Absent an extreme case, sanctions should in no event include the reversal of a transfer found to violate the restriction, since such reversal would accomplish precisely what Section 13 was intended to prevent -- a short-term change of ownership -- and would place back in control of the system someone who has demonstrated a desire no longer to operate the system.

C. "Transfer of Ownership" Should be Defined to Encompass Only Transactions that Involve Transfer of a Controlling Ownership Interest

The Commission's implementing regulations should define the term "transfer of ownership" in clear and simple terms. Such clarity and simplicity is necessary to avoid needless and costly uncertainty about the statute's application and to avoid needless regulatory burdens for the Commission, local franchising authorities, and cable operators. The proposal in the Notice to import the case-by-case approach to de facto and de jure control developed over decades for broadcast licensees does not meet the goal of simplicity and clarity. The broadcasting approach was designed to respond to a different set of concerns than those at issue here and thus addresses questions irrelevant to the simple antiprofiteering objective of the cable antitrafficking rule.

The antitrafficking rules are intended to discourage exploitative short-term ownership of cable systems. Logically, to profit exploitatively from ownership of a cable system, the would-be profiteer would have to have a firm claim on the profits of the system and the ability to effect a short-term sale. To do those things, a would-be profiteer would have to have a very substantial equity stake in the system.

The Communications Act distinguishes between an "owner" of a cable system on the one hand and a "manager/controller" of a cable system on the other.[50] Congress's use of the term "transfer of ownership" in Section 13 is consistent with its apparent intent to restrict only transactions in which ownership of a cable system, as distinguished from "management" or "control," is involved. This use of statutory language is entirely consistent with the antiprofiteering purposes of Section 13.

For these reasons, the language and objectives of Section 13 can be fully satisfied with minimal regulatory expense by defining a transfer of control as the transfer of a fifty percent or more equity ownership interest in a system. Transfers of minority shares and changes of management should not be considered to be transfers of ownership for purposes of Section 13 because they do not carry with them the potential for profiteering by short-term resale to which the restriction is addressed.

---

[50] See 47 U.S.C. Sec. 522 (5) (definition of "cable operator").

D. <u>The Holding Period Should Be Measured by Reference to Objectively Identifiable Dates</u>

Section 13 provides that the three year time period is to run from the date of the incumbent owner's "acquisition" or "initial construction" of the system.

Focusing first on "initial construction," TCI believes, as the Notice suggests[51] that the term can be understood to encompass either the initial activation of the system or the date of issuance of a franchise. Either date would be equally consistent with the statutory language and both would equally serve the statutory purpose. Therefore, in the interest of administrative simplicity (and to accommodate the multitude of disparate practices and procedures of local franchising authorities), TCI recommends that the Commission define "initial construction" to mean <u>either</u> the date on which service to the first subscriber is activated <u>or</u> the date on which a franchise is issued, <u>whichever is earlier</u>.

The date of acquisition of a system should be defined (as the Commission suggests in the Notice) as the date of closing of a transaction involving a transfer of 50 percent or more of the equity interest in a system. This date is easy to ascertain and should be relied upon without regard to subsequent dates set in "installment" or "stepped" transactions.

For purposes of certification of, and determinations as to, compliance with the three-year holding period, the period should

[51] <u>See</u> Notice at para. 14.

be measured up to the date of closing of the proposed transaction. This approach will permit parties to a transaction to request any necessary approvals during the final months of the three year period, so long as the actual transfer of ownership does not occur until the end of the holding period.

E. The Commission Should Establish Special Criteria for Application of Section 13 to MSO Transfers

The Commission recognizes in the Notice that transfers of ownership of entities owning multiple cable systems will present a special set of issues. TCI recommends that the Commission adopt particular rules for MSOs that will accomplish the statutory objective without frustrating legitimate transactions or forcing divestitures that destroy the scale and scope economies inherent in MSO ownership of cable systems.

The Commission should not apply the antitrafficking restriction to MSOs on a system-by-system basis, since to do so would frustrate transactions that have nothing at all to do with "profiteering." Rather, the Commission should treat a transaction involving transfer of ownership (defined as a transfer of a fifty percent or more equity interest) of an MSO under rules that will prevent profiteers from buying MSOs for short term resale. This goal can best be accomplished by applying the three-year holding rule to a sufficiently large proportion of an MSO's holdings (defined in terms of a percentage of subscribers) to ensure that an MSO cannot be the object of short-term profiteering, while at the same time recognizing the likely mix of newer and older systems in any MSO's holdings.

F. Spin-Offs Contemplated As Part of an Acquisition Should Not be Subject to the Holding Period And Should Be Deemed Acquired by the Party to Whom They Are Spun Off as of the Date of the Acquisition Leading to the Spin-Off

A fairly common form of transaction involving cable systems is one in which a buyer acquires a group of commonly owned systems with the intention to keep some of them and to dispose promptly of, i.e., spin off, the others. Section 13(b) of the Cable Act anticipates such transactions and expressly provides that they are to be treated as part of the initial transaction for purposes of Section 13. That means that the party that acquires and then spins off such a system need not first hold the system for three years, and that the ultimate acquirer of the system may calculate its three-year holding period from the date of the initial transaction that led to the spin-off. In the interest of clarity, the Commission's implementing regulations should specifically provide that all spin-off transactions completed within the terms specified by a binding contract for an acquisition are exempt from the Section 13 holding requirement and that the party to whom such a system is spun off may calculate its three-year holding period from the date of closing of the transaction in which its spin-off seller acquired the system.

G. <u>The Exemption for Tax Free Transfers Should Encompass All Transactions that Qualify for Tax Free Status Under the Internal Revenue Code and IRS Regulations</u>

Section 13(c)(1) of the Cable Act exempts from the three-year holding requirement "<u>any</u> transfer of ownership interest in any cable system which is not subject to Federal income tax liability."[52] In the Notice, the Commission identifies three kinds of transactions that are currently treated as tax free for purposes of the Internal Revenue Code: Tax certificate sales (IRC §1071), tax free exchanges (IRC §1031), and tax free reorganizations (IRC § 368).[53] TCI agrees that the three kinds of transactions identified in the Notice are encompassed within the tax free transfer exception to Section 13(a). However, given the unqualified statutory language including <u>any</u> tax free transfer in the exception, TCI recommends that the Commission not undertake the burden of adopting (and having to amend from time to time) regulations that catalog the universe of then-currently authorized tax free transactions under the Internal Revenue Code. Rather, the Commission's regulations should simply provide, consistently with the statute, that transactions deemed tax free under the Internal Revenue Code are exempt from the restrictions of Section 13(a).

The Notice also inquires "whether the payment of cash or other taxable consideration, to equalize the value of assets in

---

[52] 47 U.S.C. Sec. 537(c)(1)(emphasis added).

[53] Notice at para 15.

like system exchanges, should render such a transaction ineligible for this exception."[54] TCI understands the Commission to be asking whether payments customarily referred to as "boot" are to be treated as changing the tax-free nature of the transaction. TCI strongly urges the Commission not to adopt regulations under Section 13 that diverge in any way from the treatment of such matters under the Internal Revenue Code and applicable IRS regulations. Rather, as stated above, the Commission's regulations should simply mirror the applicable tax law and regulations: Any transaction that is tax free for federal tax purposes should automatically be treated as exempt under Section 13(c)(1).

H. The Exception for Transfers Required by Law Encompasses Any Involuntary Transfer of a Cable System

Here, again, the breadth of the statutory language ("any sale required by operation of any law") leaves little room for interpretation: Any involuntary transfer ordered or required by a governmental authority or by operation of law is to be exempted from the three-year holding period. This provision is certainly broad enough to cover the examples suggested in the Notice (forced sales, bankruptcy, receivership) and also any other form of involuntary transfer.

---

[54] Id.

I. All Transactions Among Commonly Controlled Entities Should Be Exempt from the Antitrafficking Prohibition and Ignored in Calculating the Three-Year Holding Period

There is substantial legislative history indicating that the exemption in Section 13(c)(3) is intended to exempt "any" transfer among affiliates or entities under common control.[55] This interpretation is, of course, consistent with the legislative focus on short-term profiteering. Transfers among affiliates or entities under common control pose no danger of exploitation through short-term resale for the simple reason that profiteering against oneself (or at one's own expense) is not a likely scenario. Therefore, the Commission's implementing regulations should broadly exempt any otherwise covered "transfer of ownership" among commonly controlled entities.

For the same reason, transfers among commonly controlled entities should not trigger a new three-year holding period. Rather, the holding period should commence running when a system enters a corporate "family," and should be measured only when there is a transfer of ownership to a buyer outside the "family," (i.e., a buyer not under common control with the seller).

J. The Statute Grants the Commission Broad Authority to Waive Section 13 Whenever the Public Interest So Requires

Section 13(d) of the Cable Act authorizes the Commission to waive the three-year holding period. The statute imposes only two limitations on the Commission's exercise of its otherwise

[55] See House Report at 119.

unlimited waiver authority. First, the Commission may grant a waiver only where it finds that doing so is "consistent with the public interest."[56] Second, where the approval of a local franchising authority is a prerequisite to a transfer, the Commission is directed not to waive the three year holding period for that transfer unless the local franchising authority has otherwise approved the transfer. Thus, the statute gives the Commission "general waiver authority."[57]

Congress clearly did not limit the Commission's waiver authority to instances of "default, foreclosure, or other financial distress."[58] Rather, Congress made clear, through the use of mandatory language ("[t]he Commission shall use its authority"), that the Commission is required to use its broad authority in particular circumstances and is also authorized to use that authority in any other circumstances in which it would be in the public interest to do so.

It is logical to expect that Congress would give the Commission broad waiver authority; otherwise the simple but rigid requirement of Section 13(a) may, in particular cases, have serious unintended adverse effects.

---

[56] 47 U.S.C. Sec. 537(d).

[57] Notice at para. 19.

[58] 47 U.S.C. Sec. 537(d).

K. <u>In the Exercise of its Exclusive Jurisdiction to Interpret and Enforce Section 13, the Commission May Rule on a Waiver Request at Any Time</u>

The Commission proposes to interpret Section 13(d) to permit it to grant waivers of Section 13 even though a request for approval of the transfer has not yet been granted by the local franchise authority, so long as the waiver is conditional on the grant of such approval.[59] TCI agrees that the statute authorizes the Commission to grant such conditional waivers and supports the Commission's tentative determination to do so.

L. <u>The Commission's Rules Should Establish and Require Clarity Regarding the Information Required to Support a Request for Approval of a Transfer, So that the 120 Day Approval Period Can Be Clearly Defined</u>

Section 13(e) requires local franchise authorities to act within 120 days on requests for approval of transfers of systems that have been held for the requisite three years, and provides for automatic approval in the absence of timely action on such a request. The 120 day limit runs from the date on which an applicant submits a request for approval "that contains or is accompanied by such information as is required in accordance with Commission regulations."[60]

Read in the light of its legislative history, Section 13(e) contemplates Commission adoption of regulations defining the information that must accompany a request for approval to set the

---

[59] Notice at para. 20.

[60] House Report at 120; Conference Report at 83.

120 day limit running. As the Commission correctly observes in the Notice, the regulations should not require the submission in every case of all information that might be even potentially relevant.[61] Rather, in the interest of avoiding unnecessary regulatory burdens for cable operators and local franchising authorities, the Commission should require only the submission of information sufficient to demonstrate the legal, technical, and financial qualifications of the proposed transferee.[62] Local franchising authorities would, of course, be free to ask for such additional information as they deem necessary (subject to any other applicable legal limits), but the demand for such information must not operate to extend the 120 day period.

A clear and uniformly applicable statement of what is minimally necessary to start the 120 day period is essential to give substance to the Congressional intent expressed in Section 13(e). Absent uniform federal rules, local franchising authorities would be able to defeat the statute simply by defining and redefining their informational requirements so as to argue either that the 120 day period never started or was repeatedly restarted. To avoid this result, the Commission's rules should expressly provide that a local franchising authority's request for information beyond the minimum required by Commission rule to be submitted with a request for approval does not operate to toll or restart the 120-day period.

---

61 Notice at para. 23.

62 See 47 U.S.C. Sec. 546.

VI. PROGRAM DIVERSITY WILL BE SERIOUSLY DIMINISHED IF THE COMMISSION ADOPTS LIMITS ON CABLE OPERATOR PARTICIPATION IN PROGRAM PRODUCTION

Section 11(c), of course, requires the Commission to consider, and not to adopt, rules relating to participation by cable operators in program production. In the Notice, the Commission tentatively concludes that other provisions of the Act, particularly other provisions of Section 11 and Sections 12 and 19, fully address the objectives of the program production provision.[63] TCI supports this conclusion.

As TCI demonstrated above, participation by cable operators in program production, through a variety of investment vehicles, has substantially increased consumer welfare. The Commission has acknowledged this view. There can be no serious doubt that vertical integration by cable operators into programming has greatly increased program diversity. TCI believes such integration does not produce harmful side effects for competition, but to the extent the Commission believes such effects are possible, they are, as the Commission notes, fully addressed by other provisions of the Act.

The attached Besen Paper (p. 4) states that there "is no need for setting limits on" program production by cable operators. The Paper points out that the principal involvement of cable operators in program production has been somewhat indirect, either the consequence of an ownership interest in

---

[63] Notice at para. 60.

program services, or because an entity with ownership interests in program production also has ownership interests in cable systems.

Moreover, the Besen Paper (p. 4) demonstrates that there are circumstances in which program production efficiencies are achieved less easily by contract than by vertical integration. It therefore concludes:

> We see few risks that anticompetitive behavior would be fostered . . . if cable systems were to take part in program production. Preventing the involvement of cable systems in program production, particularly when it is often indirect, is likely to prevent the achievement of efficiencies while offering few, if any, offsetting advantages.

VII. CROSS-OWNERSHIP

Section 11(a)(2) of the Act makes it unlawful for a cable operator to hold an MMDS or SMATV license in any area served by its cable system. TCI believes this provision should be interpreted to permit a cable operator to acquire a SMATV system with the intention of incorporating the SMATV into its overall cable system. The key indicator of such incorporation is that the programming is delivered to the former SMATV subscriber through the cable system, not the SMATV system.

This analysis is supported by the language of Section 11(a)(2) which only prohibits cable operator ownership of MMDS and SMATV "separate and apart from any franchised cable service." Thus, Congress contemplated the use of SMATV technology in conjunction with the cable system. To allow for this possibility, the Commission should recognize that when a cable operator acquires a SMATV system it should be given a reasonable time to incorporate such system into its overall operation. TCI believes that a 90-day transition period is appropriate.

VIII. CONCLUSION

For the foregoing reasons, TCI respectfully recommends that the Commission adopt rules to implement Sections 11 and 13 of the Act consistent with the comments contained herein.

Respectfully submitted,

TELE-COMMUNICATIONS, INC.

Michael H. Hammer

Michael H. Hammer
Philip L. Verveer
Theodore C. Whitehouse
Daniel R. Hunter

Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C., 20036-3384

Its Attorneys

February 9, 1993

RECEIVED

FEB - 9 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

AN ECONOMIC ANALYSIS OF THE FCC'S PROPOSED CABLE OWNERSHIP RESTRICTIONS

Stanley M. Besen
Steven R. Brenner
John R. Woodbury

CHARLES RIVER ASSOCIATES INCORPORATED

February 9, 1993

I. Introduction

The Commission's Notice of Proposed Rule Making and Notice of Inquiry on Horizontal and Vertical Ownership Limitations and Anti-trafficking Provisions solicits comment on three basic issues: (1) the nature of the limits to be placed on the number of cable subscribers that can be served by commonly-owned cable systems ("subscriber limits"); (2) the nature of the limits to be placed on the number of channels on a cable system that can be occupied by program services in which the operator has an ownership interest ("channel occupancy limits"); and (3) whether limits should be placed on the ability of cable systems to engage in video program production. The Commission also seeks comments on the implementation of the anti-trafficking provisions of the Cable Act of 1992. This paper provides an economic analysis of each of these issues.

The first section addresses the effect of the existence of large Multiple System Operators (MSOs) on their ability to exercise market power in their dealings with subscribers, advertisers, and cable program services. We begin by describing the efficiencies that result when there are large MSOs. These include efficiencies both in program acquisition and in planning and developing new technologies and services.

Next, we analyze the concerns that larger MSOs might be able to exercise increased market power in dealings with subscribers and local advertisers. We conclude that there is little basis for such concern because commonly-owned cable systems rarely compete as sellers. We also conclude, for the same reasons, that increased concentration in cable system ownership does not raise the risk that cable operators would collude, overtly or tacitly, as sellers.

We next analyze the possibility that multiple system operators serving more subscribers might exercise market power in their dealings with program services. Although this possibility cannot be dismissed as easily as can the threat that market power might be exercised against subscribers and advertisers, we conclude that there is very little risk that the exercise of monopsony power poses a threat to 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, we favor relatively high limits on the number of cable subscribers that can be served by commonly-owned cable systems. We conclude 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.

Our analysis of the issues involving vertical integration, which are raised by the channel occupancy limits, is more complex.

We begin our analysis by describing the efficiencies that may flow from vertical integration between cable systems and cable program services. These efficiencies clearly must be balanced against any anticompetitive concerns.

We cannot dismiss, as theoretical matter, the possibility that a cable program service that is vertically integrated with a cable operator might be able to use that relationship to disadvantage a rival service. In the context of the cable television industry, however, the set of factual circumstances in which such behavior would be profitable are sufficiently stringent that we cannot regard this as an imminent threat. This is so for several reasons. The cable operator may be unable to damage the rival service because the operator is too small, 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 incurred 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. As a result of the efficiencies generated by vertical integration and the difficulties of engaging in foreclosure, we favor relatively high channel occupancy limits.

Our analysis of whether cable operators should be allowed to engage in program production concludes there is no need for setting limits on such behavior. The principal involvement of cable operators in program production has been somewhat indirect, either the consequence of an ownership interest in program services, or because an entity with ownership interests in program production also has ownership interests in cable systems.

We would not expect to see large scale involvement of program services in program production. There are, however, circumstances in which efficiencies in program production are achieved less easily by contract than by vertical integration. We see few risks that anticompetitive behavior would be fostered in such circumstances if cable systems were to take part in program production. Preventing the involvement of cable systems in program production, particularly when it is often indirect, is likely to prevent the achievement of efficiencies while offering few, if any, offsetting advantages.

Finally, we present several reasons why the Commission should implement the anti-trafficking provisions of the 1992 Cable Act in a liberal manner. We recommend that the Commission minimize the extent to which these 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.

II. Ownership Limits

Section 11 of the new Cable Act requires the Commission to promulgate limits on the number of households any single owner of cable systems can reach. The existence of firms with large shares of a well-defined market, often raises concerns about the exercise of market power. In this section, we analyze whether similar concerns are present in the case of the ownership of cable television systems and whether, therefore, stringent limits should be placed on the number of subscribers (or homes passed) that can be served nationally, or regionally, by cable systems that are under common ownership.[1]

There are four types of transactions in which large MSOs engage that might potentially raise concerns about anticompetitive behavior. First, there are transactions in which cable systems sell their basic, enhanced, and premium services to subscribers. Second, there are transactions in which cable systems sell advertising time in spots that are made available to them by the

---

[1]Our discussion throughout focuses on the number of subscribers served by any cable system because that is one of the key characteristics affecting the kind of behavior described in the text. However, any ownership limit should be based on the number of homes passed rather than the number of subscribers; otherwise, multiple system operators that are approaching a subscriber limit would have incentives to artificially depress the number of subscribers. Because virtually all local franchise authorities require the wiring of the entire franchise area, comparable disincentives would not arise with a limit on homes passed.

national program services. Third, there are transactions in which cable systems acquire the services that they offer to subscribers from the packagers or producers of those services. Finally, there are the transactions in which cable systems hire the labor that performs the technical and administrative functions that they require in order to operate. The first two of these fall under the heading of potential market power as sellers, and are considered together below. We also address the third issue, the potential for cable MSOs to exercise market power as buyers. The final set of transactions clearly raises no issues of anticompetitive behavior and we do not consider it further.

A. Efficiencies from Multiple System Operation

To give some perspective to our analysis, it is important to recognize that size, per se, is no cause for competitive concerns. Firms may choose to grow to a particular size because that permits them to achieve efficiencies that are not available if they operate at a smaller scale. Moreover, firms that are successful because they operate at lower costs or are better able to meet the demands of consumers, frequently grow to a large size. Penalizing such growth and development risks promoting inefficiency by reducing the incentives and opportunity for efficient growth.[2]

[2] Of course, relatively large firms that earned dominant status through efficiencies may engage in anticompetitive strategies to maintain a dominant position. An efficient remedy would be one that is targeted to the firm-specific anticompetitive practices. By contrast, a prophylactic ban on growth would sacrifice the efficiencies that drive that growth.

As the Commission acknowledges in its Notice, significant efficiencies may result when cable systems in different geographic markets are under common ownership. These efficiencies take two basic forms, reduced costs of program acquisition and reduced costs of administration and planning for new technologies, services, or both.

In a previous paper that we submitted in the Commission's program access proceeding, we explained at some length how the costs incurred by a program service can be reduced significantly if it can deal with a single entity that negotiates on behalf of a large number of separate cable systems instead of dealing separately with each system.[3] First, there are savings in contracting costs that result when the service can negotiate with a single purchaser rather than having to reach an agreement with a large number of separate buyers. Second, and perhaps more important, there are lower costs of marketing when a single decision-maker can commit to taking a service for a large number of separate cable systems instead of the service having to obtain commitments from many separate operators. Competition among program services for the right to serve the subscribers of large MSOs results in these cost savings being passed on in the form of

---

[3]S.M. Besen, S.R. Brenner, and J.R. Woodbury, "Exclusivity and Differential Pricing for Cable Program Services," attached to Comments of Tele-Communications, Inc., before the Federal Communications Commission, In the Matter of 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 No 92-265 (January 25, 1993).

lower wholesale prices. This, in turn, may result in lower subscriber rates.

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.

With regard to innovation, large MSOs have historically played a large role in developing new services, encouraging the introduction of services developed by others, and in supporting existing services through periods of financial difficulty. This behavior is consistent with a growing body of evidence that shows that many important advances originate with users rather than suppliers, or involve a substantial contribution by users.[4]

Because many improvements will not be subject to protection under the intellectual property laws, unless users are large enough to appropriate a significant share of the benefits of these advances they will not undertake the necessary innovative activity.[5] Indeed, smaller MSOs are more likely to wait for others to start a "bandwagon" for a new program service or technology. Therefore, one would expect that innovative activity

---

[4]For an excellent study of innovative activity that emphasizes the role of users, see E. von Hippel, The Sources of Innovation, New York: Oxford University Press, 1988.

[5]For service innovations in the cable industry, trade secret protection would also be unavailable.

in the cable industry would be adversely affected if significant limits were placed on cable system ownership.[6]

B. MSOs and the Prices Paid by Subscribers and Advertisers

Measures of ownership concentration have a different meaning for cable television systems than they do for firms in other industries for one very important reason. With very rare exceptions, cable systems serve discrete geographic areas, i.e., they do not compete directly with one another either for subscribers or for local advertising revenues. As a result, one cable system's market power in selling to either advertisers or viewers within any given geographic market is unlikely to be enhanced if the system acquires, or is acquired by, another system serving a different geographic area. Nor for these transactions is the potential for collusive behavior in the industry increased when concentration increases, because cable systems are not direct competitors.

There are two possible exceptions worth noting. First, in theory, a given cable system may encounter a competitive threat from those systems on the edges of its geographic area. However, because there have been so few instances of overbuild competition

---

[6] Clearly, some advances in technology and services will originate with firms that supply the cable industry. However, even in these cases, there will some need for suppliers to coordinate with cable systems and only large MSOs are likely to take on this role. For two recent examples see P. Lambert, "TCI: $200 Million for Channel Explosion," Broadcasting, December 7, 1992, p. 5 and H.A. Jessell, "Time Warner Connects to Long Distance," Broadcasting, December 7, 1992, p. 19.

since cable's infancy, this threat is not likely to warrant a limit on national ownership concentration.

Second, there may be interdependent cable advertising demands across geographically proximate areas. One obvious problem with such a characterization is the implicit assumption that cable advertising is a relevant antitrust market. In fact, it is likely that in most, if not all, cases, the smallest antitrust market consists of the advertising of at least all local broadcast stations. This is certainly suggested by the NAB's reasons for seeking a new must-carry rule before the FCC and Congress: broadcast stations and cable systems compete for many of the same advertisers, and the NAB fears that cable operators will not carry them on their systems. In correctly-defined local advertising markets, the share of cable operators in total advertising revenues is quite small.

Even if the merger of geographically proximate systems posed an anticompetitive threat, however, a national limit on the number of subscribers reached will not (except by chance) target what is likely to be a highly localized problem. Arbitrarily defined regional limits on subscribers -- for example, state-wide limits on subscribership -- are no more relevant than national limits. The appropriate geographic scope of such limits would have to be imposed on a costly case-by-case basis.