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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

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To: The Commission

COMMENTS ON PETITION FOR RECONSIDERATION

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SUMMARY

Viacom owns and operates several satellite-delivered programming services that may be affected significantly by the horizontal ownership and channel occupancy limits the FCC has adopted in its Second Report and Order. In view of the market power currently enjoyed by the largest cable operators, Viacom believes that the FCC's 30% horizontal ownership limit and 40% channel occupancy limit will be insufficient to prevent the largest cable operators from engaging in anticompetitive practices against programming services, particularly those in which they have no ownership interest. Accordingly, for the reasons set forth in these Comments, Viacom partially supports the Petition for Reconsideration filed by the Center for Media Education and the Consumer Federation of America.

Specifically, Viacom requests that the FCC reduce its horizontal ownership limit from 30% to 15%. Whether standing alone or enforced in tandem with other provisions of the 1984 and 1992 Cable Acts, the FCC's 30% limit, which will allow the nation's largest cable operator to actually increase its cable holdings, will not deter powerful cable operators from using their monopoly power in local markets for cable television service as a means of eliminating competition in the national market for programming services. Indeed, the nation's largest cable operator, Tele-Communications, Inc., has not hesitated to exercise its enormous market power exactly in this fashion against Viacom's programming services. Hence, Viacom submits that a reduction of the horizontal ownership limit to 15% is necessary to ensure that TCI and other

very large cable operators that may emerge do not engage in the very practices against programming services which Congress sought to prevent.

Alternatively, Viacom urges the FCC to reduce its channel occupancy limit from 40% to 20% for cable operators who reach at least 15% of all cable homes passed nationwide. Where a vertically integrated cable operator reaches a disproportionately large number of subscribers and has attributable interests in many programming services, the FCC's channel occupancy limits will be effective only if they are able to minimize the anticompetitive conduct that arises from the interplay of horizontal and vertical integration as well as that which arises from vertical integration alone. By reducing its channel occupancy limit as proposed herein, the FCC will safeguard against the potential for certain types of anticompetitive conduct that could arise from the ability of cable systems to reach more than 15% of the homes passed by cable nationwide <u>and</u> use their monopoly positions in local markets to favor their own programming services at the expense of unaffiliated programmers.

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Viacom International Inc. ("Viacom"), by its attorneys, hereby submits its Comments on the Petition for Reconsideration ("Petition") filed by the Center for Media Education and the Consumer Federation of America ("CME/CFA") in the above-captioned proceeding. As the FCC is aware, Viacom owns several satellite-delivered programming services which may be affected significantly by the horizontal ownership and channel occupancy limits the FCC has adopted in its Second Report and Order (MM Docket No. 92-264), ____ FCC Rcd _____, 73 R.R.2d 1401 (1993) ("Second Report and Order").[1] Viacom therefore has a substantial interest in ensuring

[1] Showtime Networks Inc. ("SNI"), a wholly-owned subsidiary of Viacom, owns the premium programming services Showtime, The Movie Channel and FLIX. MTV Networks ("MTVN"), a division of Viacom, owns the advertiser-supported programming services MTV: Music Television ("MTV"), VH-1/Video Hits One ("VH-1") and Nickelodeon (comprising the Nickelodeon and Nick at Nite programming blocks ("Nick")). Viacom also owns Showtime Satellite Networks Inc. ("SSN"), which packages SNI, MTVN and third-party program services for distribution to owners of home television receive-only earth stations nationwide. In addition, Viacom, either directly or indirectly, is affiliated with the advertiser-supported programming services Comedy Central, Lifetime Television and All News Channel, as well as with Prime Sports Northwest, a regional sports service in the Seattle-Tacoma, Washington, area. In addition to its programming interests, Viacom owns cable systems serving a total of approximately 1,100,000 subscribers in five states.

that the FCC's horizontal ownership and channel occupancy limits reduce the economic motivation of vertically integrated cable operators to discriminate against non-affiliated programming services in favor of affiliated programming services, and otherwise deter the anticompetitive practices of the largest cable operators against programming services. For the reasons set forth below, Viacom partially supports the CME/CFA Petition and requests that the FCC (1) reduce its national horizontal ownership limit from 30% to 15%, and (2) reduce its 40% channel occupancy limit to 20% for any cable operator with an attributable interest in cable systems reaching at least 15% of all homes passed nationwide.

I. THE FCC'S 30% HORIZONTAL OWNERSHIP LIMIT WILL NOT PROTECT PROGRAMMING SERVICES AGAINST ANTICOMPETITIVE CONDUCT BY THE LARGEST CABLE OPERATORS.

CME/CFA has asked the FCC to reconsider, inter alia, its decision to permit a single entity to have attributable ownership interests in cable television systems which in the aggregate reach up to 30% of cable homes passed nationwide (the "horizontal ownership limit"). Petition at 2-11.[2] Viacom supports this CME/CFA request and urges the FCC to adopt a national horizontal ownership limit of 15% rather than 30%.

As pointed out by CME/CFA, the legislative history of the Cable Consumer Protection and Competition Act of 1992 (the "1992

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[2] The FCC will permit a cable operator to have attributable interests in cable systems reaching up to 35% of homes passed nationwide where the cable systems passing the additional 5% of homes are "minority-controlled." Second Report and Order at ¶ 28. The FCC will apply its broadcast ownership attribution standards when defining what constitutes an "attributable interest" under its horizontal ownership rules. Id. at ¶ 34.

Cable Act") reflects that Congress viewed horizontal concentration of ownership in the cable industry as a serious, near-term threat to the economic viability of programming services. See Petition at 2-4. For example, Congress surmised that a horizontal ownership level of not even 25% "may be quite significant depending on the subscriber level needed to launch and sustain a programming service." H.R. Rep. No. 102-628 ("House Report"), 102d Cong., 2d. Sess. at 42 (1992). Citing record evidence suggesting that the largest cable operators have excess market power, Congress concluded that "[C]oncerns raised regarding increased vertical and horizontal integration in the cable industry <u>are serious and substantial</u>." Id. at 43 (emphasis added). Congress thus directed the FCC to establish limits on horizontal ownership in the cable industry "[t]o address the issue of national concentration . . . and enhance effective competition." S. Rep. No. 102-92 ("Senate Report"), 102d Cong., 1st Sess. at 34 (1991).[3]

The FCC has responded to Congress's directive by adopting a national horizontal ownership limit of 30% in lieu of the FCC's originally proposed limit of 25%. <u>Second Report and Order</u> at ¶ 25. Citing a "preponderance of the data provided in the record," but without citing specific record evidence, the FCC concluded that a 30% horizontal ownership limit is "generally appropriate" to

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[3] Since the term "effective competition" as used in the quoted language appears in the portion of the Senate Report which discusses horizontal ownership and not rate regulation, Congress clearly intended "effective competition" in this context to refer to enhanced competition in the market for programming services that would necessarily result from the imposition of meaningful limitations on horizontal ownership in the cable industry.

prevent the largest cable operators from engaging in anticompetitive practices against programming services. Id. The FCC also argued that the 30% horizontal ownership limit is sufficient when viewed in tandem with the FCC's channel occupancy limits, the leased access provisions of the 1984 Cable Act, and other behaviorial restrictions set forth in the 1992 Cable Act, i.e., Sections 4 (requiring carriage of certain commercial television stations), 5 (requiring carriage of certain noncommercial television stations), 12 (regulating carriage agreements between programming services and cable operators) and 19 (prohibiting certain anticompetitive practices of vertically integrated cable operators). Id. at ¶ 26. In explaining why it raised the 25% limit it had originally proposed earlier in the proceeding, the FCC relied heavily on Congress's statement that "The legislation does not imply that any existing company must be divested . . . ." Id. at 14, citing Senate Report at 34. Not surprisingly, the FCC's 30% limit would not require any cable system operator to divest any of its cable holdings at this time, and in fact would allow even the nation's largest and most powerful cable operator, Tele-Communications, Inc. ("TCI"), to actually increase its cable holdings.[4]

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[4] The FCC noted that under its horizontal ownership rules TCI would have attributable interests in cable systems reaching 27% of homes passed nationwide. Second Report and Order at 14, n.40.

Viacom respectfully submits that the FCC has not adequately effectuated Congressional intent with respect to horizontal ownership limits, and should reduce its adopted limit from 30% to 15%. There is no evidence in the 1992 Cable Act or its legislative history that Congress intended the FCC to calibrate its horizontal ownership limit in accordance with the perceived but heretofore undemonstrated effectiveness of other sections of the 1984 and 1992 Cable Acts in regulating the anticompetitive practices of the largest cable operators against programming services. Indeed, it is difficult to see how those other sections will have any impact whatsoever on the types of behavior which the FCC's horizontal ownership limit is designed to prevent. For example, there is little or no factual support for the argument that leased access is a viable option for programming services that cannot secure carriage by the largest cable operators on fair and reasonable terms. Further, the fact that a large cable operator may have certain must-carry obligations under the 1992 Cable Act only means that the operator must commit a percentage of its available channels to television broadcast stations. Irrespective of that obligation, the operator may still retain the power to put a programming service out of business if the service cannot compete without meaningful access to the operator's subscribers.

Furthermore, the fact that a large cable operator is prohibited under Section 12 from extracting a financial interest or exclusivity rights in a programming service as a condition of carriage does not address the question of whether the operator,

solely by virtue of the size of its subscriber base, has enough market power to determine whether or not a programming service will reach the number of subscribers it needs to succeed.[5] Indeed, since the prohibitions listed in Section 12 will be applied on a contract-by-contract rather than on an industry-wide basis, and since they address conduct that is largely subjective in nature and thus difficult to prove (e.g., coercion and discrimination), it is unlikely that the FCC's Rules implementing Section 12 will meaningfully deter anticompetitive conduct by the largest cable operators against non-affiliated programming services. In addition, it is not realistic for the FCC to assume that in most cases programming services will bring Section 12 complaints against the largest cable operators, who are their biggest customers and are thus essential to their success.[6] Accordingly, the FCC's

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[5] The FCC's program access rules implementing Section 19 are similarly unavailing, since they regulate, inter alia, the extent to which a vertically integrated cable operator must offer its own programming services to other multichannel video programming distributors. The fact that a vertically integrated cable operator may be required to sell its programming services to other distributors will not address the market condition which motivated Congress to limit horizontal ownership, i.e., a very small number of cable operators controlling access to a disproportionately large number of cable subscribers, with the economic incentive and ability to discriminate against non-affiliated programming services in favor of affiliated programming services.

[6] It is for this very reason that Viacom did not in its prior comments in this proceeding take a position on the FCC's horizontal ownership limits. See Comments of Viacom International Inc., filed February 9, 1993; Further Reply Comments of Viacom International Inc., filed May 12, 1993; Comments of Viacom International Inc., filed August 23, 1993; and Reply Comments of Viacom International Inc., filed September 3, 1993.

horizontal ownership limit is most appropriately viewed as an independent basis for regulating anticompetitive conduct by the largest cable operators against programming services, and must therefore be sufficiently low to prevent that conduct without reference to other sections of the 1984 and 1992 Cable Acts.

The FCC has also drawn too much from the above-quoted language from the Senate Report on the subject of divestiture. Specifically, Congress stated that "The legislation does not imply that any existing company must be divested and gives the FCC the flexibility to determine what limits are reasonable and in the public interest." Senate Report at 34. This language, which does not appear in the sections of the House Report or the House-Senate Conference Report discussing horizontal ownership limits, does not prohibit the FCC from adopting a limit that would require divestiture of existing cable systems. At most, Congress only intended not to require the FCC to impose divestitures if the FCC believes such divestitures would not be in the public interest. Further, Congress clearly did not intend that the divestiture issue be the driving factor in determining whether one level of permitted horizontal ownership will be more effective than another in minimizing anticompetitive conduct. The 1992 Cable Act's legislative history in fact reflects that Congress was concerned primarily with achieving a proper balance between the anticompetitive effects of excess horizontal ownership and the benefits created by economies of scale in the cable industry. See, e.g., Senate Report at 33-34; Second Report and Order at ¶ 25. In

other words, while the divestiture question is relevant to the FCC's analysis, under no circumstances should it override the issue of excess market power where, as demonstrated below, that power seriously threatens the economic viability of programming services which are unaffiliated with the largest cable operators.[7]

It is well settled that a national programming service cannot successfully launch and operate unless it is able to reach a "critical mass" of cable subscribers through which it can generate sufficient advertising revenues and/or subscriber fees. In the case of national advertiser-supported basic programming services such as Viacom's MTV or Nickelodeon, Viacom's experience, confirmed by the experience of other advertiser-supported basic cable networks, has shown that the "critical mass" of subscribers required to succeed is roughly 40 million of the approximately 57 million cable subscribers in the United States. "Pay" services such as Viacom's Showtime and The Movie Channel have extraordinarily high fixed costs and therefore are also heavily dependent on wide distribution by cable operators in order to amortize those fixed

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[7] Since existing levels of horizontal ownership in the cable industry were what motivated Congress to require horizontal ownership limits in the first place, Congress surely did not intend that the FCC adopt a limit -- 30% -- which allows the largest cable operator to not only maintain but to <u>increase</u> its existing ownership of cable systems. Furthermore, allowing a single cable operator to reach up to 30% of all homes passed nationwide would allow a mere <u>three</u> cable operators to reach <u>90%</u> of all homes passed nationwide. Even if only two cable operators took full advantage of the 30% limit, the result would be that two cable operators would control access to <u>60%</u> of the homes passed in the United States, which is hardly the competitive scenario Congress envisioned in requiring the FCC to adopt horizontal ownership limits.

costs. Further, pay services, where carried, also must be marketed aggressively by cable operators through promotion, favorable channel positioning, packaging and retail pricing. The level of horizontal ownership in the cable industry therefore has a direct and substantial impact on the success of national basic or pay programming services: where one cable operator controls access to a sizeable percentage of cable homes nationwide, the success of a programming service depends upon whether that cable operator agrees to carry the service on fair and reasonable terms.

TCI enjoys precisely this sort of power over non-affiliated basic and pay programming services. At the time the FCC adopted the Second Report and Order TCI held attributable interests in cable systems passing approximately 23.8 million homes or 27% of homes passed nationwide in accordance with the FCC's method of calculation. Second Report and Order at 14, n.40. As a result, any decision by TCI not to carry or favorably market a programming service would require that service to be carried by nearly every other cable system in the United States in order for the service to succeed. Even where TCI agrees to carry non-affiliated programming services, its high level of horizontal ownership enables it, among other types of anticompetitive conduct, to drive down the license fees it pays for those services to artificially low levels, which in turn lowers the license fees those services will receive from non-TCI systems who use TCI license fees as their benchmark when negotiating with programmers. Those lower license fees ultimately decrease the amount which programming services are able to spend on

program development, thereby potentially reducing the diversity and quality of programming available to cable subscribers.

Moreover, the market power TCI derives from excessive horizontal ownership is further enhanced by its ownership interests in numerous basic and pay programming services which compete directly with those owned and operated by Viacom and others.[8] The courts have recognized that a vertically integrated company that uses the monopoly power it possesses in one market to achieve competitive advantage in a second market (even in the absence of an attempt to monopolize the second market) can violate the antitrust laws. U.S. v. Griffith, 334 U.S. 100 (1948); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979), cert. denied 444 U.S. 1093 (1980). In the cable television area, that principle has led at least one federal court to hold that a vertically integrated cable operator with monopoly power in the local markets for cable television service where it operates may inflict antitrust injury on non-affiliated pay programming services, even if the operator's overall share of cable subscribers nationwide would be insufficient to constitute market power for purposes of straightforward monopoly analysis under the antitrust laws. Viacom International Inc. v.

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[8] TCI now owns all or part of at least 25 programming services in the United States, including Encore, Starz!, QVC Network, Home Shopping Network, Superstation WTBS, CNN, Headline News, TNT, The Cartoon Channel, The Family Channel, The Discovery Channel, The Learning Channel, Black Entertainment Television, Court TV, Prime Network, Sportschannel America, X*Press Executive and The Box. In addition, TCI and Bertelsmann Music Group recently announced the formation of a joint venture which will launch a nationwide music/home shopping channel.

Time Inc., 785 F.Supp. 371, 376-80 (S.D.N.Y. 1992) ("Time Inc.").[9] The same anticompetitive concerns would be equally applicable where the cable services involved are basic rather than pay networks, since basic networks rely heavily on advertising dollars and thus, like pay networks, cannot succeed without access to a large number of cable viewers.

Hence, regardless of whether the programming service in question is basic or pay, the denial of a programming service's access to a vertically integrated cable operator with excessive horizontal concentration in local markets may prevent that service from reaching the "critical mass" of subscribers that it needs to price its service competitively against a similar service owned by the vertically integrated cable operator. This concept, known as "monopoly leveraging," applies fully to the relationship between the largest cable operators on the one hand, and Viacom and other non-affiliated programmers on the other. That is, even assuming arguendo that the largest cable operators' level of horizontal ownership nationwide would not by itself constitute unlawful market power under the Sherman Act, the fact remains that cable operators

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[9] As discussed at pages 13-14 infra, it is not necessary for the FCC to find a violation of federal antitrust laws before setting a horizontal ownership limit that requires divestiture. The legislative history of the 1992 Cable Act indicates that Congress intended the FCC's horizontal ownership limit to address practices against programming services which hamper competition regardless of whether those practices rise to the level of an antitrust violation. Nonetheless, federal antitrust laws and the cases arising thereunder are a useful reference for identifying the types of anticompetitive conduct arising from excess horizontal concentration and vertical integration and the effects of that conduct in the marketplace.

with excessive market power can obtain an insurmountable advantage over Viacom and other non-affiliated programmers and otherwise put non-affiliated programming services at a competitive disadvantage by denying or conditioning -- on onerous terms -- access to the same "critical mass" of subscribers currently reached by the operators' own programming services.[10] The net result over time will be elimination of the competition and program diversity Congress sought to achieve in directing the FCC to adopt a horizontal ownership limit for the cable industry.

Indeed, the largest cable system operator in the United States, TCI, has not hesitated to exercise its enormous market power against Viacom for the purpose of attempting to drive Viacom's pay programming services out of business and inflicting other forms of antitrust injury. On September 23, 1993, Viacom commenced a civil action in the United States District Court for the Southern District of New York against TCI, TCI's affiliates Liberty Media Corporation, Encore Media Corp. and others. Viacom International Inc. v. Tele-Communications, Inc. et al., 93 Civ. 6658 (LAP) (S.D.N.Y., filed September 23, 1993). As set forth in Viacom's Amended Complaint (filed November 9, 1993), TCI has used its power in the cable system operations market to acquire monopoly

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[10] As an example, TCI's 27% level of horizontal concentration is well in excess of the 10% threshold found to support a "monopoly leveraging" claim under federal antitrust law in Time Inc. The District Court in that case "[could not] dismiss the possibility" that the defendant's monopoly power in local cable markets, which arguably accounted for less than 10% of all cable subscribers nationwide, had contributed to the entrenchment of the defendant's market power in the national market for pay programming services. Time Inc., 785 F.Supp. at 379.

power in the pay programming services market, and has withheld an affiliation agreement to carry SNI's programming services as a means of (a) lowering the value of SNI and forcing SNI to enter into a merger with TCI's pay movie service Encore on terms favorable to Encore, and (b) eliminating or weakening SNI as a competitor of Encore in the pay programming services market. Further, as part of its systematic campaign to drop Viacom's pay service The Movie Channel in favor of Encore or TCI's new pay movie service Starz!, TCI, as of September 22, 1993, had deleted The Movie Channel from at least 28 TCI systems, and TCI and local management at TCI's cable systems have informed SNI of plans to drop The Movie Channel from at least 27 other TCI systems.

Viacom thus strongly urges the FCC to adopt a maximum national horizontal ownership limit of 15% in lieu of the 30% limit adopted in the Second Report and Order. While Viacom recognizes that there will always be some imprecision in setting an appropriate horizontal ownership limit for an industry as large as cable television, it is evident from Viacom's experience with TCI that a 30% limit will not deter large cable operators with excessive horizontal concentration, such as TCI, from engaging in the very practices against programming services which Congress sought to prevent. In fact, since the 30% limit will allow TCI to increase its cable holdings, there is every reason to expect that, absent a reduction of the limit to 15%, TCI will continue to inflict antitrust injury on Viacom and other non-affiliated programmers

even more vigorously than before.[11] Further, while a 15% limit would require some divestitures of TCI systems, those divestitures would not be prohibited by the 1992 Cable Act and do not need to be justified with a finding of an antitrust violation by TCI against Viacom or any other non-affiliated programmer. In this regard, Congress emphasized that:

> [T]raditional antitrust analysis has not been, and should not be, the sole measure of concentration in media industries. Both Congress and the Commission have historically recognized that diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are substantially below those that a traditional antitrust analysis would support.

House Report at 42. Hence, regardless of whether TCI's above-described market position raises antitrust concerns - - and Viacom emphasizes that it does - - there is ample evidence that, unless TCI's level of horizontal ownership is curtailed, Viacom and other non-affiliated programming services will continue to be at TCI's mercy when negotiating for carriage on TCI's systems, and will be forced to compete at an irremediable disadvantage against TCI's own

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[11] After the FCC adopted the 30% horizontal ownership limit on September 23, 1993, TCI announced a proposed merger between Bell Atlantic, TCI and TCI's affiliate Liberty Media Corporation ("Liberty"). If effectuated, the proposed merger will produce a combined entity with the potential to reach many more homes passed than currently reached by TCI alone. Since Congress did not have an opportunity to consider the potential anticompetitive effects of the proposed Bell Atlantic/TCI/Liberty merger when it enacted the 1992 Cable Act, and since the FCC similarly did not have an opportunity to consider the proposed merger prior to its adoption of its 30% horizontal ownership limit, Viacom submits that the proposed Bell Atlantic/TCI/Liberty merger is a further factor warranting a substantial reduction of the 30% limit in order to protect programming services against anticompetitive practices by the largest cable operators.

programming services for access to the necessary "critical mass" of cable subscribers.[12]

II. THE FCC SHOULD REDUCE ITS CHANNEL OCCUPANCY LIMIT TO 20% FOR CABLE OPERATORS WHOSE LEVEL OF HORIZONTAL OWNERSHIP IS EQUAL TO OR GREATER THAN 15%.

CME/CFA has also asked the FCC to reconsider its 40% "channel occupancy" or "vertical integration" limit which prohibits a cable operator from devoting more than 40% of its activated channels to programming services in which it holds an attributable interest. Second Report and Order at ¶ 68.[13] In particular, CME/CFA has recommended that the FCC adopt a vertical integration limit of 20%. Petition at 14. For the reasons set forth below, if the FCC does not adopt the 15% horizontal ownership limit proposed above, Viacom partially supports CME/CFA's request for reconsideration of the 40% limit -- but only with respect to those cable operators whose level of horizontal ownership is equal to or greater than 15%, and asks that the FCC adopt a 20% channel occupancy limit in those

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[12] Viacom also submits that an entity such as TCI should not be permitted to expand its ownership of cable systems above the horizontal ownership limit through the "minority-controlled" exemption set forth in the Second Report and Order. See note 2, supra. Given TCI's substantial history of anticompetitive conduct against Viacom and others, there is no reason to expect that TCI will not hesitate to wield its enormous market power against non-affiliated programming services even where it holds interests in a nominally "minority-controlled" cable system.

[13] The FCC will allow carriage of vertically integrated video programming services on two additional channels or up to 45% of a cable system's channel capacity, whichever is greater, provided such additional video programming services are "minority-controlled." Second Report and Order at ¶ 71. As under the FCC's horizontal ownership rules, the FCC will define an "attributable interest" for purposes of the channel occupancy limit by reference to the broadcast attribution rules. Id. at ¶ 61.

situations.[14]

Like the FCC's horizontal ownership limit, the FCC's channel occupancy limit is designed to ensure that the largest cable operators do not unfairly deny programming services access to the "critical mass" of subscribers that they need to succeed. Whereas the horizontal ownership limit is designed to achieve this objective by limiting the number of subscribers which a single cable operator may serve, the channel occupancy limit is designed to achieve the same objective by limiting the number of channels a vertically integrated cable operator may devote to its own programming services, irrespective of its level of horizontal ownership. As set forth in the Second Report and Order, the FCC's horizontal ownership and channel occupancy limits will be enforced independently of one another: a single cable operator may reach up to 30% of all homes passed and devote up to 40% of its channels to its own programming services.

TCI's above-described anticompetitive practices against Viacom (see page 12-13, supra) and its overall market power militate strongly in favor of reduced channel occupancy limits for cable operators reaching at least 15% of all cable homes passed. Where a vertically integrated cable operator reaches a disproportionately

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[14] Viacom has supported a more liberal channel occupancy limit in its earlier comments in this proceeding. See, e.g., Comments of Viacom International Inc., MM Docket No. 92-264, filed August 23, 1993. Viacom still supports that more liberal channel occupancy limit as set forth in its earlier filings in this proceeding, except for cable operators with at least 15% horizontal concentration, which enables such operators to engage in monopoly leveraging. See pp. 10-12, supra.

large number of subscribers and has attributable interests in many programming services, the FCC's channel occupancy limits will be effective only if they are able to regulate the anticompetitive conduct that arises from the interplay of horizontal and vertical integration as well as that which arises from vertical integration standing alone. For example, TCI's cable systems already reach enough subscribers to make or break a programming service. Under the "monopoly leveraging" theory described above, TCI is able -- because of its excessive horizontal concentration of cable system ownership nationwide -- to compound its market power in non-competitive local markets by denying carriage to a programming service in favor of one of its own programming services, thus inflicting antitrust injury that greatly diminishes the competitive standing of non-affiliated programming services. At the same time, TCI is able to greatly enhance the competitive position of its own affiliated programming services by assuring them a significant subscriber base and thereby enabling those services, because of their assured subscriber base, to undercut the license fees unaffiliated programming services charge to non-TCI systems. The net result is that TCI has the best of both worlds: it is permitted to control access to a "critical mass" of subscribers <u>and</u> use that access to eliminate or severely impair competition to its own affiliated programming services, ultimately to the detriment of cable subscribers.

Thus, if the Commission does not adopt the 15% national ownership limit proposed above, Viacom strongly recommends that the

FCC retain its 40% channel occupancy limit only for those cable system operators who reach fewer than 15% of homes passed nationwide. For cable system operators who reach at least 15% of homes passed nationwide, Viacom recommends that the FCC reduce its channel occupancy limit from 40% to 20%.[15] By amending its rules in this manner, even if the FCC does not adopt the horizontal ownership limit proposed by Viacom above, the FCC will safeguard against the potential for certain types of anticompetitive conduct that could arise from the ability of cable systems to reach at least 15% of the homes passed by cable nationwide and use their monopoly positions in local markets to favor their own programming services at the expense of unaffiliated programmers.[16] At the same

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[15] As recognized in the Second Report and Order, the United States District Court for the District of Columbia recently held that the horizontal ownership limits mandated by Congress in the 1992 Cable Act are unconstitutional. Daniels Cablevision v. United States, 835 F.Supp 1 (D.D.C. 1993). The FCC has thus stayed the effective date of its horizontal ownership rules pending the appeal of the District Court's decision. Second Report and Order at para. 3. The FCC's stay provides further justification for reducing the channel occupancy limits applicable to cable operators passing at least 15% of all cable homes, since the stay (which will be permanent if Daniels is not reversed) in effect means that those operators will be subject only to a 40% channel occupancy limit and no horizontal ownership limits, a state of affairs which will only aggravate the very same market conditions which produce the above-described anticompetitive practices against programming services.

[16] In its earlier comments in this proceeding, Viacom noted that the FCC's channel occupancy limits should not preclude a cable operator from carrying a widely carried program service merely because it also owns the service. Accordingly, Viacom proposed that any program service that is carried by cable systems not under common ownership with the programmer and is available to more than 50% of subscribers nationwide (excluding subscribers to commonly-owned systems) should not be counted toward the channel occupancy limits. See, e.g., Comments of Viacom International Inc. filed February 9, 1993, at 4-6. Though the FCC did not adopt Viacom's proposal, Viacom continues to believe that an exemption from the

time, cable operators without significant horizontal concentration would have more opportunity to reap the economic benefits attendant to carriage of their own affiliated programming services with little possibility of anticompetitive consequences.[17]

III. CONCLUSION

Viacom's recent dealings (as well as those of other non-affiliated programmers) with TCI, particularly when viewed in the context of the proposed Bell Atlantic/TCI/Liberty merger, strongly suggest that the FCC should reconsider its horizontal ownership and channel occupancy limits set forth in the Second Report and Order.

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channel occupancy limits for widely carried programming services is appropriate.

[17] The need for more stringent application of horizontal ownership and channel occupancy limits is especially compelling in situations where the vertically integrated cable operator also controls the technological "bottlenecks" through which a programming service must pass in order to reach cable subscribers. As alleged in Viacom's above-referenced Amended Complaint, TCI has entered into an agreement with General Instrument Corporation ("GI") under which TCI has licensed GI's digital compression and encryption technology for delivery of programming to TCI's subscribers. Several other large cable operators have followed suit and entered into similar agreements with GI. GI also gave TCI a license to build the TCI Authorization Center, which will employ GI's digital compression and encryption technology for the purpose of controlling cable subscriber access to programming through the Center's addressable technology. The TCI Authorization Center could serve not only TCI's subscribers but the subscribers of the other large cable operators who have agreed to purchase GI's digital compression technology. Since GI's digital compression system will not work with descramblers developed by other manufacturers, and since GI's encryption process will not accommodate multiple authorization centers, Viacom must either agree to use the TCI Authorization Center entirely on TCI's terms, which requires the use of closed transmission technology, or risk losing access to TCI's subscribers -- the largest and most critical subscriber base. See Amended Complaint of Viacom at ¶¶ 95-118, Viacom International Inc. v. Tele-Communications Inc. et al., 93 Civ. 6658 (LAP).

Standing alone, the 30% horizontal ownership limit is too high to prevent TCI from continuing to engage in anticompetitive practices against programming services, and thus should be reduced to 15% notwithstanding the possibility of divestiture. Further, in the absence of a reduction of the horizontal limit, enforcement of the channel occupancy limits without reference to horizontal ownership will not safeguard programming services against the types of anticompetitive behavior which each limit individually is supposed to prevent. Thus, if the FCC does not adopt Viacom's proposed 15% horizontal ownership limit, Viacom urges the FCC to reduce its channel occupancy limit to 20% for any cable operator who reaches 15% or more of homes passed nationwide.

Respectfully submitted,

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February 14, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments on Petition for Reconsideration was served on the below listed individuals by first-class mail, postage prepaid, this 14th day of February, 1994:

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