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Federal Communications Commission

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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	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions	)	

COMMENTS OF TELE-COMMUNICATIONS, INC.

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February 9, 1993

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SUMMARY

o Vertical and horizontal ownership have resulted in very significant consumer benefits and are critical to the continued development of diverse program services and advanced technologies.

o Modern legal and economic analysis, as well as marketplace experience, fully justify liberal subscriber and channel occupancy limits which will allow cable operators to continue to provide the substantial consumer benefits associated with horizontal and vertical ownership. Notwithstanding this analysis, TCI would support the following:

1. Subscriber Limits -- a limit on horizontal ownership in the 30-40% range;

2. Channel Occupancy Limits -- a rule permitting cable operators to devote a significant amount of system bandwidth to affiliated program services.

o TCI supports the concept of anti-trafficking, but urges the Commission not to impose rules which would unnecessarily restrict legitimate purchases and sales of cable systems.

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") hereby files its comments in the above-captioned proceeding.[1] Attached to TCI's Comments is a paper entitled "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions", prepared by Stanley M. Besen, Steven R. Brenner and John R. Woodbury (hereinafter the "Besen Paper") which analyzes issues raised in this proceeding. TCI, through its operating subsidiaries, is a multiple systems operator providing cable service in 49 different states to approximately nine million subscribers.

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[1] Notice of Proposed Rulemaking and Notice of Inquiry in MM Docket No. 92-264, FCC 92-542 (rel. Dec. 28, 1992)("Notice").

I. THE COMMISSION'S REGULATIONS UNDER SECTION 11 OF THE ACT MUST REFLECT THE SUBSTANTIAL PUBLIC INTEREST BENEFITS OF VERTICAL AND HORIZONTAL OWNERSHIP

At the outset, it is important to emphasize that Congress did not establish limits on vertical and horizontal ownership. Instead, it mandated that the Commission establish limits, leaving it to the Commission's discretion to set the level of such limits. It is, of course, the level of these limits that is the critical issue. Moreover, while Congress expressed some concern with the potential harmful effects of vertical and horizontal ownership, it also endorsed the widely-supported notion that such ownership enhances consumer welfare. In the House Report, for example, Congress noted that:

> consolidation in the cable industry has brought some benefits to consumers. The Committee believes that the growth of MSOs in the cable industry has produced some efficiencies in administration, distribution, and procurement of programming. Further, programmers' transaction costs also may have been reduced in the absence of the need for negotiation with each of thousands of local cable systems throughout the country. Moreover, large MSOs, able to take risks that a small operator would not, can provide a sufficient number of subscribers to encourage new programming entry.[2]

Section 11 of the Act does not require the Commission to take any action that would substantially limit vertical or horizontal ownership, or to punish companies that, over the last

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[2] H.R. Rep. No. 628, 102nd Cong., 2d Sess. 43 (1992) ("House Report").

several years, grew vertically and horizontally. Rather, Congress gave the Commission broad discretion to set limits that appropriately balance the benefits of vertical and horizontal ownership against any potential harmful effects.

A. Vertical and Horizontal Ownership Have Resulted in Very Significant Consumer Benefits

It is well-established that vertical and horizontal ownership produce significant benefits for consumers. Large, vertically integrated firms have both the incentive and the ability to efficiently finance program production. They are able to assume risks smaller entities cannot take, and they provide a subscriber base of sufficient size to encourage new program entry. Large multiple system cable operators ("MSOs") also produce significant efficiencies in the distribution, marketing and purchase of programming.[3]

The Commission itself has repeatedly found vertical and horizontal ownership to be in the public interest. In fact, it recently recognized that vertical and horizontal ownership in the cable industry have created substantial consumer benefits, including economies of scale, increased investment in innovative high quality programming, and the introduction of new services into the marketplace.[4]

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[3] See Notice at para. 6.

[4] See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C. Rcd 4962, 5003-11 (1990); see also NTIA, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations at 78-107 (June 1988) (benefits of horizontal

In the last 15 years, program diversity has expanded dramatically. There is more diverse, high quality television programming available today than at any point in the history of the medium. It is no accident that this diversity coincided with the development of the cable industry. Vertical and horizontal ownership created the economic underpinning that allowed companies like TCI, Time Warner, Viacom, Turner Broadcasting, and others to take the enormous risks associated with the development, launch, and distribution of national satellite program services.

Consider the program choices consumers had in the early 1970's before the development of the modern cable industry -- the three networks, PBS, and a few independent broadcast signals. Just 20 years later, there are over 60 satellite program services available, including specialty channels devoted entirely to news, children's programming, minority programming, the arts, and government. Without a doubt, the most significant factor in this change is the growth and development of the cable industry.

The following chart compares the program services available to consumers in the 1970s and their choices today.

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concentration include economies of scale and lower costs; expansion of cable programming and reduction of transaction costs)("NTIA Report").

CONSUMER PROGRAM CHOICES	
1972	**1993**
ABC CBS NBC PBS Local Independent TV Stations	ABC CBS NBC PBS Local Independent TV Stations <u>Basic Satellite Program Services:</u> American Movie Channel, America's Disability Channel, Arts & Entertainment Network, Bravo Black Entertainment Television, The Cartoon Network, CNBC, CNN, Comedy Central, Courtroom Television Network, C-SPAN, C-SPAN 2, Country Music Television, The Discovery Channel, E! Entertainment Television, ESPN, EWTN: The Catholic Cable Network, The Family Channel, FoxNet, Galavision/ECO, Inc., Home Shopping Network I, Home Shopping Network II, HSNE (Home Shopping Network Entertainment), Headline News, The New Inspirational Network, The International Channel, LIFETIME Television, Mind Extension University, MOR Music TV, The Nashville Network, Nostalgia Television, QVC Network, QVC Fashion Channel, Sci-Fi/Channel-USA Networks, TBS, Telemundo, TNT, Trinity Broadcasting Network, Univision, VH-1, VISN-ACTS <u>Pay (a la carte) Satellite Program Services:</u> Cinemax, Encore, The Disney Channel, Flix, HBO, The Movie Channel, Playboy Channel, Regional Sports Networks, Showtime <u>Regional Program Services</u>*: Empire Sports Network, Home Sports Entertainment, Home Team Sports, Iowa Cable Network, Midwest Sports Channel, New England Cable News, Prime Sports Network, Sportsouth Network <u>Pay-Per-View:</u> Action Pay Per View, Cable Video Store, Request Television I, Request Television II, Spice, Viewers Choice, Viewers Choice 2

Source: National Cable Television Association, <u>Cable Television Developments</u>, October 1992 at i-C, Warren Publishing, Inc., Television & Cable Factbook, Services Volume No. 61, 1993, pages G65-78.

*This list does not include all regional program services available. It is merely illustrative of the growth in such networks since 1972.

Program diversity is a longstanding goal of communications policy and the critical factor underlying Section 11 of the Act.[5] Given the role of the cable industry in realizing that goal, it would be anomalous indeed if the Commission were to adopt rules that fundamentally alter the current structure of the industry. The Commission should not do so. Instead, it should adopt rules that appropriately recognize the beneficial impact of vertical and horizontal ownership on program diversity.

B. Vertical and Horizontal Ownership Are Critical to the Continued Development of Cable Technology and the Realization of a Broadband Telecommunications Infrastructure

The explosive dynamism of cable technology today further supports the proposition that the Commission should adopt ownership rules that impose on the industry the least amount of intrusion and disruption necessary to protect the public interest.[6] Vertical and horizontal ownership clearly enhance the development of innovative technology. The attached Besen Paper (p. 8) demonstrates that:

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[5] See 47 U.S.C. Sec. 533 (f)(2)(G); see also Section 2(b)(1) of the Act; 47 U.S.C. Sec. 521(4); cf. 47 U.S.C. Sec. 548 (the purpose of that section is to promote programming diversity).

[6] It is worth noting that, while some U.S. industries recently have shunned research and development ("R&D"), the opposite is true in the cable industry. In addition to the substantial internal R&D commitment by TCI and other cable MSOs, the industry recently created a central R&D facility, CableLabs. CableLabs is an important factor in telecommunications research, including the Commission's own efforts to advance technology.

> Economies of scale also exist in administration and planning for new technologies and services. Many of the costs of these activities are independent of the number of subscribers being served. Because smaller MSOs will have higher costs per subscriber, they are likely to invest less in planning for new technologies and services.

Two recent technological advancements announced by TCI demonstrate the dynamic nature of cable technology and its potential to significantly enhance consumer welfare:

1) Deployment of digital compression technology throughout TCI cable systems. Digital compression converts a single channel into as many as 10 channels that can be viewed on a normal television set.[7]

2) Within four years, over 90% of TCI's customers will be served by systems incorporating fiber optic cable technology. These systems, which facilitate high quality digital transmission of television signals, feature optical fiber to neighborhood nodes with coaxial cable distribution downstream from that point.

These technological advances will dramatically increase the channel capacity and technical quality of TCI's cable systems and, in so doing, vastly expand consumer choice. The channel

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[7] A digital compression system converts the analog signals now used to transmit video and voice into a digital format. Advanced equipment at the uplink site compresses the digital signals so that 10 channels or more can be transmitted in the bandwidth formerly used by one analog channel (6 Mhz). The compressed digital signal can be sent on one satellite transponder to a cable system's head-end and, through the optical fiber/coaxial cable system, to a customer's home, where a set-top, compressed digital terminal decompresses the digital channel and converts it back into 10 analog channels that can be viewed on the customer's television set.

capacity expansion also will provide a powerful incentive for increased production of a broad range of intriguing new niche and interactive services.

TCI strongly believes that vertical and horizontal ownership are essential to technological development. While the rewards that flow from these technological developments are enticing, the risks and costs are daunting. Large, vertically integrated firms not only have the incentive, but the capital resources to turn technological ideas into marketplace realities. Had the government adopted rules in 1980 that severely restricted vertical and horizontal ownership, TCI believes that many of the technological developments of the 1980s would not have occurred (or would have been substantially delayed). Likewise, if the Commission now adopts ownership regulations that fundamentally alter the structure of the industry, it will imperil the realization of many current technological plans and the benefits that will accrue to consumers. The Besen Paper (p. 8-9) expresses the view that "innovative activity in the cable industry would be adversely affected if significant limits were placed on cable system ownership."

Further, it is becoming increasingly apparent that the cable industry will play a critical role in creating the broadband infrastructure that will serve this country's telecommunications needs in the 21st Century. Congress and the Commission have

focused on the critical need to develop such an infrastructure.[8] The cable industry recently has demonstrated that its traditional coaxial cable, when combined with fiber optics, digital compression and other computer applications, is uniquely situated to provide a significant part of that infrastructure in a cost-effective and timely manner.

TCI does not believe the cable industry alone will provide the complete telecommunications infrastructure. Other industries have valuable contributions to make. However, TCI is absolutely convinced that the cable industry is a necessary player if we are to have that infrastructure in an acceptable time period and at a reasonable cost. TCI urges the Commission to recognize that vertical and horizontal ownership are essential to this vision, and to adopt rules which do not unnecessarily restrict such ownership.

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[8] See, e.g., High Performance Computing Act of 1991, 15 U.S.C. Secs. 5501-5528 (1993); Information Infrastructure And Technology Bill of 1992, S. 2937, 102nd Cong., 2d Sess. (1992); Communications Competitiveness and Infrastructure Modernization Bill of 1991, H.R. 2546, 102nd Cong., 1st Sess. (1991); Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the H.R. Comm. on Energy and Commerce, 102nd Cong., 1st Sess. (1991); Federal Communications Commission En Banc Hearing on Personal Communications Services, General Docket 90-314, Dec. 5, 1991; Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, 7 FCC Rcd. 6886 (1992).

C. The Commission's Rules Under Section 11 Should Reflect the Fact that Many Other Provisions of the Act Address Similar Concerns

The above analysis, as well as the economic, legal and public policy analysis provided below, constitute an overpowering rationale for a liberal interpretation of Section 11 that does not unnecessarily restrict growth and inadvertently eliminate the consumer benefits of vertical and horizontal ownership. In addition, as the Commission has noted, numerous other provisions of the Act and existing law address the same issues which underlie Section 11.[9] For example, Section 12 of the Act requires the Commission to promulgate regulations regarding the terms and conditions under which unaffiliated distributors may obtain access to vertically integrated program services.[10] Similarly, Section 19 of the Act is concerned with the activities of vertically integrated entities.[11] The must carry rules contained in Section 4 of the Act directly address the ability of unaffiliated program providers to reach consumers.[12] Finally, the leased access rules are designed to ensure that unaffiliated

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[9] Notice at para. 52.

[10] 47 U.S.C. Sec. 536.

[11] See 47 U.S.C. Sec. 548; see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket 92-265, FCC 92-543, at para. 8 (rel. Dec. 24, 1992).

[12] 47. U.S.C. Sec. 534.

programmers have the ability to obtain distribution on a cable system.[13]

All of these provisions address, directly or indirectly, the ability of large, vertically integrated MSOs to extract unreasonable concessions from programmers or unfairly restrain competition by alternative multichannel video program distributors, the very issues that the Commission has found are the basis of the ownership provisions of the Act.[14] Clearly, the Commission should adopt a unified approach to the Act that recognizes the interrelated nature of these provisions. It would be irrational to presume that Congress wanted the Commission to view each of these provisions as a complete answer to the issues raised by vertical and horizontal ownership. Had Congress intended such a result, it would not have needed seven provisions in the bill dealing with essentially the same set of issues. The much better interpretation is that Congress, believing vertical and horizontal ownership had the potential to restrict competition, gave the Commission several tools to address that potential problem. It intended that the Commission look at the "big picture" and use these tools in a common-sense way that promoted a competitive marketplace. It did not intend the Commission to impose regulations under each of these sections

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[13] See 47 U.S.C. Sec 532; see also Implementation of Rate Regulation Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Dkt 92-266, FCC 92-544, at paras. 144-145 (rel. Dec. 24, 1992).

[14] See Notice at para. 5.

that, in the aggregate, have the effect of radically restructuring the current cable industry.

The fact that some or all of the alternative provisions described in this section are ultimately found unconstitutional, does not undercut the overall analysis provided herein. That analysis, by itself, strongly supports a liberal interpretation of Section 11. TCI only points out that, to the extent these alternative provisions are put into effect, they constitute yet another reason for liberally interpreting Section 11.

II. THE COMMISSION SHOULD ADOPT ATTRIBUTION RULES THAT REFLECT CURRENT MARKETPLACE CONDITIONS AND PROMOTE MARKETPLACE CERTAINTY

Although attribution is implicated in several areas covered by Section 11, TCI believes the Commission should adopt one set of attribution rules consistent with the proposal described below.

In establishing "ownership" criteria for the implementation of either horizontal or vertical rules, the Commission must consider the purposes behind the limits: to ensure the availability of programming based upon consumer preference, rather than upon economic affiliation or the arbitrary exercise of monopsony power. Thus, the necessary thresholds of "ownership" or "affiliation" should be those which assure that cable operators make programming carriage decisions based on the merits of the program service and its appeal to consumers, not on affiliation or non-affiliation.

TCI proposes a three-part test:

1) Interests of 10% or Lower -- any interest at or below 10% should be viewed as de minimus. The Commission has already recognized in its Attribution Rulemaking[15] that the current five percent broadcast attribution threshold is outdated. The Commission tentatively proposed a 10% trigger in order to facilitate broadcasters' ability to compete in today's capital markets. TCI supports raising the broadcast attribution rule. Given that the Commission has already recognized that these rules are outdated and impede access to capital, it would be arbitrary and capricious to insist on applying them here.

2) Interests of 50% or Greater -- interests at or above 50% plainly provide de jure control to such interest holders. Under Commission precedent fully applicable here, such interests should be deemed controlling. See, e.g., Albert J. Feyl, 15 FCC 823 (1951). Thus, in any situation where there is a majority owner with interests of 50% or greater, by definition, no minority owner can have a controlling interest. Therefore, such minority ownership interests should not be attributable for purposes of calculating the Commission's ownership rules.

This analysis is, of course, fully consistent with the Commission's "single majority shareholder" concept. The Commission has previously recognized that minority shareholders in a company which has a single majority shareholder have vastly

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[15] Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, 7 FCC Rcd 2654 (1992).

diminished governance opportunities. See, e.g., Attribution of Ownership Interests, 97 FCC 2d at 1008. In such instances, "the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee...." Id. at 1008-09. TCI believes the "single majority shareholder" concept should be incorporated into the Commission's rules adopted in this proceeding.

The Commission's treatment of partnerships should also apply here. Thus, under current rules, general partnership interests can be assumed to control their partnerships regardless of actual equity levels. Limited partners which meet the insulation criteria should be discounted entirely. These rules may change as a result of the attribution rulemaking, and any such changes should be applied here as well.

3) Interests Between 10% and 50% -- for purposes of the horizontal rules, TCI proposes a proration of cable subscribers to reflect more accurately the number of subscribers served by an MSO. A prorated approach will more precisely measure the amount of subscriber access controlled by any one entity. For example, where a firm holds a 20% interest in a cable system which passes 10,000 homes (and assuming no single majority shareholder), that firm should be deemed to pass 2,000 homes. Also, if the Commission does not prorate, and instead attributes all subscribers in a cable system to any entity with an interest between 10% and 50%, it will, in effect, count such subscribers twice (or, potentially several more times).

TCI recognizes that it would be difficult to prorate interests in a program service. Therefore, in calculating ownership for purposes of the vertical rules pursuant to Section 11(f), TCI would not object to attributing a program service fully to any entity having above 10% ownership in such service (subject, of course, to the single majority shareholder exception).

III. SUBSCRIBER LIMITS

Modern economic and legal analysis, as well as marketplace experience, fully justify very high subscriber limits. Such analysis distills decades of learning on competition in the marketplace and appropriately balances the benefits of horizontal ownership with its potential harmful effects. TCI believes the Commission should be guided by this analysis in adopting subscriber limits under Section 11. Notwithstanding this analysis, however, TCI would support, consistent with the comments contained herein, a limit on horizontal ownership in the 30-40% range.

A. Economic Analysis Demonstrates That Neither The Current Level of Horizontal Concentration in Cable, Nor An Increase in That Concentration, Pose a Substantial Threat of Market Power

The attached Besen Paper describes the well-documented efficiencies that result when there are large MSOs. These include efficiencies both in program acquisition and in planning and developing new technologies and services. Such efficiencies

enhance consumer welfare in many ways; for example, promoting competition among program services for the right to serve the subscribers of large MSOs results in costs savings that can be passed on in the form of lower wholesale prices. This, in turn, may result in lower subscriber rates.

The Besen Paper also analyzes the concerns that larger MSOs might be able to exercise increased market power in dealings with subscribers and local advertisers. It concludes that there is little basis for such concerns because commonly-owned cable systems rarely compete as sellers. For the same reasons, it concludes that increased concentration in cable system ownership does not raise the risk that cable operators would collude, overtly or tacitly, as sellers. Likewise, the Besen Paper concludes that there is very little risk that MSOs will exercise monopsony power in their dealings with program services and thereby risk a decrease in the diversity and quantity of programming available to consumers. The nature of bargaining between large MSOs and cable program services permits prices to be raised for some services without increasing the prices that are paid for others. As a result, even if large MSOs can affect the prices they pay for programming, they will have no incentives to restrict their purchases of cable program services. For all these reasons, it is appropriate that the Commission adopt relatively high limits on the number of cable subscribers that can be served by commonly-owned cable systems. The Besen Paper (at p. 2) concludes that "neither the current level of horizontal

concentration in cable ownership, nor an increase in that concentration, pose a substantial threat of increased market power and reduced program diversity."

B. The Commission Should Impose a Horizontal Ownership Limit in the 30-40% Range

TCI recommends that the Commission adopt a horizontal ownership limit in the range of 30-40% pursuant to Section 11(f)(1)(A).[16] Such a limit is supported by well-established legal and economic analysis and would be consistent with the public interest objectives contained in Section 11(f)(2) of the Act, most importantly, Congress' mandate that the Commission "not impose limitations which would impair the development of diverse and high quality video programming."[17]

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[16] 47 U.S.C. Sec. 533(f)(1)(A). The Senate Report describes a conversation about horizontal ownership between then Senator Gore and TCI President and CEO, John Malone. Senator Gore asked Mr. Malone what horizontal limit Congress should place on cable operators. Mr. Malone responded that broadcasters "can own 25 percent of the market with VHF stations and up to 50 with UHF stations. Our technology is different. Clearly, some lower limits are in order for our industry." S. Rep. No. 92, 102nd Cong., 1st Sess. 34 (1991)("Senate Report). This statement is entirely consistent with the analysis contained in TCI's comments in this proceeding. The broadcast rules Mr. Malone referred to are calculated on the basis of total U.S. television households. Currently, there are approximately 92 million television households. Even using 25%, the lower of the two numbers Mr. Malone referred to, a broadcaster could reach approximately 23 million homes. If that standard were applied to the cable universe, which is what Mr. Malone and Senator Gore were speaking about, it would constitute approximately 42% of cable subscribers. This percentage is in line with TCI's analysis contained herein.

[17] 47 U.S.C. Sec. 533(f)(2)(G).

In the Notice, the Commission states that the legislative history of the Act indicates that antitrust analysis should not be the sole measure of concentration in the cable industry.[18] However, the legislative history recognizes that antitrust analysis is a relevant factor.[19] In fact, while the antitrust analysis may not provide a perfect analogy, it would be irrational not to consider such analysis, given the considerable learning that it offers.

Congress was concerned that concentration of ownership in the cable industry "may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market."[20] Generally, the courts have looked to market shares as

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[18] Notice at para. 32.

[19] See House Report at 42 (the House Report merely notes that antitrust analysis should not be the sole measure; it does not forbid its use); cf. Senate Report at 80-81 (Commission given discretion to establish reasonable limits on vertical and horizontal integration; its limits should not impair diversity in video programming).

[20] Notice at para. 31, citing House Report at 42-43. It is clear that Congress was concerned solely with single firm monopsony power rather than monopsony power brought about by interdependent pricing conduct by several MSOs (or more precisely, oligopsony power). This is the thrust of the legislative history which refers only to potential problems caused by the concentration of ownership in a single MSO. Indeed, the House Report notes that the national level of concentration in the cable industry, as measured by the Herfindahl-Hirschman Index, is in the unconcentrated range. This fact renders oligopsony power highly improbable. Moreover, the antitrust laws provide a powerful deterrent against several MSOs collusively exercising monopsony power.

the appropriate way to measure the market power of a single firm. In the Notice, the Commission appears to adopt such an approach in suggesting a percentage of the national market as an appropriate measurement. While market share may not equate precisely with market power, it does provide a practical benchmark to delineate circumstances where market power may be present. TCI therefore supports the use of market share in this proceeding, but cautions that such a measurement is not always determinative on the issue of market power.

Determining what constitutes unacceptably high market power is, on the other hand, a highly controversial issue.[21] The courts sometimes use "monopoly power" and "market power" interchangeably, further confusing the issue. In a famous statement in the Alcoa case, Judge Learned Hand opined that a ninety percent share was sufficient to confer monopoly power but that "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[22] A frequently cited compendium of monopoly cases since that time concludes that "[a] market share in excess of 70% is almost always deemed sufficient to support an inference of monopoly power, although that inference may be overcome by other evidence.

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[21] See generally Lloyd Constantine et al., The Cutting Edge of Antitrust: Market Power, Selected Articles, 60 Antitrust L.J. 799 (1992) (hereinafter referred to by individual author's name).

[22] United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).

In contrast, a market share of less than about 40% virtually precludes a finding of monopoly power."[23]

The most recent enunciation of a standard for market power by the Supreme Court occurred in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 26-29 (1984), where the Court held that a 30% market share was insufficient to confer market power in a tying case. Lower courts have since followed this rule almost without exception.[24]

Areeda and Hovenkamp note that "[i]t would be rare indeed to find that a firm with only 25 or 50 percent of the market could control price over any significant period without substantial cooperation from other firms" and that "there is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power."[25] According to a leading antitrust economic scholar, Professor George Hay, the typical approach in assessing monopoly power would appear to be that of the Second Circuit in Broadway Delivery, which:

> suggested that the jury could be told that "a market share below 50 percent is rarely evidence of monopoly power, a share between 50 and 70 percent can occasionally show monopoly power, and a share above 70 percent

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[23] I Antitrust Law Developments (Third), 213-14 (1992) (citations omitted).

[24] See cases cited in I Antitrust Law Developments, id., at 151.

[25] Areeda and Hovenkamp, Antitrust Law 548-549 (1992 Supp.).

> is usually strong evidence of monopoly power." (Footnotes omitted.)[26]

There have been fewer cases specifically addressing the issue of market power in monopsony, as opposed to monopoly, cases. However, In Re Beef Industry Antitrust Litigation, 713 F. Supp. 971, 980 (N.D. Tex. 1989), aff'd. 907 F.2d 510, 514-16 (5th Cir. 1990), found a market share of 28.6% was insufficient to confer monopsony power. In United States v. Syufy Enterprises, 903 F.2d 659, 663-71 (9th Cir. 1990), single firm market shares variously calculated at 39%-75% were deemed insufficient to confer monopsony power where the buyer was dealing with sophisticated sellers. In this regard, the Reply Comments of the United States Department of Justice in Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, at 44 (April 1, 1990), seem particularly relevant:

> If both the supplier and buyer have bargaining power, it is difficult to predict whether the prices they agree on will be above, below or within the range that would result if both industries were competitive in structure. In this case just as MSOs are becoming increasingly concentrated and have acquired some amount of bargaining power, it also appears that certain program suppliers have considerable bargaining power in their own right.

Finally, the Department of Justice, as evidenced by its review of cooperative purchasing groups, has stated that it is not at

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[26] George A. Hay, Market Power in Antitrust, printed in The Cutting Edge of Antitrust, supra note 32, at 807, 826.