all concerned about monopsony power where the buyer accounts for 35% or less of the market.[27]

The cases cited above have arrived at general economic conclusions with respect to single firm monopsony power that have been distilled from conflicting expert economic evidence applied to leading firms in various industries operating under the same set of economic assumptions and incentives as those in the cable industry. There is no reason to suppose that market shares lower than those deemed innocuous in other industries could result in monopsony power in the cable industry simply because the technology of the cable industry is different.

The above analysis suggests that horizontal concentration in the 30-40% range of a national market does not create a risk that a distributor could extract unreasonable concessions from suppliers or unfairly restrain competition from alternative distributors, the very concerns that the Commission has said underlie Section 11.[28]

TCI's proposed 30-40% range is extremely reasonable when compared to the horizontal concentration found in other industries. The following chart demonstrates that many industries have concentration levels well above 40%. While there may be factors which render these examples less than

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[27] See, e.g., Letter of James F. Rill, Assistant Attorney General, Antitrust Division, to Patrick M. McAdam, Esq., August 22, 1989.

[28] Notice at para. 33.

perfectly analogous, they nonetheless do underscore the reasonableness of TCI's proposal.

COMPANY	PRODUCT	SHARE (%)	YEAR
IBM	MAINFRAME COMPUTERS	64.0%	1988
KODAK	PHOTOGRAPHIC FILM	81.0%	1988
COCA-COLA	FOUNTAIN SODA	59.8%	1990
KELLOGG'S	READY-TO-EAT CEREALS	38.0%	1989
WM. WRIGLEY JR. CO.	CHEWING GUM	71.5%	1989
JOHNSON & JOHNSON	FIRST AID BANDAGES	79.0%	1990
PROCTOR & GAMBLE	DISPOSAL DIAPERS	49.0%	1990
GENERAL MOTORS	AUTO SALES	33.3%	1989
MCDONALD'S	BURGER RESTAURANTS	46.5%	1989
HERSHEY	CANDY BARS	46.3%	1989
MARS	CANDY BARS	35.5%	1989
WHIRLPOOL	WASHING MACHINE PRODUCTION	50.0%	1988
H.J. HEINZ	KETCHUP PRODUCERS	55.0%	1989
GILETTE	SHAVING PRODUCTS	64.0%	1989
TAMBRANDS	TAMPONS	53.0%	1989
HALLMARK	GREETING CARDS	44.0%	1989

Source: Arsen J. Darnay, MARKET SHARE REPORTER 1991, Detroit: Gale Research Inc.

In the Notice, the Commission asks "at what percentage of homes passed a single MSO could preclude the success of a new cable service."[29] It is unlikely that an MSO that accounts for 30-40% of cable subscribers would be able to preclude the launch and viability of a program service. Even if such MSO decided not to carry a particular program service on any of its cable systems, the programmer would still be able to sell to cable operators reaching 60-70% of all cable homes passed. The existence of so large a remaining sales opportunity for the programmer, would make it highly improbable that a single MSO could materially impact the programmer's decision to launch or its long-term survival.

The historical functioning of the marketplace generates significant practical support for this analysis. The economic structure of program services vary greatly. Some generate revenues from license fees paid by cable operators, some from advertising sales, and some from a mix of both sources. In addition, the nature of a programmer's costs will significantly affect the level of revenues it needs to remain viable. However, it is clear that attaining any particular level of penetration, and certainly a level of penetration greater than 60-70% (the inverse of TCI's proposed horizontal limit of 30-40%) is not a prerequisite to long-term viability for video programmers. There are many popular, established program services that have been in business over an extended period of

[29] Notice at para. 37.

years with penetration below 60-70%. The following chart provides examples of such services.

Satellite Program Service	Began	Current Subscribers (in millions)	Percent of Total Cable Subs
America's Disability Channel/The Silent Network	Sept. 1990	15.1	26.1
Black Entertainment TV	Jan. 1980	29.4	50.9
Bravo	Dec. 1980	5	8.7
Comedy Central	April 1991*	22	38.1
Country Music TV	Mar. 1983	16.2	28.1
Court TV	July 1991	6	10.4
E! Entertainment TV	Aug. 1987+	19	32.9
EWTN (Eternal Wold TV Network)	Aug. 1981	27	46.8
Galavision	Oct. 1979@	3.8	6.6
International Channel	July 1990	3	5.2
The Learning Channel	Nov. 1980	17	29.5
Mind Extension U.	Nov. 1987	17	29.5
The New Inspirational Network	April 1978	5.5	9.5
Nostalgia Television	May 1985	12.3	21.3
VISN	Sept. 1988	12.8	22.2

Source: Warren Publishing, Inc., Television & Cable Factbook, Services Volume No. 61, 1993, pages G65-78.

* Merger of HA! Comedy Network & Comedy Channel.
\+ Began as Movietime, changed name as of June 1990.
@ Began as pay service, switched Sept. 1988.

TCI believes the Commission should take into account two further factors in fashioning its horizontal limits. First, the Commission's regulations under other sections of the Act, including rules relating to program access,[30] program carriage agreements,[31] leased access,[32] and must carry,[33] are adequate to prevent or redress any actual or potential abuse by a cable operator with a horizontal share below the 30-40% range.[34] Second, the Commission should not presume that cable operators, based on vertical and horizontal ownership or any other reason, seek to preclude program services. In TCI's experience, the opposite is true. It is the quality and diversity of program choice that enables operators to attract and retain customers. This fundamental characteristic of the cable business will be even more important as the industry evolves, through the deployment of fiber optics, digital compression and other technologies, into a distribution system with 500 or more channels. In such an environment, cable operators are highly unlikely to discourage or preclude program services.

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[30] 47 U.S.C. Sec. 548.

[31] 47 U.S.C. Sec. 536.

[32] 47 U.S.C. Sec. 532.

[33] 47 U.S.C. Sec. 534.

[34] TCI notes that several of these provisions are currently the subject of a constitutional challenge. See e.g., Time Warner Entertainment Company, L.P. v FCC, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992). Citing these provisions here should not be construed as TCI support for the notion that these services are, in fact, constitutional. See infra note 38.

In conclusion, TCI recommends that the Commission adopt a national horizontal limit in the 30-40% range of homes passed. Such a limit will enable cable operators to continue to realize the efficiencies and economies of scale that have resulted in a diversity of programming for consumers, while fully satisfying Congressional objectives.

C. The Commission Should Only Promulgate National Ownership Rules

In paragraph 35 of the Notice the Commission asks "whether regional or national subscriber limits, or both, are necessary or appropriate to implement the objectives of the 1992 Cable Act." TCI believes the Commission should promulgate ownership rules on a national basis only and that the statute provides neither the authority nor a public policy rationale for regional limitations.

Nothing in Section 11 of the Act expresses any concern with regional ownership. In Section 2 of the Act, Congress sets out exhaustive findings, none of which evince any interest in, or effort to target, regional ownership. To the contrary, the findings in Section 2 clearly have a national focus. For example, Section 2(a)(3) suggests that as a result of increased penetration the cable industry has become "a dominant nationwide medium." Similarly, the Senate Report notes that the Commission should place reasonable limits on the size of MSOs "[t]o address the issue of national concentration in the cable industry."[35]

Moreover, in determining the appropriate market, the Commission should look to the area in which programmers sell their services and the area in which the multichannel distributors purchase such services. TCI submits that cable programmers sell in a national market and multichannel distributors buy in a national market.

TCI urges the Commission to promulgate only national ownership rules under Section 11.

D. Homes Passed Is An Appropriate Measure of Cable Operator Size

In paragraph 36 of the Notice, the Commission suggests that in determining a cable operator's size it would be more "appropriate and practical" to measure a cable operator's share of homes passed than its share of cable subscribers. TCI agrees that a measurement based on homes passed is preferable.[36] A measurement based on subscribers may have the anomalous effect of discouraging subscriber growth and the provision of diverse

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[35] See Senate Report at 34 (emphasis added); see also House Report at 42.

[36] The Commission should not, however, count homes passed toward a cable operator's totals for purposes of the subscriber limits in situations where there is a viable alternative multichannel provider. Subscriber limits are concerned with the ability of a cable operator to prohibit a program service from reaching consumers. Where there is a competitive multichannel provider that harm cannot occur. See further discussion of the impact of a viable alternative multichannel provider infra at Section IV E.

and high quality programming that would increase subscriber penetration.

IV. CHANNEL OCCUPANCY LIMITS

Section 11(c) of the Act requires the Commission to establish "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."[37]

As an initial matter, TCI would like to make two points about this provision:

1) Establishing a limit on the ability of a cable operator to speak on an infrastructure it has built with its own capital is unconstitutional under the First Amendment.[38] Such a limitation is even more unorthodox in light of other provisions of the Act, also likely unconstitutional, which further reduce an operator's ability to speak over its own medium. In the aggregate, channel occupancy limits, coupled with must carry and leased access, constitute a dramatic infringement on cable operator's First Amendment rights.

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[37] 47 U.S.C. 533(f)(1)(B).

[38] See Time Warner Entertainment Company, L.P. v. Federal Communications Commission, No. 92-2494 (D.D.C. filed Nov. 5, 1992); Turner Broadcasting System Inc. v. Federal Communications Commission, No. 92-2247 (D.D.C. filed Oct. 5, 1992); Daniels Cablevision v. United States, No. 92-2292 (D.D.C. filed Oct. 13, 1992); National Cable Television Association v. Federal Communications Commission, No. 92-2495 (D.D.C. filed Nov. 5, 1992); Discovery Communications v. United States, No. 92-2558 (D.D.C. filed Nov. 13, 1992).

2) Marketplace facts demonstrate that vertical integration has in no way diminished the ability of unaffiliated program services to obtain carriage on cable systems. To the contrary, unaffiliated program services have received very broad carriage on TCI systems. For example, TCI distributes ESPN to over 92% of its subscribers; USA Network to over 91% of its subscribers; The Weather Channel to over 88% of its subscribers; Nickelodeon to over 93% of its subscribers; and MTV to over 93% of its subscribers. None of these services is in any way affiliated with TCI. Claims that unaffiliated services have been denied carriage are purely anecdotal and do not demonstrate the type of pattern of behavior that should lead the Commission to handicap an entire industry.

Moreover, Congress' concern that cable operators would favor their affiliated program services, was tempered by its recognition of the benefits of vertical integration. In Section 11(f)(2)(G), Congress instructed the Commission not to "impose limitations which would impair the development of diverse and high quality video programming."

As TCI has demonstrated above, there is a direct correlation between vertical integration in the cable industry and the substantial program diversity available to consumers today. As noted in the attached Besen Paper (p.23):

> vertical integration between MSOs and program services can lower costs, leading to reduced prices and increased service quality to the viewing public.

A. <u>The Public Interest and the Purposes of the Act Will Best Be Served if the Commission Permits Cable Operators To Devote a Significant Amount of System Bandwidth to Affiliated Program Services</u>

The Commission should not impose channel occupancy limits that unreasonably restrain the ability of a cable operator to devote channel capacity to affiliated services. Legal and economic precedent, as well as the recognized consumer benefits of vertical and horizontal ownership, justify allowing cable operators to dedicate a significant amount of their system capacity to affiliated program services. An unjustifiably low channel occupancy limit would not only be patently unfair, given the cable operator's investment in the system, but would severely impair the development of new program services in contravention of Section 11(f)(2)(G) of the Act.

As is well known from the economic literature on vertical integration, ownership links between upstream and downstream firms can lead to substantial efficiencies. These efficiencies are sometimes difficult, or costly, to accomplish through contracts. It is equally clear that these efficiencies translate into increased consumer welfare. The attached Besen Paper describes at length the efficiencies and consumer benefits which flow from vertical integration.

These efficiencies clearly must be balanced against any anticompetitive concerns. However, in the context of the cable television industry, the set of factual circumstances in which it would be profitable for a program service that is vertically integrated with a cable operator to use that relationship to disadvantage a rival are sufficiently unlikely that such behavior cannot be regarded as an imminent threat. This is so for several reasons. The cable operator may be unable to damage the rival services because the operator is not large enough, because the rival service is profitable enough to withstand the loss of revenue, or because the rival service can protect itself by lowering payments to programming inputs. Foreclosure, even if it could harm the rival service, may yield little or no payoff because the affiliated program service faces too many other substitutes. The costs incurred by the cable operator to disadvantage the rival service may be greater than the gains of the affiliated program service. The ownership of many program services is dispersed, raising the prospect that the foreclosing cable operator must share the gains with other owners of the service who do not bear the associated costs. Finally, rival program services may have means of protecting themselves from harm -- what economists call counterstrategies -- that prevent a foreclosure strategy from succeeding.

In light of these factors, the Besen Paper (p. 4) concludes that, "[a]s a result of the efficiencies generated by vertical integration and the difficulties in engaging in foreclosure, we favor relatively high channel occupancy limits." As the Besen Paper further points out, this conclusion is also supported by the potential for real harm to consumers if the Commission adopts an unnecessarily restrictive channel occupancy limit.

The proposal for high channel occupancy limits is consistent with the analysis undertaken by antitrust courts and scholars, as well. As discussed above, while such analysis need not be fully determinative on the issues raised in Section 11, it does provide the distillation of decades of learning on closely analogous questions and therefore should be afforded substantial weight by the Commission.

Section 11 is premised on Congressional concerns with the potential anticompetitive impact of vertical integration. However, in his seminal book on antitrust policy, Robert Bork argues that to the extent vertical integration is associated with competitive harm, such harm is more likely the result of excessive horizontal concentration. Where harm exists, he advocates limits on horizontal ownership, thus permitting the efficiencies of vertical integration to be realized without resulting in competitive harm.[39]

As noted above, TCI supports a 30-40% limitation on horizontal ownership. According to Bork's analysis, such a limitation should obviate any perceived problems with vertical integration by a cable operator. While we recognize that Congress directed some limitation on the channels occupied by programs in which the operator has an attributable interest, in light of the economic theory and evidence marshalled by Bork and others cited below, Section 11 should be construed to permit

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[39] Bork, The Antitrust Paradox 225-238 (1978).

cable operators very substantial flexibility to carry affiliated services.

The percentage of channel capacity that would result in the substantial foreclosure inimical to competition is difficult to assess. An official of the Federal Trade Commission, after analyzing the cases on vertical foreclosure, opined that:

> [S]earching for the magic foreclosure percentage is like searching for a unicorn: an interesting but futile exercise. What is sufficient foreclosure in one case may not be in another. It depends on the market at issue: the size of competitors, the barriers to entry, all of the qualitative measures that separate competitive from noncompetitive markets.[40]

Nevertheless, TCI's view that a relatively high channel occupancy limit is appropriate has support in the most recent antitrust cases dealing with vertical "foreclosure," the harm most often perceived in vertical cases. A compendium of vertical foreclosure cases since the Supreme Court's seminal decision in Jefferson Parish comments that:

> While foreclosure of 20% to 30% of the market was a gray area before Jefferson Parish ... the concurring opinion in Jefferson Parish, finding exclusive dealing lawful without detailed analysis when 30% of the market was foreclosed, may foretell higher market share thresholds as a prerequisite to finding exclusive dealing unlawful. See Sewell Plastics, 720 F.Supp. at 1212-14 (even market share of 40% would not enable bottling cooperative to increase prices profitably

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[40] See Kevin J. Arquit, Director, Bureau of Competition, Federal Trade Commission, Remarks before "The Cutting Edge of Antitrust: Market Power," Antitrust Section, American Bar Ass'n, (Oct. 18, 1991); see also Kevin J. Arquit, Market Power in Vertical Cases, printed in The Cutting Edge of Antitrust, supra note 32, at 921.

above the competitive level); Gonzales v. Insignares, 1985-2 Trade Cas. (CCH) ¶ 66,701, at 63,335 (N.D. Ga. 1985) (summary judgment for defendant; only 40% of consumers affected).[41]

No case after Jefferson Parish has held that vertical foreclosure of less than 50% of the market poses anticompetitive concerns.

Finally, whatever limit the Commission adopts, TCI urges that existing channel lineups in excess of that limit be grandfathered. This is necessary to avoid any disruption in service to consumers. Consumers that value a particular service should not be punished by removal of that service in response to the Commission's rule. The Commission has in the past recognized the wisdom of grandfathering when it significantly changes the rules under which an industry has previously operated. TCI also notes that digital compression and other technologies that vastly expand channel capacity eliminate the rationale underlying the ownership rules and therefore further support grandfathering.

B. The Channel Occupancy Limits Should Apply Only to Programmers Affiliated With the Particular Cable Operator

In the Notice, the Commission proposes to apply the channel occupancy limits only in situations where actual vertical integration exists, i.e., where a video programmer is affiliated

[41] See Antitrust Law Developments, supra note 34, at 177, note 972.

with the particular cable operator. TCI supports this approach.

As the Commission has recognized, the genesis of Section 11 was Congress' concern that vertically integrated firms, as a result of their integration, would act in ways to diminish competition.[42] Therefore, Section 11 should apply only in those locations where the programmer has an attributable interest in the cable operator serving that location, since this is the only location in which the practices of Congressional concern can occur. A vertically integrated cable operator has neither the incentive, nor the ability, as a result of its verticality, to favor a program service with which it has no attributable ownership connection.

C. The Channel Occupancy Limits Should Not Apply to Regional or Local Video Program Services

TCI believes the channel occupancy limits should only apply to national program services. As discussed above, there is nothing in the Act or its legislative history that supports application of the limits to regional programmers. Moreover, inclusion of regional program services within these rules would discourage cable operators from developing programming responsive to the needs and preferences of regional audiences, contrary to Congress' instruction in Section 11(f)(2)(G) of the Act.

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42 Notice at paras. 41-43.

The same analysis is fully applicable to local program services. The Commission should explicitly exclude such services from Section 11. In so doing, it will encourage cable operators to continue to invest in and develop programming which addresses the unique local needs of the communities they serve.

D. The Commission Should Use System Bandwidth to Calculate Channel Occupancy Limits

In paragraph 47 of the Notice, the Commission asks what procedures should be used to calculate the channel occupancy limits and, specifically, if it should subtract certain channels, e.g., over-the-air broadcast channels, leased access channels, and public, educational and governmental ("PEG") channels, for purposes of such calculation.

The question of how to count channels is becoming increasingly complex. With digital compression, fiber optics, and other technological advancements, the traditional methods of counting channels may no longer be appropriate. Does it make sense for the Commission to apply rules to a 500 channel system in the same way it has previously applied them to a 36 channel system? How will the Commission calculate a single digitally compressed channel that offers consumers 10 channels of service? If a cable operator offers 50 pay-per-view options, should that be counted as one or 50 channels? How will the Commission calculate multiplexed channels? And, the Commission must answer these questions not only for the purposes of the channel occupancy rules, but also for must carry and leased and PEG access.

These are critical issues because their resolution will effect the incentives of cable operators to continue to invest in the development of new technologies and innovative program services. TCI believes that one method for the Commission to ensure the retention of incentives for such investment is to calculate the channel occupancy limits based on bandwidth. Cable systems provide channel capacity in 6 MHz segments, and the Commission should count each segment as a single unit for purposes of calculating channel occupancy. Thus, for example, if the Commission were to adopt a 50% channel occupancy standard, a cable operator in a 36 channel system would be permitted 18 segments for distribution of affiliated programming.[43]

Cable operators should be free to use digital compression or other technologies to expand the capacity of the channels they are permitted to program with affiliated services. Such an action is clearly in the public interest and should not result in a recalculation of the channel occupancy limits. The Commission should not, in effect, punish a cable operator for expanding its channel capacity, by forcing a recalculation that might reduce its overall ability to distribute affiliated

[43] TCI believes that channel segments used for non-video services, such as PCN or data transfer, should not be counted for purposes of assessing the permissible carriage of affiliated services. Such non-video services are unrelated to the goals underlying Section 11 of the Act.

programming. Such a step would discourage the development of digital compression and other technologies that expand consumer choice. The attached Besen Paper (p. 23-24) points out that:

> limiting vertical integration can increase production costs, leading to reduced quality, and even discouraging the introduction of innovations such as digital compression by reducing the returns to innovative activity.

In addition, the Commission should take into account all local broadcast signals and leased and PEG access channels in calculating the channel occupancy limits. These services are carried pursuant to rules which have the same effect as the channel occupancy limits, i.e., carriage of non-affiliated program services. It is, therefore, logical that carriage of such services not be the basis for a reduction in the number of affiliated services a cable operator may carry.

E. The Channel Occupancy Limits Should Not Apply Where There is a Competitive Multichannel Distributor

The purpose of channel occupancy limits is to ensure that program services unaffiliated with the local cable operator have the ability to reach consumers. If there is a viable alternative multichannel distributor, then a vertically integrated cable operator will not be able to deny a programmer access to consumers. Therefore, the channel occupancy limits should not apply because the harm they are designed to prevent cannot occur.

For example, when a direct broadcast satellite system is available nationwide, a vertically integrated cable operator will not have the power to deny an unaffiliated programmer the ability to reach consumers through that medium. In such a case, channel occupancy rules make no sense. For the same reasons, when there is a local multichannel distributor competing with the cable system, the rules should not apply to that system.

TCI is sensitive to the fact that in order for a competitive presence to be a sufficient reason for elimination of the rules, the competitor must be a viable one. However, TCI notes that at least three major U.S. corporations have recently announced their intentions to deliver broadband video services into the home. One of these companies, General Motors subsidiary, Hughes Communications Inc., a subsidiary of General Motors, plans to offer multichannel video services nationwide, i.e., in all TCI markets, via direct broadcast satellites.[44] The other companies, U S West Communications Inc. and Bell Atlantic, have equally aggressive plans which cover very large regions of the country.[45] Each of these companies is much larger than TCI. TCI would not oppose an appropriate test for determining viability, but believes any such test should result in a finding that the

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[44] See Hughes Signs Programmers for DirecTV DBS Venture, Communications Daily, Dec. 7, 1992, at 2.

[45] See Harry A. Jessell, Telco to Compete Head to Head with MSO in N.J., Broadcasting, Dec. 21, 1992, at 4; U S West to Roll Out VDT Network Regionwide Beginning in 1994, Communications Daily, Feb 5, 1993, at 1.

companies cited above are viable competitors in all the markets in which they operate.[46]

V. THE COMMISSION SHOULD ADOPT ANTITRAFFICKING RULES THAT PREVENT "PROFITEERING" WITHOUT DISCOURAGING INVESTMENT IN CABLE TELEVISION

The legislative history of the Cable Act indicates that the three-year holding period established in Section 13 was intended to prohibit practices generally characterized as "profiteering," which TCI understands to refer to transactions in which cable systems are acquired by persons intent upon quick resale at a profit rather than provision of cable television service to the public.[47] The sporadic involvement of such persons in the cable industry has the potential to disadvantage subscribers (through adverse impacts on rates and service) and to injure the reputation and business prospects of the industry as a whole. For these reasons, TCI believes that the antitrafficking restriction has the potential to bring desirable stability to the cable television business for the ultimate benefit of subscribers, programmers, and responsible system operators.

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[46] TCI does not believe the "effective competition" test in Section 623 of the Act is an appropriate test for purposes of the ownership rules in Section 11. That test addresses the ability of an alternative distributor to serve consumers, a wholly different purpose than the channel occupancy provisions of Section 11, which are concerned with the ability of program services to obtain distribution by cable systems.

[47] TCI notes that the Commission's action in its rate proceeding under the Act may also mitigate such profiteering and this fact supports a liberal interpretation if the antitrafficking provisions.

At the same time, however, the Commission must recognize that continued increases in the quality and availability of cable television service depend on a steady stream of new capital investment in the industry. New operators with new ideas must have the opportunity to enter the industry by acquisition, and established operators must have the opportunity to bring their expertise and economies of scale to those communities that would most benefit from them. All cable operators need to be able to configure their holdings as efficiently as possible and to attract investment needed to finance growth.

For these reasons and others, the attached Besen Paper (p. 4-5) recommends that the Commission "minimize the extent to which these [antitrafficking] rules block transfers of ownership because transfers typically will promote the efficient operation of cable systems without posing a threat that they will lead to higher prices being charged to consumers."

The prohibition on profiteering and the encouragement of investment in growth and efficiency can coexist without difficulty if the Commission regulations implementing Section 13 are configured to ensure that the antitrafficking restrictions impose no unnecessary burdens, apply only to the "profiteering" transactions Congress sought to prohibit, and do not impair publicly beneficial entry into, investment in, and exit from, the cable television business.

In the sections that follow, TCI undertakes to apply these principles consistently and concretely in responding to the specific questions posed in the notice.

A. The Purpose of the Antitrafficking Restriction is to Prevent "Profiteering"

Implementation of Section 13 in a consistent and publicly beneficial manner requires a clear understanding of its purpose. While the legislative history of Section 13 is not extensive, it indicates that the evil addressed by the provision is what Congress called "profiteering."[48] In this context, it is apparent that Congress wanted to adopt a simple and largely self-effectuating mechanism to increase the likelihood that ownership of cable television systems will generally be in the hands of persons interested in providing high quality, efficient service to the public rather than persons interested only in exploiting ownership of the facility for short-term gain through quick resale.

Thus, it was not the intent of Congress to discourage or inhibit legitimate transactions necessary to facilitate investment in, and efficient operation of, the cable industry. Parties willing to commit capital to the industry should not be discouraged from doing so, and incumbent operators should have the necessary freedom to transfer systems to more efficient or better funded operators so that the public can receive the

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[48] House Report at 119.

highest quality and most efficiently-provided cable service. It is equally clear from the brevity of the legislative history on this section that Congress did not intend to create a substantial new regulatory regime at the federal or local level.

B. The Commission Should Assert and Maintain Exclusive Jurisdiction for Monitoring and Enforcement

Section 13 is a federal law establishing a uniform federal policy. Stable interpretation and uniform application of that policy are crucial to ensure that the purpose of the prohibition is achieved without unduly disrupting the existing nationwide markets for acquisition of, and investment in, cable television systems. For this reason, the Commission -- not local franchise authorities -- should have not only primary but exclusive responsibility for interpretation and enforcement of the antitrafficking prohibition, subject to the usual judicial review process in the federal courts.

The Commission proposes to require certification of compliance with the antitrafficking requirement in connection with each "transfer of ownership," and to accord a presumption of compliance where such certification is made.[49] TCI supports this aspect of the Commission's proposal. Submission of such certificates to the local franchising authorities in the first instance as a procedural matter should present no problem so long as the Commission's rules clearly provide that any issue as to compliance with Section 13 is to be brought promptly to the

[49] Notice at para. 8.

Commission for resolution; the Commission's rules should thus provide that the local franchising authority's role is limited to reviewing the certification and either accepting it or challenging it in proceedings before the Commission. The rules should also make clear that the commencement of such proceedings does not operate to toll or extend the 120 day limit provided for in Section 13(e) of the Act.

Generally, TCI strongly disagrees with any proposal to vest local franchising authorities with responsibility for interpreting or enforcing this federal law. Rather, all interpretation and enforcement of this law should be handled by the Commission through certification, declaratory ruling, and complaint procedures, with expedited consideration where necessary. If a local franchising authority is of the view that a particular transfer is not consistent with the law, it should not have the authority to make that determination for itself (as both prosecutor and judge) but instead should be required to bring the issue to the Commission for resolution. As noted below, if the Commission defines "transfer of ownership" and the calculation of the three-year period simply and clearly, determinations ought to be neither frequent nor difficult. Judicial review of rulings under this federal law should be the exclusive responsibility of the federal courts.

Exclusive jurisdiction in the Commission and the federal courts is absolutely necessary to ensure that uniform standards and guidelines are established and maintained. It would wreak havoc on the industry if the multitude of local franchise authorities were at liberty to grant or withhold approval of transactions based on their own interpretations of a federal law.

Due to the complexity and value of most cable system ownership transactions, time is of the essence in most such transactions, such that significant regulatory delay will often be fatal to the transaction. For this reason, the Commission should make available expedited declaratory ruling and complaint procedures where necessary to ensure a timely ruling on antitrafficking issues. The Commission's rules should provide automatically for expedited proceedings whenever a party advises the Commission that the 120 day time limit provided for in Section 13(e) is applicable to the transaction.

Sanctions should be imposed only for repeated and willful violations of the antitrafficking restriction. In general, no sanctions at all should be imposed on a party that acts in reliance on a reasonable, good faith interpretation of Section 13 and the Commission's implementing regulations. If, as TCI recommends, the Commission enacts simple and clear standards as to what is permissible and impermissible under Section 13, there should be relatively few cases in which honest mistakes are made, and those instances should not elicit harsh punishment. It is certainly not the purpose of Section 13 to impose a general chill on entry into and exit from the cable industry, and the threat of substantial sanctions for honest infractions of this restriction will certainly have a chilling effect on legitimate transactions.