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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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AUG 23 1993

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	)	
	)	
Further Notice of Proposed Rule Making	)	

COMMENTS OF TELE-COMMUNICATIONS, INC. ON FURTHER NOTICE

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SUMMARY

The construction of a broadband telecommunications infrastructure has emerged as perhaps the most prominent telecommunications policy goal of the 1990's. The cable industry is well-positioned to contribute substantially to this goal. The Commission should, therefore, use the substantial discretion accorded it by Congress to establish ownership limits that do not create disincentives to continued investment by the cable industry in the development of this broadband infrastructure. Specifically, TCI respectfully submits that the Commission should:

- Adopt a national subscriber limit of 35% or higher of homes passed;
- Adopt a channel occupancy limit no lower than 40%;
  - Exclude minority, local, and regional programming services from calculation of the channel occupancy limit;
  - Grandfather existing carriage relationships from the channel occupancy limit;
  - Use system bandwidth to calculate the channel occupancy limit; and
- Adopt the pro rata attribution scheme for horizontal and vertical limits proposed by TCI in its initial Comments. However, if the Commission uses the broadcast attribution criteria, it should adopt the existing exceptions to those criteria, including the single majority shareholder, debt and non-voting stock, and insulated limited partner exceptions.

As demonstrated herein, these proposals are fully supported by traditional economic analysis, antitrust jurisprudence and scholarship, experience in other industries, and the Commission's own longstanding policy goals.

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COMMENTS OF TELE-COMMUNICATIONS, INC. ON FURTHER NOTICE

Tele-Communications, Inc. ("TCI") hereby files its Comments on the Commission's Further Notice of Proposed Rule Making in the above-captioned proceeding.[1]

INTRODUCTION

The construction of a broadband telecommunications infrastructure has emerged as perhaps the most prominent telecommunications policy goal of the 1990's. The articulation

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[1] Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions, Report and Order and Further Notice of Proposed Rule Making, MM Docket No. 92-264, FCC 93-332 (released July 23, 1993) ("Further Notice").

by the Administration, Congress, and the Commission of the need for such an infrastructure, and its attendant consumer benefits, has been remarkably consistent:

- President Clinton, in his comprehensive policy paper on using technology to build economic strength, stated: "Just as the interstate highway system marked a historical turning point in our commerce, today the 'information superhighway' -- able to move ideas, data, and images around the country and around the world -- is critical to American competitiveness and economic strength. ... Accelerating the introduction of an efficient, high-speed communication network and associated computer systems would have a dramatic impact on every aspect of our lives. But this is possible only if we adopt forward-looking policies that promote the development of new technologies and if we invest in the information infrastructure needed for the 21st Century."[2]

- In a hearing of the House Telecommunications Subcommittee, Chairman Markey said, "We have to move very quickly. It's a matter of national urgency to get this digital technology into every home within the next two to three years, so that the market will be created for the software and hardware companies to get it down to a price that ordinary families can afford."[3]

- Senator Inouye, Chairman of the Senate Telecommunications Subcommittee, recently remarked, "Everyone agrees that this nation needs to promote the growth and development of an enhanced, high-quality, universally available telecommunications network before this decade is out."[4]

- In a recent Cable Act proceeding, the Commission stated, "We agree that cable operators can, and should, contribute to the continued development of an advanced telecommunications infrastructure. Cable operators

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[2] President William J. Clinton and Vice President Albert Gore, Jr., "Technology for America's Economic Growth, A new Direction to Build Economic Strength," February 22, 1993, at 28.

[3] See "Markey Thinking of National Goal for Digital Deployment," Telecommunications Reports, April 5, 1993, at 12.

[4] Jim Sprecht, "Panel Probes Perils, Plusses of New Information Age," Gannett News Service, July 14, 1993.

> have major communications capabilities in place and are rapidly making facilities and services improvements.... [W]e further tentatively conclude that our regulatory requirements for cost-based rates should also be designed to assure that cable operators may fully respond to incentives to provide a modern communications infrastructure...."[5]

Governmental interest in a broadband infrastructure has been echoed in the marketplace. The trade and general press reflect an extraordinary amount of dynamism as companies in the cable, telecommunications, computer, and related industries, separately and in newly formed alliances, forge ahead in the development of a broadband infrastructure.

While TCI recognizes that other industries have valuable contributions to make, it is beyond dispute that the cable industry will play a pivotal role in the ultimate realization of this broadly endorsed policy goal. Over the last two decades, TCI and other cable companies have invested billions of dollars to construct a distribution system that now passes nearly 90 million U.S. homes.[6] This nearly ubiquitous deployment is a principal reason why the cable industry is a key player in the development of the broadband infrastructure. Upgrading cable's existing plant with fiber optics and digital compression is less expensive than alternatives facing other technologies and can be achieved in a relatively short time frame. As described more

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[5] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Cost-of-Service Notice of Proposed Rule Making, MM Docket No. 93-215, FCC 93-353 (released July 16, 1993), at ¶ 9.

[6] Paul Kagan Associates, Inc., estimate for December 31, 1992.

fully below, TCI and other cable companies have already invested considerable capital towards this upgrade.

In TCI's view, it is unfortunate that the 1992 Cable Act requires the Commission to impose ownership limits. Not only is the need for such limits lacking,[7] but the timing is extraordinarily poor. At the very point when the cable industry is poised to contribute substantially to this country's principal telecommunications goal, the Commission is forced to place limitations on the industry's growth. Fortunately, the Commission has the flexibility to establish limits that sensibly reflect the current state of the marketplace.

TCI believes the Commission should use its discretion to establish a channel occupancy limit no lower than 40%.[8]

In addition, TCI continues to believe that a horizontal limit of 40% or higher is fully justified. However, in no event should the Commission adopt a subscriber limit lower than 35% of homes passed nationwide, the high end of the range proposed in the Further Notice. If the Commission adopts TCI's proposals, it will, in the Commission's own words, "encourage cable operators

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[7] See generally Stanley M. Besen, Steven R. Brenner, John R. Woodbury, "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions," February 9, 1993 ("Besen et al."). For purposes of convenience, the Besen analysis is attached to these Comments, as well.

[8] As discussed below, TCI believes that program services that are minority owned or targeted, and local and regional program services, should be exempt from the channel occupancy limit. In addition, the Commission should calculate the channel occupancy limit based on the system bandwidth proposal contained in TCI's initial Comments and described in more detail below.

to continue to invest in the development of new technologies and innovative program services."[9] On the other hand, if lower limits are adopted, TCI believes that the Commission will have created an environment where cable industry investment will be substantially reduced. As a result, the attainment of the nation's infrastructure goals will be, at a minimum, significantly delayed.

Regulations such as those implicated in this proceeding produce hard consequences in terms of investment in the marketplace. Strict limits on horizontal and vertical ownership in the cable industry necessarily will result in reduced investment in technology. As demonstrated in the expert economic analysis prepared by Stanley M. Besen et al. and attached to TCI's initial Comments in this proceeding, large, vertically integrated firms have not only the incentive, but also the capital resources to turn technological concepts into marketplace realities.[10] The Besen analysis concludes that strict ownership limits "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."[11]

For this reason, in recent years, the Commission has sought to avoid imposing structural restrictions. Instead, where

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9 Further Notice at ¶ 183.

10 See Besen et al. at 8-9.

11 Id. at 23-24.

regulation was necessary, it has opted for more narrowly tailored behavioral regulations. For example, in its Computer III proceeding the Commission replaced the structural separation requirements it had imposed on the provision of enhanced services by the RBOCs and AT&T with non-structural safeguards.[12]

In this regard, the Commission already has acknowledged that its regulations implementing other provisions of the 1992 Cable Act, in particular the program access, leased access, and must carry rules, address essentially the same issues that underlie the ownership provisions of the Act.[13] These regulations fully eliminate the need for strict vertical and horizontal restraints.

TCI's proposals reflect the fact that the investments TCI and others are making in the broadband infrastructure are very large and far from risk-free. In weighing whether to make these investments, media companies understand full well that these investments are indeed gambles which hold the promise of creating new services, but whose financial success is also very uncertain. In a recent article, Business Week, while noting that media companies were betting that multimedia would be a profitable business, cautioned that "in the euphoric early days of this revolution, they probably ought to worry about losing their next few billion."[14] In such an uncertain environment, the

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12 See, e.g., Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 3 FCC Rcd 1135, 1136 (1988) (Phase I Further Reconsideration).

13 Further Notice at ¶ 209.

14 "Media Mania," Business Week, July 12, 1993, at 119.

Commission should avoid creating any further disincentives to investment.

TCI's proposals also are consistent with numerous Commission findings that in a dynamic industry, regulations should be tempered so as not to create disincentives for continued growth. For example, the Commission responded to the rapid and highly successful growth of the cellular industry by substantially relaxing its strict cellular rules in order to encourage further technological development and service expansion:

> While these [cellular] standards have served a useful purpose in providing a stable environment for the initial growth of service, these same standards may now stand as an impediment to the development of more spectrum-efficient service capable of accommodating the millions of additional cellular subscribers anticipated in the future.... We believe that this process can be encouraged by providing a mechanism to implement new technology without delay.[15]

This principle of tempering regulations to encourage growth should apply with particular force where, as here, the ultimate goal of such dynamism has been so broadly endorsed and is so clearly in the public interest.

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[15] Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, 3 FCC Rcd 7033, 7034 (1988). See also SMR Report and Order, 3 FCC Rcd 1838, 1847 (1988) (FCC overhauls its strict regulations of the rapidly expanding SMR industry in order to "grant licensees the maximum amount of flexibility to manage their systems, consistent with our regulatory objectives of ensuring efficient use of the spectrum, increasing service options to end users, and fostering a competitive SMR industry").

Moreover, there are persuasive reasons in addition to those relating to the creation of a broadband infrastructure that support TCI's proposals:

SUBSCRIBER LIMIT

- Economic analysis demonstrates that neither the current level of horizontal concentration in the cable industry, nor a moderate increase in that concentration, poses a substantial threat of abuse of market power.

- Antitrust jurisprudence and scholarship conclude that a market share of 35% or higher is insufficient to confer monopoly or monopsony power.

- A subscriber limit of 35% or higher is extremely reasonable when compared to the level of horizontal concentration found in many other industries in which single companies have held market share substantially higher than 50% of a national market.

- An MSO that accounts for 35% or more of cable subscribers would be hard-pressed to preclude the launch and viability of an unaffiliated program service, even assuming it had the motive to do so. This is borne out by the fact that many popular, established program services have been in business for many years with penetration below 60%.

- A horizontal limit of 35% or higher will enable cable operators to respond to market incentives for further growth created by any opportunities to realize further efficiencies and economies of scale, which in turn can yield more efficient service and increased diversity of programming for consumers -- fully satisfying Congressional objectives.

CHANNEL OCCUPANCY LIMIT

- Marketplace facts demonstrate that vertical integration has in no way diminished the ability of unaffiliated program services to obtain carriage on cable systems. In fact, there is a direct correlation between vertical integration

and the substantial program diversity available to consumers today.

- A 40% channel occupancy limit is consistent with analyses undertaken by courts and antitrust scholars. Thus, it is not surprising that since the Supreme Court's seminal decision in Jefferson Parish, no court has held that vertical foreclosure of less than 50% of the market poses anticompetitive concerns.

- The Besen economic analysis concludes that "as a result of the efficiencies generated by vertical integration and the difficulties in engaging in foreclosure, we favor relatively high channel occupancy limits."

- The Commission's previous Cable Act Orders, particularly the Program Access Order, eliminate the need for a vertical limit below 40%.

Finally, TCI notes that the Commission retains jurisdiction over the horizontal and vertical limitations. This allows the Commission to revisit these issues on its own motion or the motion of interested parties. If parties can make a threshold showing that existing levels of concentration result in an abuse of market power, the Commission can consider lowering the limits. Conversely, if parties can make a threshold showing that the limits are so narrowly drawn as to undermine the Commission's other public interest goals, the Commission can consider raising the limits. This flexibility provides an ample safety net for the Commission to adopt the horizontal and vertical limits proposed by TCI in full knowledge that any adjustments that may be necessary can be accomplished in a relatively short time frame.

I. HORIZONTAL (SUBSCRIBER) LIMIT

A. The Commission Should Adopt a National Subscriber Limit of 35% Or Higher of Homes Passed

In the Further Notice, the Commission correctly noted that the legislative history of the 1992 Cable Act makes clear that Congress did not intend the Commission to establish subscriber limits that would require any company to divest itself of any cable systems.[16] Rather, the Commission recognized the need to allow for reasonable MSO growth. TCI agrees with these conclusions and urges the Commission to reiterate them as overriding principles in its final Order in this proceeding.

In the Further Notice, the Commission asked for comment on a subscriber limit in the range of 20%-35% and tentatively proposed a limit of 25% of homes passed. However, the Commission recognized that "there is some indication in the record that a higher limit of 30%-35% would be reasonable to allow for future MSO growth without precluding the launch or success of new programming services."[17] TCI agrees with the Commission's assessment of the record and submits that, in the absence of any showing of abuse of market power, the Commission is compelled to establish the limit at least at the high end of its proposed range. Moreover, TCI believes that such a horizontal limit would, more appropriately than a 25% limit, satisfy the Commission's express desire to establish a limit "high enough to

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16 Further Notice at ¶¶ 147-148.

17 Id. at ¶ 148.

preserve the benefits of horizontal concentration, while ensuring that cable operators cannot impede the flow of video programming."[18]

TCI urges the Commission to adopt a national subscriber limit of 35% or higher. As explained below and in TCI's initial Comments, such a proposal is appropriate for the following reasons:

- There has been no persuasive evidence submitted in this proceeding that establishes a record of abuse of market power by any MSO (any evidence submitted in this regard has been minimal and purely anecdotal). Thus, there is no reason to unreasonably prohibit moderate growth in the industry.

- As described above, the cable industry, along with the computer, telecommunications, and other industries are at a critical juncture in the development of the broadband telecommunications infrastructure that has been identified as the nation's principal telecommunications policy goal. Given the extremely dynamic state of the marketplace, it makes no sense to adopt rules that prohibit moderate growth in an industry that is expected to play a key role in the development of that infrastructure.

- As TCI and other Commenters have pointed out, the 1992 Cable Act and the Commission's implementing regulations already address the same concerns that underlie the ownership regulations. In particular, the program access, leased access,

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18 Id.

must carry, and rate regulation provisions operate to prevent a single MSO from abusing any market power it may have as a result of horizontal ownership. Thus, strict ownership limits would be a classic case of regulatory overkill. The Commission itself has acknowledged this fact.

- The economic analysis prepared by Besen et al. demonstrates conclusively that horizontal ownership in excess of 35% would pose no threat that an MSO could abuse market power to the detriment of consumers or programmers.

- Antitrust analysis likewise counsels that a single firm owning substantially in excess of a 35% share of a market is not cause for concern. In fact, this analysis suggests that horizontal concentration in excess of 50% or more is often not problematic and such percentages of ownership are common in many industries. Of course, the Commission need not rely solely on antitrust principles. However, those principles were developed through the distillation of decades of analysis of issues analogous to those raised in this proceeding and it would be irrational for the Commission not to give them appropriate weight.

- Finally, the Commission retains jurisdiction over the horizontal limit and, should problems arise, it can always revisit the issue. Rather than now establishing an unnecessarily low limit that has the negative consequences for technology and programming growth that have been described in the Comments of TCI and others, the Commission should adopt a limit of 35% or

higher and, after it has had a chance to analyze the impact of that limit on the marketplace, adjust downward or upward as necessary.

B. A Subscriber Limit of 35% Or Higher Is Consistent With Relevant Economic, Legal, and Public Policy Precedent

In its initial Comments, TCI demonstrated that economic, antitrust, and legal analyses, as well as marketplace experience fully justify very high subscriber limits.[19] TCI described how horizontal ownership has resulted in substantial consumer benefits and explained that such ownership is critical to the continued development of cable technology and the realization of a broadband telecommunications infrastructure.[20] The economic analysis prepared by Stanley M. Besen et al. reinforced TCI's view. Among the Besen analysis' principal findings with respect to horizontal concentration were the following:

- Common ownership of cable systems by MSOs leads to significant efficiencies both in the acquisition and marketing of program services, and in the planning and developing of new technologies and services. These efficiencies may be realized directly not only by the cable systems, but also by program services that find dealing with a smaller number of buyers reduces their costs of developing and marketing services. Similarly, larger MSOs also are more likely to participate in the innovation of new program services, a role they have played historically. Efficiencies that lower the costs of cable systems or program services may, in turn, be passed on to consumers in lower rates. A strict horizontal limit risks

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19 TCI Comments at 15-27. See also Besen et al. at 5-22.

20 TCI Comments at 2-10.

loss of additional such efficiencies that could be realized by growth.[21]

- Because commonly owned cable systems rarely compete against each other, increased MSO size will have virtually no effect on concentration in any well-defined antitrust market supplied by cable systems.[22] Consequently, there is virtually no basis for concern that allowing MSOs to be larger would increase their ability to exercise market power in dealings with subscribers and advertisers.[23]

- There is very little risk that large MSOs could exercise monopsony power in their dealings with program services and thereby decrease or restrict the diversity or quantity of programming available to consumers.[24]

- Even if large MSOs could affect the fees they agree to pay individual program services, this bargaining is unlikely to restrict the availability or quality of cable program services. A cable MSO and a particularly popular program can bargain over who captures some of the revenues in excess of cost generated by that popularity without threatening either the viability or the quality of the service. Indeed, a larger MSO will have <u>more</u> incentive to consider how bargaining over fees affects the viability

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21 Besen <u>et</u> <u>al</u>. at 6-9.

22 As Besen <u>et</u> <u>al</u>. note, separate cable systems occasionally have interdependent advertising demands in the same geographic market, but this does not alter the general conclusion. First, it is very likely that a well-defined market also includes at a minimum the time for advertising supplied by broadcast stations, and thus common ownership of some cable systems in an area would have relatively little effect on overall concentration. Second, in any case such issues would be highly localized, and would not be addressed by national (or even general regional) limits on MSO ownership.

23 Besen <u>et</u> <u>al</u>. at 9.

24 <u>Id.</u> at 14-17.

and quality of a program service than would a smaller MSO.[25]

Based on the foregoing findings, Besen et al. concluded 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."[26] Accordingly, they "urge the Commission to adopt a very liberal limit on MSO size."[27]

Alternatively, one reaches the same conclusion if concentration is measured by national ownership shares and judged by usual antitrust standards. Antitrust scholarship and jurisprudence teaches that a market share of 35% or higher does not create a concern that a firm could extract unreasonable concessions from its suppliers or could unfairly restrain competition among distributors of programming -- the very concerns that the Commission has said underlie Section 11.[28] In fact, the antitrust analyses of TCI and other commenters show that a single firm cannot exercise monopoly power with less than

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25 Id. at 17-22.

26 Id. at 2 (emphasis added). This conclusion is consistent with the Commission's own finding in its 1990 Cable Report that the level of national concentration in the cable industry did not warrant regulatory intervention. 1990 Cable Report, MM Docket No. 89-600, 5 FCC Rcd 4962, 5006 (1990); Notice of Proposed Rule Making, MM Docket No. 92-264, FCC 92-542 (released December 28, 1992) at ¶ 35 ("Notice").

27 Besen et al. at 22.

28 TCI Comments at 17-22.

50% of the relevant market.[29] The Supreme Court's most recent enunciation of a standard for market power held that a 30% market share was insufficient to confer market power in a tying case.[30] Lower courts have since followed this rule almost without exception.[31] Moreover, Areeda and Hovenkamp have shown that "there is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power."[32]

Further, a horizontal limit of 35% or higher is extremely reasonable when compared to the horizontal concentration found in other industries which often are well above 50%.[33] For example, in recent years Kodak had an 81% share of the photographic film market, Coca-Cola had a 59.8% share of the fountain soda market, Wrigley had a 71.5% share of the chewing

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29 See, e.g., NCTA Comments at 17; TCI Comments at 19-23; Timer Warner Comments at 21-23.

30 Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 26-29 (1984).

31 See cases cited in I Antitrust Law Developments (Third) (1992), at 151.

32 Areeda and Hovenkamp, Antitrust Law 548-549 (1992 Supp.). The jurisprudence and scholarship with respect to market power in monopsony cases reveal similar conclusions. See, e.g., United States v. Syufy Enterprises, 903 F.2d 659, 663-71 (9th Cir. 1990) (single firm market shares variously calculated at 39%-75% deemed insufficient to confer monopsony power).

33 TCI Comments at 22-23.

gum market, and Gilette had a 64% share of the shaving products market.[34]

In its initial Comments, TCI and others also presented real-world data demonstrating that many program services have flourished at subscriber penetration levels well below 60%.[35] For example, program networks such as Black Entertainment Television, Telemundo, Bravo, and Court TV have had success with penetration levels of 40% or less. Thus, the Commission need not be concerned that a single MSO with a subscriber limit or 35% or higher could "preclude the success of a new cable service."[36]

Finally, TCI urges the Commission to consider two additional factors when fashioning its horizontal limits: 1) The Commission's regulations under other sections of the Act, including rules relating to program access, program carriage agreements, leased access, must carry, and rate regulation are adequate to prevent or redress any potential abuse by a cable operator caused by horizontal concentration;[37] and 2) Quality

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[34] See Arsen J. Darnay, Market Share Reporter 1991, Detroit: Gale Research Inc.

[35] See NCTA Comments at 16; TCI Comments at 24-25; Time Warner Comments at 28-29.

[36] Notice at ¶ 37.

[37] TCI Comments at 10-12, 26; TCI Reply Comments at 4-9. MPAA demonstrates its awareness of the fundamental interdependence among these various regulations by conditioning its support for a 25% subscriber cap on the Commission's adoption of reasonable program access, leased access, and attribution requirements. MPAA Comments at 5. Given that the Commission has already adopted strict regulations in the program access and leased access areas and has tentatively settled on an exacting 5% (continued...)

and diversity of programming are the very essence of cable system growth; because this fundamental characteristic of the cable industry will become even more important with the wide-scale proliferation of fiber-optics and digital compression, cable operators will have no incentive to discourage or preclude program services.[38]

For the foregoing reasons, TCI respectfully submits that a 25% horizontal limit is too low and urges the Commission to adopt, at a minimum, a horizontal limit of 35% or higher.

C. Cable Systems that are Minority Controlled Should Not Be Counted Toward the Horizontal Ownership Limit

The Commission has long recognized the link between minority ownership and program diversity, as well as the importance of promoting minority ownership for its own sake.[39] Both of those goals would be well-served by the Commission's proposed treatment of minority-controlled cable systems for purposes of applying the horizontal ownership limitations.[40]

TCI supports the Commission's proposals and believes that the Commission should not place an artificial ceiling on the exemption of minority-controlled systems from the horizontal

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[37](...continued)
horizontal attribution standard, MPAA's own logic supports the adoption of a horizontal limit above 25%.

[38] TCI Comments at 26.

[39] Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 981 (1978) ("1978 Policy Statement").

[40] Further Notice at ¶ 150.

ownership limit. Instead, it should entirely exempt investments in such systems from operation of the horizontal ownership limits. A wholesale exemption would maximize the number of minority-controlled systems and thereby encourage diversity in both control and programming. It would do this by encouraging MSOs such as TCI to take small percentage interests in a large number of minority-controlled cable systems without fear that the attribution rules will unfairly penalize them for doing so.

D. The Attribution Scheme Proposed in the Further Notice is Unreasonably Restrictive

Although the following discussion of attribution is contained in the section of this filing which addresses a horizontal limit, TCI believes it also is fully applicable to the vertical limit proposed in the Further Notice. TCI will not repeat the discussion in the section of this filing directed at the vertical issues.

1. The Commission Should Adopt the Attribution Method Proposed by TCI in its Initial Comments in this Proceeding

In its Comments in response to the initial Notice in this proceeding, TCI proposed an approach to attribution that would accomplish the purposes of the Cable Act without unduly inhibiting investment in the cable industry.[41] In the Further Notice, the Commission rejected TCI's attribution proposal and instead announced an intention to employ the attribution criteria

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[41] TCI Comments at 12-15.

established for the broadcast multiple ownership rules (47 C.F.R. § 73.3555).[42]

TCI remains of the view that its attribution proposal is more appropriate for the horizontal and vertical ownership limits in the Cable Act than the broadcast limits. The rationales advanced by the Commission for rejecting TCI's proposal do not meaningfully respond to the merits of TCI's proposal. The fact that the Commission has yet to adopt its pending proposal to raise the 10% limit for broadcasting is hardly a reason not to do so (for cable and for broadcasting). Similarly, the possibility of de facto control independent of a given level of stock ownership is not a reason to favor one attribution limit based on stock ownership over another. TCI respectfully urges the Commission to recognize that the conspicuous absence of a good reason for rejecting TCI's proposal warrants a rethinking of this issue and adoption of the proposal advanced by TCI in its earlier Comments.

TCI's proposal reflected, among other things, a practical effort to deal with a phenomenon of growing significance in the cable television industry: joint ventures among cable MSOs, in which two or more MSOs own interests in a cable system or a cable programmer. In such instances, the Commission's proposed attribution rules will unwittingly promote increased concentration. Consider, for example, a cable system that is owned 50% by Cable Operator A and 50% by Cable Operator B. Under

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[42] Further Notice at ¶ 160.

the Commission's proposal, all of the subscribers of this system will be attributed to both Operator A and Operator B. If Operator A decided to sell its interest, Operator B could purchase it without being adversely affected under the Commission's horizontal ownership rules; yet the increase in concentration would be undeniable.

Such perverse results would be avoided if at least in the multiple-MSO ownership context the Commission provided for pro rata attribution. In the above example, Operator A and Operator B would each be initially attributed with 50% of the system's subscribers. Therefore, if Operator A were to purchase Operator B's interest, it would incur an increase in its subscriber base for horizontal ownership purposes that mirrored the actual number of added subscribers. TCI's proposal thus more accurately reflects the actual dispersion of ownership in cable system joint ventures.

2. If the Commission Uses the Broadcast Attribution Criteria, It Should Adopt the Existing Exceptions to Those Criteria

The broadcast attribution criteria include exceptions that help ameliorate the stifling effect on investment that such restrictions entail. To the extent the Commission adopts the broadcast attribution rules for use in the horizontal and vertical cable ownership contexts it should, at a minimum, also adopt the single majority shareholder, insulated limited partner,