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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| 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 | ) | |

**REPLY TO OPPOSITIONS**

Center for Media Education and Consumer Federation of America ("CME/CFA") by their counsel, Institute for Public Representation and Media Access Project, and pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, respectfully submit their Reply to Oppositions to Petitions for Reconsideration filed in the above referenced proceeding.[1] CME/CFA's Reply stresses the inadequacy of the ownership limits the Commission has adopted to contain cable operators' market power as Congress intended. Specifically, it reiterates the need to (i) reduce substantially the horizontal limit, (ii) include telephone subscribers when calculating a system's reach, (iii) not include PEG, must carry, and leased access channels when calculating a system's capacity, (iv) eliminate the 75 channel cap on

[1] NCTA mistakenly contends that is inappropriate for the Commission to entertain the CME/CFA Petition for Reconsideration because "a petition for reconsideration may not be used to raise issues already fully considered by the Commission." NCTA Opp. at 3, citing WWIZ, Inc., 37 F.C.C. 685, 686, aff'd sub nom. Lorain Journal Co. v. FCC, 357 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). In fact, interested parties often (and quite properly) ask the Commission to reconsider its position before issuing a final rule. Section 405 of the Communications Act requires CME, which did not participate in earlier stages, to file a petition for reconsideration to preserve its opportunity to appeal. The authority NCTA erroneously believes establishes its contention pertains not to rulemaking but rather to license renewal hearings, and is therefore not on point.

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the vertical limits, and (v) apply the limits to existing vertical arrangements.

## I. THE ADOPTED OWNERSHIP LIMITS DO NOT ADEQUATELY ADDRESS CONGRESS'S INTENTION TO FOSTER COMPETITION AND DIVERSITY.

Several commenters claim the CME/CFA petition overemphasizes the importance Congress attached to diversity and competition, and undervalues the benefits derived from horizontal concentration and vertical integration.[2] We agree that Congress required the Commission to balance these concerns; the issue is where that balance should be struck.

When in 1990 the Commission considered these factors, it concluded the benefits of size and vertical integration outweighed their dangers, and consequently decided not to adopt ownership limits.[3] Not surprisingly, this is the "balance" preferred by the industry.[4] But it is also the position that Congress rejected when it passed the 1992 Cable Act.[5] The balance mandated by Congress calls for the regulatory intervention that the Commission's 1990 Report did not. The ownership limits adopted by the Commission in the Second Report and Order,[6] which allow even the largest MSOs to continue to grow, and grandfather existing vertical arrangements, resemble the balance the Commission struck in its 1990 Report far more than that envisioned in the 1992 Act. The Commission should not substitute its own

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[2] TCI Opp. at 2, 5; NCTA Opp. at 4; TWE Opp. at 1; Liberty Opp. at 7.

[3] Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5003-5011 (1990) ("1990 Report").

[4] See, e.g., TWE Opp. at 3; Liberty Reply Comments at 7-11.

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act" or "1992 Act").

[6] Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, 8 FCC Rcd 8565 (1993) ("Second Report and Order").

earlier judgment for the regulatory compromise required by the 1992 Act. CME/CFA therefore repeat their call for rules more faithful to the balance Congress intended.

## II. THE HORIZONTAL LIMITS ALLOW LARGE CABLE OPERATORS TO EXERT THE VERY MARKET POWER CONGRESS SOUGHT TO CURB.

Some commenters dispute CME/CFA's observation that the existing level of horizontal concentration permits the largest MSO, Tele-Communications, Inc. ("TCI"), "make or break" power over independent commercial programmers.[7] But Viacom has described TCI predation at work. According to Viacom, TCI has withheld affiliation with a Viacom service in order to reduce its value (and thereby force a merger with a competing TCI service on favorable terms) or wipe it out altogether. Also, in order to replace Viacom's "The Movie Channel" with its own competing "Encore" and "Starz!," TCI has dropped "The Movie Channel" from 28 of its systems and announced plans to drop it from 27 more.[8] This illustrates how, "with increased concentration in the cable industry, the large MSOs have the market power to determine what programming services can 'make it' on cable."[9] CME/CFA have little doubt that limits which permit TCI to grow still larger can do nothing to prevent the evil Congress sought to avert.[10]

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[7] Liberty Opp. at 10-11; TCI Opp. at 6-7; TWE Opp. at 6.

[8] Viacom Comments at 12-13.

[9] S. Rep. No. 92, 102d Cong., 1st Sess. 33 (1991) ("Senate Report").

[10] Two commenters, one of whom is affiliated with TCI, ask the Commission to conclude from the lack of comment by independent programmers that they do not mind this imbalance in market power. Liberty Opp. at 6, TWE Opp. at 9. Considering that both House and Senate Reports discuss the problem of MSO abuses stemming from their monopsony power in the programming market, we find this explanation unlikely. Instead, CME/CFA suggest the programmers have not commented because of their reasonable fear of offending the MSOs who, after all, have it in their power to put them out of business. In

The Commission should not be deterred from imposing horizontal limits with teeth merely because such limits would require TCI to divest. In Section 11, Congress required the Commission to weigh no fewer than seven public interest considerations when determining subscriber and channel occupancy limits.[11] But "[ensuring] that the majority of MSOs continue to expand," the Commission's rationale for the 30 percent horizontal limit, was not one of them.[12] Several commenters, however, seize on one Senate Report sentence saying divestiture need not be required as a sign Congress intended rules which would not compel any company to divest. This is too much weight for a single sentence of legislative history to bear, certainly too much for one that does not even suggest that the Commission avoid requiring divestiture. Fairly read, the sentence merely says that (at the slightly under 25 percent market share then enjoyed by the largest MSO) divestiture might or might not be necessary.[13] CME/CFA therefore ask the Commission to accord the divesture question minimal weight compared to the specific public interest objectives Congress, in Section 11, directed the Commission to consider when formulating the ownership limits.

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fact, Viacom admits it did not address the issue until now for fear of reprisal. Viacom Comments at 6 n.6.

[11] 47 U.S.C. § 533 (f)(2)(A)-(G).

[12] Second Report and Order at ¶ 25. In fact, the adopted limit allows all MSOs to continue to expand. A limit of 15 percent would allow the majority of MSOs to do so. The issue is not the expansion of the majority of MSOs, the issue is the market power exerted by the largest MSOs.

[13] "The legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable and in the public interest." Senate Report at 34.

## III. TELEPHONE SUBSCRIBERS SHOULD COUNT TOWARD HORIZONTAL LIMITS.

A number of commenters suggest that the CME/CFA proposal to count subscribers of telephone companies affiliated with cable companies toward the horizontal limits exceeds the Commission's authority under the 1992 Act because Section 11 only refers to "limits on the number of cable subscribers" reached through cable systems.[14] Yet, under the "homes passed" standard adopted by the Commission, it is the company's potential reach that counts.[15] Telephone subscribers are potential video dialtone subscribers, and as NCTA argues in a different context, "a telephone company engaged in video dialtone is providing 'cable service.'"[16] Because telephone video dialtone subscribers are functionally indistinguishable from cable subscribers, a cable company that is affiliated with a video dialtone system has expanded its potential reach as surely as one that is affiliated with a traditional cable system. Thus, both should be included when calculating horizontal concentration of ownership.

While Section 11 refers specifically to cable subscribers, the Commission has

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[14] GTE Opp. at 2; Liberty Opp. at 13; TWE Opp. at 9-10; TCI Opp. at 8; U S WEST Opp. at 2-3.

[15] The Commission (as well as all commenters) preferred a "homes passed" to a "subscriber" standard for two good reasons: It was (1) more stable, and thus easier to keep track of, and (2) consistent with language that speaks of "'the number of cable subscribers' any one person can reach." Second Report and Order at ¶ 24.

[16] NCTA explains "'Cable service' is defined in the Cable Act as (A) the one way transmission to subscribers of (i) video programming, or (ii) other programming service and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service. 47 U.S.C. § 522 (6). A video dialtone system satisfies each of these definitional elements." Joint Brief for Petitioners at 14, National Cable Television Assoc., Inc. v. FCC, Case No. 91-1649 (D.C. Cir. 1994).

authority to regulate in ways "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[17] Under the "reasonably ancillary" test, the Commission has authority to act "for ends for which it could also regulate broadcast television [or]...to achieve 'long established' goals or to protect its 'ultimate purposes.'"[18] From its inception, the Commission has relied on ownership limits to protect its ultimate goals of maintaining diversity and competition. Indeed, even before passage of Section 11, "the FCC ha[d] the authority to impose horizontal limitations on the cable industry (both national and regional)."[19] CME/CFA have no doubt that it lies within the Commission's authority to adopt ownership limits which include affiliated telephone subscribers under the "reasonably ancillary" standard.

CME/CFA believe that the proposed expansion is well within the Commission's broad authority and constitutes a logical outgrowth of the homes passed standard. Some commenters, however, claim that considerations of fairness and the Administrative Procedure Act require the Commission to conduct further rulemaking to include telephone subscribers in the horizontal limits.[20] If the Commission finds that further rulemaking is preferable, CME/CFA call on the Commission promptly to initiate that procedure. That telephone and cable are rapidly converging has become a commonplace, and ownership limits that do not take the resulting impact on competition and diversity into account are outdated even before

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[17] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

[18] Home Box Office, Inc. v. FCC, 567 F.2d 9, 28 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

[19] Senate Report at 34.

[20] Liberty Opp. at 13; see also U S WEST Opp. at 3.

they can take effect.

## IV. THE CHANNEL OCCUPANCY LIMITS SHOULD BE STRENGTHENED.

### A. PEG, Must Carry, and Leased Access Channels Should Not Be Counted in Calculating System Capacity.

Several commenters take issue with CME/CFA's position that channels devoted to PEG, must carry, and leased access should not be counted for the purpose of implementing the channel occupancy caps.[21] For the most part these commenters echo the Commission's flawed reasoning that such channels, because they are not MSO-affiliated, must then be the unaffiliated programming Congress intended the limits to support.[22] But this is not the case. The purpose of the Section 11 vertical limits is not to provide space for public, educational and government access TV (PEG), for broadcast TV (must carry), or for leased access.[23] The purpose of channel occupancy caps is to keep cable operators from filling every available channel with their own programming; they give independent commercial programmers a chance to get on the wire. In other words, the caps create a vacuum for independent programming to fill. While the MSOs may see the PEG, must carry, and leased access channels as "lost," they are not, from the independent programmers' point of view,

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[21] See, e.g., Liberty Opp. at 14-16; NCTA Opp. at 12-13; TCI Opp. at 11-12.

[22] "Moreover, carriage of broadcast, PEG, and leased access channels promotes diversity and provides alternative sources of unaffiliated programming to cable subscribers in furtherance of the statutory objectives." Second Report and Order at ¶ 54.

[23] The Commission should note that these provisions are not scrambled under a general "diversity" heading; each serves a separate purpose, and each has its own section in the 1992 Act. The Commission will remember that statutes are generally interpreted so that each section may be given effect.

"gained" -- they do not make space for their programming.[24] Thus they do not advance the purpose of the limits, which is surely why the Senate Report advised the Commission not to count them when applying the channel occupancy limits.[25] The Commission's rule, which seems to say "so long as it's not MSO-affiliated, it counts as 'diverse'," does not do justice to Congress's more nuanced approach. Because the PEG, must carry, and leased access channels are as unavailable for programming by independents as the MSO-filled channels are, and therefore contribute nothing to the purpose of the channel occupancy limits, they should not be included in calculating system capacity.

### B. The Commission Should Not Impose a 75 Channel Ceiling on the Channel Occupancy Limits.

Several commenters protest the CME/CFA request that the Commission reconsider its decision to place a 75 channel cap on the channel occupancy limits.[26] The industry advances two irreconcilable arguments to support its position. First they say there is no need for the limits because the next generation of cable will provide more capacity than the MSOs can possibly fill with their own programming.[27] But then they say relaxed occupancy limits are an important incentive to build such systems.[28] These claims cannot both have merit.

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[24] The Commission suggests that independent programmers may avail themselves of leased access. Second Report and Order at ¶ 54. But a pay-for-carriage system is no help at all to the commercial independent programmers Section 11 is designed to protect. To stay in business, the programmers need the operators to pay them for their product, not the other way around.

[25] Senate Report at 80.

[26] Liberty Opp. at 19-20; NCTA Opp. at 14; TCI Opp. at 12-14; TWE Opp. at 17.

[27] Liberty Opp. at 20; TWE Opp. at 17; TCI Opp. at 13.

[28] Liberty Opp. at 20; NCTA Opp. at 14; TCI Opp. at 14; TWE Opp. at 18.

If increased capacity will render the limits superfluous, they are not the slightest disincentive to the MSOs. And if they do affect incentive (i.e. prevent MSOs from counting on more than 40 percent of even greatly increased capacity), then the former argument is disingenuous, and the limits will be as necessary as ever. The industry's own arguments make it clear that for cable's next generation the limits will be either harmless or essential. If the limits become irrelevant, they may easily be retired, while if the opposite scenario develops, imposing them would require choosing between divestiture and grandfathering. The prudent and reasonable course is therefore to eliminate the 75 channel ceiling.

### C. Existing Vertical Integration Should Not be Grandfathered.

Several commenters disagree with CME/CFA's request that the Commission reconsider its decision to grandfather all vertically integrated programming in effect in 1992.[29] All cite Congress's desire to minimize disruption. CME/CFA do not deny that avoiding disruption is a valid concern, but we remind the Commission that curbing the anti-competitive behavior which accompanies vertical integration is a paramount concern of the 1992 Act.[30] To the degree grandfathering avoids disruption, it must also undermine the effectiveness of Section 11. If only a few systems need grandfathering, the integration preserved may be inconsequential, but then so is the disruption avoided. If, on the other hand, grandfathering does prevent substantial disruption, it must blow proportionately large holes through the regulatory scheme. Given this linkage between avoiding disruption and vitiating the rule, the Commission should support the overarching objective of Section 11.

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[29] Liberty Opp. at 20-21; NCTA Opp. at 14-15; TCI Opp. at 14-15;

[30] 1992 Cable Act § 2 (a)(5).

CME/CFA would also point out that no commenter has come forward with an estimate of the amount of vertical integration that is to be left in place. Without knowing how much disruption grandfathering avoids (and the inverse question, how much damage it does), the Commission has no basis for assessing the reasonableness of its rule. Unless it can quantify and weigh the impact of grandfathering, the Commission should apply the limits to existing vertical arrangements.

**CONCLUSION**

As CME/CFA have argued, the ownership rules the Commission adopts in its Second Report and Order are too weak to preserve competition and diversity as Congress intended. CME/CFA therefore urge the Commission to reconsider and revise them in accordance with the proposals set forth in this Reply and in their earlier pleadings.

Respectfully submitted,

Angela J. Campbell

Angela J. Campbell

Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave., N.W., Rm.312
Washington, D.C. 20001

Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

Of Counsel:

Lisa M. Stevens
Graduate Fellow

Jonathan Reel
Student Intern

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CERTIFICATE OF SERVICE

I Martha L. Rodriguez, certify that the foregoing "Reply to Oppositions" was served by first-class, postage prepaid mail this 1st day of March, 1994 to the following:

Robert L. Hoegle
Timothy J. Fitzgibbon
Carter, Ledyard & Milburn
Counsellors at Law
1350 I Street, N.W.
Suite 870
Washington, D.C. 20005

Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1969

James T. Hannon
U S WEST Communications, Inc.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Ward W. Wueste, Jr.,
John F. Raposa
GTE Telephone Operations
P.O. Box 152092
Irving, Texas 75015-2092

GTE Telephone Operations
Legal Department
1850 M Street, N.W.
Washington, D.C. 20036-5801

George H. Shapiro
Robert D. Primosch
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Stephen S. Madsen
Cravath, Swaine & Moore
825 Eighth Avenue
New York, New York 10019

James R. Hobson
Donelan, Cleary, Wood & Maser
1275 K Street, N.W., Suite 850
Washington, D.C. 20005-4078

David B. Gluck
Mark R. Boyes
600 Las Colinas Boulevard
Suite 2200
Irving, Texas 75039

Michael H. Hammer
Philip L. Verveer
Melissa E. Newman
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.-Suite 600
Washington, D.C. 20036-3384

Martha L. Rodriguez

Martha L. Rodriguez