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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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	)	
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	)	

OPPOSITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P. TO CENTER FOR MEDIA EDUCATION AND CONSUMER FEDERATION OF AMERICA'S PETITION FOR RECONSIDERATION

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SUMMARY

The subscriber limits and channel occupancy limits established by the Commission are already set at the lowest levels needed to preserve the substantial efficiencies and benefits achieved through consolidation and vertical integration, as Congress directed. They should not be set at lower levels.

With regard to the subscriber limits, the Commission determined that a limit of thirty percent of homes passed would act in conjunction with other provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") to ensure diversity. The Commission considered Congressional intent and the evidence in the record and determined that a thirty percent limit would address concerns regarding market power while preserving the efficiencies achieved through consolidation in the cable industry. Moreover, petitioner's approach that telephone customers should be included in the cable subscriber limit lacks any support in the 1992 Cable Act, the legislative history or the record and should be rejected.

With regard to channel occupancy limits, the forty percent limit calculated on the basis of all activated

channels is the minimum level needed to preserve the benefits of vertical integration. The Commission determined that PEG, leased access and broadcast channels, in conjunction with the forty percent channel occupancy limit, would ensure a diversity of programming sources. In addition, the 75 channel threshold beyond which the limits will no longer apply is essential to the continuing development of innovative cable technology. The Commission's decision to grandfather existing vertically integrated relationships was required in order to prevent subscriber confusion and to minimize disruption to subscriber service and existing carriage agreements. Finally, adopting more stringent attribution standards would jeopardize the benefits of vertical integration that Congress sought to preserve by creating additional disincentives to investment in new programming.

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OPPOSITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P., TO CENTER FOR MEDIA EDUCATION AND CONSUMER FEDERATION OF AMERICA'S PETITION FOR RECONSIDERATION

Time Warner Entertainment Company, L.P. ("TWE"), by its attorneys, and pursuant to Section 1.429(f) of the Commission's rules, respectfully submits this Opposition to the Center for Media Education and the Consumer Federation of America's ("CME/CFA") Petition for Reconsideration of the Commission's Second Report and Order 1/ in this proceeding. As we show below, CME/CFA's one-sided, indeed punitive, approach would have the Commission disregard its congressional charter to preserve the benefits of horizontal and vertical relationships in its regulations and would further constrain cable operators' ability to make

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1/ Second Report and Order, MM Docket No. 92-264, FCC 93-456 (adopted September 23, 1993; released October 22, 1993) ("Second Report and Order").

investments in new programming that both Congress and the Commission have regarded as desirable.

I. SUBSCRIBER LIMITS

A. The Commission's Subscriber Limit of Thirty Percent of Homes Passed Is the Minimum Level Needed to Preserve the Benefits of Horizontal Integration.

As added by Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Section 613(f)(1)(A) of the Communications Act of 1934, 47 U.S.C. § 533(f)(1)(A), directs the Commission to establish "reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest". In its Second Report and Order, the Commission adopted a subscriber limit "prohibiting any one entity from having an attributable interest in cable systems that in the aggregate reach more than 30% of cable homes passed nationwide". Second Report and Order ¶ 25. Petitioner argues that the subscriber limit adopted by the Commission is too high to adequately address Congressional concerns regarding diversity and existing levels of MSO market power. 2/ In this connection, CME/CFA advocates a limit in the range of 10 to 20%.

Petitioner simply ignores the Congressional mandate that the Commission must ensure that its regulations "account for any efficiencies and other benefits" gained through increased growth and do not "impair the development of diverse and high quality video programming". 47 U.S.C. § 533(f)(2)(D), (G). There can be no dispute that consolidation in the cable industry has brought immense benefits to consumers and to industry participants. As the

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2/ TWE challenged Section 11(c) and various other provisions of the 1992 Cable Act and the Cable Communications Policy Act of 1984 ("1984 Cable Act") in the United States District Court for the District of Columbia. Time Warner Entertainment Company, L.P. v. FCC, 835 F. Supp. 1 (D.D.C. September 16, 1993.) In its decision, the District Court held that the channel occupancy limits were constitutional but that the subscriber limits were not. TWE appealed the decision of the District Court declaring constitutional the provisions of § 11(c) regarding channel occupancy limits and program creation and other provisions of the 1992 Cable Act and the 1984 Cable Act to the United States Court of Appeals for the District of Columbia. Time Warner Entertainment Company, L.P. v. FCC, No. 93-5349 (D.C. Cir. filed November 12, 1993). In the Second Report and Order, the Commission stayed the effective date of the subscriber limit regulations "until final judicial resolution of the District Court's decision". Second Report and Order ¶ 3 and n.5. In addition, TWE filed a Petition for Review in the United States Court of Appeals for the District of Columbia of the Commission's regulations that implement Section 11(c) based on the unconstitutionality of the underlying enabling legislation. See Time Warner Entertainment Company, L.P. v. FCC, No. 94-1035 (D.C. Cir. filed January 14, 1994). TWE submits this opposition without prejudice to its claims and arguments in those or any related proceedings.

Commission itself found in its 1990 Report to Congress, Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962 (1990) ("1990 Cable Report"):

> "Higher concentration levels in the cable industry have enabled companies to take advantage of valuable economies of scale and foster investment in more and better program sources, which lead to more investment in programming, more original programming and a wealth of new viewing options for consumers". (1990 Cable Report ¶ 82)

In addition, Congress itself found that "the growth of MSOs in the cable industry has produced some efficiencies in administration, distribution, and procurement of programming", that "programmers' transaction costs also may have been reduced in the absence of the need for negotiation with each of thousands of local cable systems throughout the country" and that "large MSOs" are "able to take risks that a small operator would not" and "can provide a sufficient number of subscribers to encourage new programming entry". House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. 43 (1992) ("House Report").

The Commission established the 30% limit with these conflicting concerns in mind and sought "to balance [the] two competing concerns raised by Congress". Second Report and Order ¶ 25. The Commission based its determination "on the preponderance of the data provided in the record". Second Report and Order ¶ 25. Petitioner offers no empirical evidence to justify a limit lower than 30%. Indeed, the 30% level adopted by the Commission is at the low end of the range suggested by most commenters.

Petitioner's contention that the subscriber limit of 30% of homes passed is insufficient to ensure diversity is without merit. As the Commission correctly observed, the 30% limit will act in conjunction with Sections 12 and 19 of the 1992 Cable Act, Sections 4 and 5 of the 1992 Cable, Section 612 of the 1984 Act, and the channel occupancy limits. Second Report and Order ¶ 26. Rather than viewing the subscriber limit provision as an isolated measure, the Commission determined that the "cumulative effect of these regulations coupled with a horizontal ownership limit of 30%" would appropriately address diversity concerns without thwarting the substantial benefits gained through increased ownership. Id. 3/

3/ Petitioner's assertion that national ownership limits for television stations are substantially lower than 30% disregards the fact that television broadcasters can now have as much as a 25% share of national television households--a group much larger than cable homes--and, in addition, can reach up to 10% of the nation's cable subscribers in areas they do not reach by their broadcast. See In re Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, MM Docket No. 82-434, 8 FCC Rcd 1184 (1993). Permitting such a "reach" for broadcasters, which is much larger than 30% of cable homes

Petitioner's argument that existing levels of market power justify a lower limit is equally unavailing. The Commission requested data concerning the percentage of homes passed necessary for a single MSO to "preclude the success of a new cable service". In re 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, MM Docket 92-264, 8 F.C.C. Rcd. 210 (adopted December 10, 1992; released December 28, 1992) ("NPRM") ¶ 37. The Commission received an abundance of empirical data from commenters, but no commenter identified such a percentage, and there is nothing in the record to support a finding that any particular percentage of subscribers is necessary for success. On the contrary, as TWE noted at length in its initial Comments, the success of a given programming service does not depend on its attaining any particular level of subscriber penetration. See TWE I at 25-29 4/ (noting specific examples of programming

passed, supports the Commission's 30% subscriber limit for cable operators.

4/ Comments dated February 9, 1993 and Reply Comments dated May 12, 1993 that were submitted in response to the Commission's initial NPRM are indicated by the submitter's name and the designation "I". Comments dated August 23, 1993 and Reply Comments dated September 3, 1993 that were submitted in response to the FNPRM are indicated by the services, such as BET and Country Music Television, that have been in operation for years with penetration levels well below 60% to 70%). Petitioner, in contrast, offers no evidence to justify its proposed 10% to 20% subscriber limit. Indeed, setting the limit any lower than the 30% homes passed limit adopted by the Commission would seriously impair the substantial benefits achieved through consolidation in the cable industry, in contravention of Congress's explicit directive.

B. The Commission Established the Thirty Percent Subscriber Limit By Considering Congressional Intent and the Evidence in the Record.

In addition, petitioner argues that the 30% subscriber limit was established merely to avoid divestiture. Based on the legislative history and "the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse effect on diversity", the Commission determined that disruption of existing arrangements should not be required. Second Report and Order ¶ 27. The legislative history states that the "legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what

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submitter's name and the designation "II".

limits are reasonable and in the public interest". 5/ As the Commission noted, it "considered a number of factors" 6/ including this clear indication of Congressional intent. Id. Unlike petitioner's one-sided approach, the Commission sought to "balance the concerns expressed about concentration with the efficiencies gained by greater integration". Senate Report at 34.

C. The Commission Determined That A Thirty Percent Limit Would Address Concerns Regarding Possible Market Power While Preserving the Efficiencies Achieved Through Consolidation in the Cable Industry.

Petitioner next asserts that the 30% limit set by the Commission is too high because the largest MSO, Tele-Communications, Inc. ("TCI"), with less than 30% of all homes passed, is able to impede the flow of video programming to consumers. Relying on allegations in lawsuits and citing to selective portions of the legislative history, petitioner requests that the Commission act on the basis of unproven facts and ignore both the competing concerns of Congress and the facts in the record before it.

Although the legislative history expresses concern with the alleged market power of MSO's, it also states that

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5/ S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991) ("Senate Report").

6/ For example, the Commission received evidence that antitrust analysis and empirical data supported a 30% to 40% limit. See, e.g., TWE I at 21-29.

factors such as the cable operator's incentive "to put on programming that increases subscribership and decreases churn" act to "counterbalance" concerns "regarding the market power of the cable operator vis-a-vis the programmer". Senate Report at 24. Moreover, in this proceeding the Commission did not receive any comments from unaffiliated programmers complaining about discrimination based on affiliation. There was nothing in the record to justify setting a subscriber limit below 30%.

D. Telephone Customers Should Not Be Included in the Cable Subscriber Limit.

In the event that a cable operator and telephone company merge, petitioner seeks to count telephone customers in the cable subscriber limit. This proposition has no support in the legislative history or the 1992 Cable Act. Petitioner reasons that telephone customers served by a telephone company that is affiliated with a cable operator should be included in the subscriber limit solely on the basis that such customers have strong 'potential' to become cable subscribers. This approach makes no sense--it would in effect punish telephone companies for making investments in the cable field, and would therefore be fundamentally at odds with policies favoring development of "two wires" into the home. Petitioner's approach lacks any support in the record, is wholly speculative and should be rejected. 7/

II. CHANNEL OCCUPANCY LIMITS

A. The Forty Percent Channel Occupancy Limit Calculated on the Basis of All Activated Channels Is the Minimum Level Needed to Preserve the Benefits of Vertical Integration.

As amended by Section 11(c) of the 1992 Cable Act, § 613(f)(1)(B) of the Communications Act of 1934, 47 U.S.C. § 533(f)(1)(B), directs the Commission to establish "reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest". The Commission concluded that "a 40% limit on the number of channels that can be occupied by affiliated video programming services is reasonable to serve Congress' competing objectives", Second Report and Order ¶ 68, and TWE stresses that 40% is the minimum necessary to preserve the benefits of vertical integration. In addition, the Commission concluded that the calculation of channel capacity with regard to the channel occupancy limits should take into account all activated channels. Id. at ¶ 54.

7/ It should be noted that although (as petitioner points out) Bell Atlantic and TCI announced their intention to merge after the Commission adopted its regulations, it was announced well before that date that US West was going to make a significant investment in TWE.

Petitioner asserts that the Commission should adopt a 20% channel occupancy limit calculated on the basis of activated channels less any PEG, leased access and broadcast channels. Citing to the comments of the Motion Picture Association of America ("the MPAA"), which proposed a 20% limit in conjunction with a 15% attribution standard, 8/ petitioner contends that the MPAA's use of hypothetical TCI cable systems was evidence ignored by the Commission. But, as petitioner acknowledges, the Commission addressed the MPAA's assertion and found that the 40% channel occupancy limit combined with the availability of leased access, popular unaffiliated programming services, and PEG and must carry channels would amply ensure diversity. Nonetheless, petitioner contends that PEG, must carry and leased access are not substitutes for channel occupancy limits because must carry is only available to local broadcast stations and leased access has "very limited capacity". 9/

8/ MPAA II at 7.

9/ In addition, it should be noted that the MPAA's examples suppose that an operator will mechanically prefer services in which it has an attributable interest. Cable operators, however, are not free to ignore subscriber preferences, and in fact no single operator has an interest in more than 9 of the 20 most popular services. See NCTA, Cable Television Developments at 16-A-17-A (May 1993).

First, Congress's objective of ensuring diversity focused on the concern that there be a diversity of programming sources. PEG, leased access and broadcast programming are "diverse" programming sources just as unaffiliated programmers would be. Second, Section 612(b)(1) of the 1984 Cable Act, which requires a cable operator to devote up to 15% of its total channel capacity for "commercial use by persons unaffiliated with the operator", 47 U.S.C. § 532 (b)(1), clearly offers ample carriage opportunities to unaffiliated programmers; leased access opportunities cannot fairly be characterized as "very limited". Petitioner's complaint that PEG channels can be used only by government, educational institutions and members of the public is simply absurd, for all such sources of programming are diverse as against the cable operator.

Moreover, petitioner asserts that the Commission failed to implement a comprehensive regulatory scheme as required by the 1992 Cable Act. The Commission, however, was regarding the regulatory framework of the 1992 Cable Act as a whole 10/ and sought to ensure that its regulations

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10/ The Commission specifically noted the interaction of the various provisions of the 1992 Cable Act, including Sections 12 and 19, which the Commission concluded were aimed primarily at anti-competitive behavior, and the must carry, leased access and PEG requirements, which the Commission concluded would also ensure diversity. Second Report and Order ¶ 70. Because of this interaction, the comported with the Congressional mandates that its regulations "account for any efficiencies and other benefits" gained through vertical integration and would not "impair the development of diverse and high quality video programming". 47 U.S.C. § 533(f)(2)(D), (G). The Commission has found that vertical integration between cable operators and cable programmers "produces significant benefits for cable subscribers" by, for example, "providing financial support for faltering program services", thus contribut[ing] to program diversity" (1990 Cable Report ¶¶ 82-83); "promot[ing] the introduction of new services into the increasingly competitive programming services market" (id. ¶ 84); "providing needed capital and a ready subscriber base" for new services and facilitating efficient communications between programmers and program distributors concerning such crucial matters as "viewer taste, reaction to programs and desire for new programs" (id.); reducing "transaction costs normally incurred in acquiring programming" (id.); and "enabl[ing] cable operators to improve the quality of existing program services" (id. ¶ 85). In addition, Congress assembled substantial quantities of evidence that "vertical relationships strongly

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Commission determined that the channel occupancy limits "need not be unduly restrictive". Id.

promote diversity and make the creation of innovative, and risky programming services possible", and it identified C-SPAN, CNN, Black Entertainment Television, Nickelodeon and the Discovery Channel as "examples of innovative programming services that would not have been feasible without the financial support of cable system operators". House Report at 41, discussing Congressional testimony. To set the limit at a level below 40% would jeopardize these benefits of vertical integration, contrary to Congress's directive.

Petitioner argues that PEG, must carry and leased access channels should be subtracted from the base against which the channel occupancy limits apply. 11/ As the Commission determined, PEG, leased access and broadcast channels provide alternative sources of unaffiliated programming to subscribers. Second Report and Order ¶ 54. The Senate Report's suggested approach does not constrain the Commission's flexibility to adopt "reasonable" channel occupancy limit as required by the 1992 Cable Act itself.

11/ In a similar vein, petitioner argues that local and regional services should not be excepted from the limits because doing so weakens the regulations "as a tool for curbing vertical integration". Petitioner, however, again fails to acknowledge that both Congress and the Commission recognized the substantial benefits achieved through vertical integration, and neither sought to curb it. Moreover, petitioner ignores Section 2(a)(10) of the 1992 Cable Act which provides that "a primary objective" of federal regulation is "the local origination of programming".

This is particularly so in view of the fact that under the must carry, PEG and leased access regimes operators have already lost the ability to select the programming that will appear on a substantial portion--in TWE's case, an average estimated at over 30% and in some cases up to 50%--of their channel capacity. In further support of applying the limit against all activated channels, it should be noted that all commenters, except the Local Governments, strongly supported this approach, <u>see</u> TWE Reply I at 26; TWE Reply II at 14, n.6, and indeed it is indispensable to preserving the benefits of vertical integration.

Further, petitioner contends that the Commission has overestimated the benefits of vertical integration. Petitioner asserts that services such as CNN, BET and Nickelodeon became successful prior to their affiliation with cable operators. The 1988 study performed by the National Telecommunications and Information Administration, however, found that vertical integration confers significant benefits upon consumers by "expand[ing] the supply of cable programming, thus expanding the diversity of viewing choices for subscribers" and by significantly reducing transaction costs. U.S. Dep't of Commerce, <u>Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233</u> 91 (1988) ("1988 NTIA

Report"). Contrary to petitioner's assertion, the NTIA Report explained that cable operators' $550 million investment in Turner Broadcasting Corp. preserved the financial health of Turner services such as CNN. Id. In addition, as the Commission itself found, cable operators' financial backing of BET was essential in ensuring the availability of a network aimed at black Americans. See 1990 Cable Report ¶83. Moreover, Nickelodeon was created by Warner-Amex Cable, and thus was vertically integrated from its inception.

In short, the 20% channel occupancy limit calculated against all activated channels less PEG, leased access and broadcast channels advocated by petitioner would severely impair the development of "diverse and high-quality" programming, in contravention of Congressional objectives, because cable operators would be discouraged from taking investment risks. There was virtual unanimity among commenters that 40% of all activated channels is the minimum acceptable level for a channel occupancy limit. See TWE Reply II at 13. A limit set any lower than 40% of all activated channels--particularly the 20% limit proposed by petitioner--would severely jeopardize the flow of investment into new programming and deprive subscribers of programming services. 12/

B. The Commission's Adoption of a 75 Channel Threshold Beyond Which the Limits Will No Longer Apply Is Essential to Permit Development of the Next Generation of Cable Technology.

Petitioner argues that the Commission should reconsider the establishment of a 75 channel threshold beyond which the channel occupancy limits no longer apply. As noted by TWE, a system having 75 channels represents the current "state of the art" in conventional cable technology. TWE II at 24. The Commission recognized that the next generation of cable, which will implement new technologies such as digital switching and digital compression, "will help obviate the need" for the channel occupancy limits because of the greatly expanded channel capacity that will result from these innovative technologies. Although petitioner asserts that there is a strong likelihood that all newly created channels will be filled by affiliated programmers, petitioner overlooks the fact that these technologies will permit virtual "video on demand" and new channels will necessarily be occupied by programming from numerous sources. Cable operators simply will not have the

12/ See TWE I at 51-53 (applying a 20% limit and providing examples of TWE systems that would be forced to drop programming services).

ability to fill the expanded capacity with affiliated services. Significantly, petitioner fails to address the fact that massive investments in advanced technology are being made right now. 13/ Without a 75 channel cap, cable operators cannot be expected to continue investing, and technological advances will be stifled. Moreover, as the Commission noted, the 75 channel threshold "will be subject to periodic review", Second Report and Order ¶ 84, alleviating concerns that the channel cap could become a detriment to unaffiliated services.

C. The Commission's Decision to Grandfather Existing Vertically Integrated Relationships Was Appropriate.

Petitioner contends that the Commission's decision to grandfather existing vertically integrated relationships frustrates the development of unaffiliated programming. Petitioner asserts that the Commission has no basis to determine that the disruption of service to the public outweighs the application of the limits because the Commission did not cite any evidence as to how many systems would not be in compliance.

As the Commission noted, grandfathering existing vertically integrated relationships comports with the

13/ See TWE II at 18 (TWE planning to invest up to $5 billion over the next five years to upgrade its cable technology).

Congressional mandate that the Commission prescribe regulations that "take particular account of the market structure, ownership patterns, and other relationships in the cable television industry". Second Report and Order ¶ 94 (quoting 47 U.S.C. § 533(f)(2)(C)). Such an approach is clearly within the Commission's discretion to establish "reasonable" limits. Moreover, the Commission's decision to grandfather existing relationships is consistent with the approach adopted by the Commission in the broadcast context under § 73.3555. 14/ The Commission also made clear that once additional capacity becomes available, the cable operator will be unable to offer additional affiliated programmers until such operator is in compliance with the limits. Second Report and Order ¶ 93. The Commission's determination to grandfather existing relationships is obviously an appropriate measure to prevent subscriber confusion and to minimize disruption to subscriber service and existing carriage agreements.

14/ See 47 C.F.R. § 73.3555 n.4 (stating that broadcast multiple ownership regulations "will not be applied so as to require divestiture . . . of existing facilities").

D. The Attribution Standards Adopted By the Commission for Subscriber Limits and Channel Occupancy Limits Are Set at the Minimum Level Needed to Preserve the Benefits of Horizontal and Vertical Integration.

Petitioner argues that the attribution standards adopted by the Commission for subscriber limits and channel occupancy limits are inappropriate to address the influence that a cable operator may have over programming decisions. On the contrary, those standards are already set at such a low level that they carry a real risk of impairing investment incentives, and the Commission should decline petitioner's invitation to make them even more stringent.

The Commission concluded that the broadcast attribution criteria contained in § 73.3555 "are strict enough to identify all interests that afford the potential to exert influence or control over management or programming decisions, yet flexible enough to permit continued MSO investment in new video programming services". Second Report and Order ¶¶ 62; see also id. ¶ 35. The Commission sought to balance the competing concerns of Congress that petitioner, once again, overlooks. In addition, the legislative history indicates Congressional intent that the broadcast attribution criteria are appropriate in the context of the subscriber limits and the channel occupancy limits. See Senate Report at 80 ("In determining what is an attributable interest, it is the intent of the Committee