor affiliated over unaffiliated programmers or to discriminate against unaffiliated programmers. In light of the constitutional infirmities inherent in channel occupancy limits, the Commission should make every effort to rely on the behavioral restraints developed under Sections 12 and 19 to remedy the ills perceived by Congress in adopting these provisions.

We therefore propose a regulation that indicates that a video programmer cannot occupy more than a specified proportion of all channels on a cable system owned by an operator who has an attributable interest in the programmer.<sup>30/</sup> While for some purposes multiplex channels should be considered a single channel, this is not one of those situations -- each multiplexed channel should count toward the limit. Certainly, a multiplexed channel provides no more diversity than an entirely different service and should not receive more favorable treatment under Section 613.

We submit that this approach represents the correct balancing of Congress' different policy objectives. It would be an anomalous result indeed if, for example, the residents of the Arlington and Fairfax, Virginia and Montgomery County, Maryland are free to receive all the

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<sup>30/</sup> Finally, TBS firmly supports the Commission's proposal to grandfather any existing vertical relationships which exceed the channel occupancy limits at the time such limits are adopted. NPRM at ¶ 55. Under the TBS proposal, no grandfathering would be necessary. But under any circumstance, the Commission has correctly recognized that requiring the divestiture or deletion of programming is not only not mandated by the Act, *see Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"), but would also be disruptive to the public and devastating to cable program networks. *See* NPRM at ¶ 55.

diversity provided by The Cartoon Network, Black Entertainment Television, The Discovery Channel, and The Family Channel, since their cable systems are not vertically-integrated with program services, while the residents of the District of Columbia might be prevented from gaining access to all these services, since its cable operator may be "vertically integrated" under some approaches to Section 613.

**D. The Attribution Rules Applied In Connection With Channel Occupancy Limits Should Be No More Stringent Than Those Applied to The Cable Programmers' Broadcast Counterparts**

As with the program access rules, TBS urges the Commission to adopt an ownership standard that is no more stringent than the standards applied to its broadcast counterparts. This standard should be defined with reference to the attribution standards generally applicable to the broadcast industry, including the "single majority shareholder" rule.<sup>31/</sup> In this context, moreover, TBS believes that the Commission should take care not to put in place rules which inhibit and stifle the benefits of cable operator investment in programmers based on a record which advances no more than the vague notion that increased concentration in the cable industry has the "potential" to create barriers to entry for new programmers<sup>32/</sup> and that vertical integration "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."<sup>33/</sup>

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<sup>31/</sup> See Comments of Turner Broadcasting System, Inc., In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 (filed January 25, 1992) at 14-15.

<sup>32/</sup> See 1992 Cable Act, Section 2(a)(4).

<sup>33/</sup> Id., Section 2(a)(5).

### **III. A Threshold Which Limits Vertically Integrated Program Networks' Ability to Further Innovate and Expand Would Be Unconstitutional**

We know that the Commission realizes the sensitive constitutional ground over which it is asked to tread by Section 613. If the Commission adopts limitations that are so broadly conceived as to structurally inhibit TBS's and other vertically integrated programmers' ability to gain access to cable systems in order to effectively compete and to make an increased commitment to new programming, they would clearly be unconstitutional. Such regulations would directly burden the right of vertically integrated cable program networks and operators to speak, a right which is undeniably protected by the First Amendment.<sup>34/</sup>

This direct burden on speech stems from two aspects of Section 613. First, these channel limitations, which were explicitly designed to expand the audience available to broadcast networks and non-vertically integrated cable program networks at the expense of vertically integrated cable program networks,<sup>35/</sup> unconstitutionally targets the exercise of protected speech by the limited class of speakers made up of vertically integrated cable programmers and operators. The targeting of particular speakers silences particular viewpoints and thereby "distort[s] the market for ideas". Leathers v. Medlock, 111 S. Ct. 1438, 1443-44 (1991). Such regulations also unconstitutionally favor one class of speakers over another, Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some

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<sup>34/</sup> See, e.g., Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); Winters v. New York, 333 U.S. 507, 510 (1948); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1444 (D.C. Cir. 1985), cert. denied sub nom. National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986).

<sup>35/</sup> See 1992 Cable Act, Section 2(a)(5) (noting that vertical integration gives cable operators the incentive and ability to favor their affiliated programmers, which could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems).