III. THERE IS NO REASON TO IMPOSE FURTHER HORIZONTAL AND VERTICAL OWNERSHIP RESTRICTIONS ON CABLE TELEVISION

Petitioners assert that the "underlying problem" that is responsible for recent rate increases is "market power and economic concentration in the industry." [53] They urge the Commission to reevaluate its horizontal concentration and vertical integration rules to "crack down" on transactions and agreements that are impeding competition and reasonable prices.[54]

It is not clear, at the outset, how excessive horizontal and vertical concentration, even if it existed, would drive rates up, and petitioners do not explain the linkage. They note that "[c]able operators who control access to large numbers of viewers can extract concessions from programmers who need to reach a large audience."[55] But any such concessions, to the extent that they reduced programming costs, would result in *lower* rates under the Commission's rules -- and would not logically cause rates to increase, even in a deregulated environment. Similarly, if there were a problem with vertical integration, its impact might be felt by non-vertically-integrated programmers and it might adversely affect the array of programming available to systems and subscribers. But precisely how it would adversely affect subscribers' rates is a mystery.

This is not to say that horizontal and vertical integration cannot, in certain circumstances, present anticompetitive risks that outweigh their efficiencies and benefits. But those risks generally have little to do with subscriber rates. And there is no reason for the Commission to

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53 Petition at 19.

54 *Id.*

55 Cooper Statement at ¶32.

launch a separate proceeding to investigate and deal with these issues, because it is already reviewing such issues on an ongoing basis.

The Commission conducted a thorough rulemaking on horizontal and vertical concentration five years ago and has annually reviewed this subject as part of its requirement to report to Congress on the status of competition in the video marketplace. It has consistently refused to recommend harsher ownership restrictions and, for reasons that we set forth at greater length in our comments for the Fourth Annual Report, has no basis to do so now.[56]

A. **Horizontal Concentration**

In urging the Commission to reevaluate its current horizontal and vertical ownership restrictions, petitioners maintain that recent mergers, acquisitions and other developments have "significantly increased concentration and undercut competition in the cable television marketplace."[57] In particular, they cite regional clustering as "rais[ing] concerns about the likely development of a fully competitive market for video services."[58]

As Congress recognized in enacting Section 613 of the Act, horizontal concentration and vertical integration may spur both anticompetitive harm *and* procompetitive benefits. In light of

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56 Comments and Reply Comments of NCTA, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, CS Docket No. 97-141, July 23, 1997, August 20, 1997 ("Competition Inquiry"). The horizontal concentration provision of the Act and its implementing rules were held unconstitutional in *Daniels Cablevision v. United States*, 835 F. Supp. 1 (D.D.C 1993), *appeal sub nom, Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *reh'g en banc denied, Time Warner Entertainment Co., L.P. v. FCC*, 105 F.3d 723 (D.C. Cir. 1997). In response to this decision, the Commission stayed its rules pending appellate review. It would be imprudent for the Commission to put into effect rules that have been held to infringe fundamental First Amendment rights until the First Amendment issues are resolved on appeal.

57 Petition at 2.

58 Petition at 13.

these conflicting interests, Congress directed the Commission to consider a number of public interest objectives in establishing ownership limits.[59] As petitioners point out, the statute dictates that the Commission's rules ensure that cable operators do not unfairly impede the flow of video programming by favoring affiliated video programmers. But they ignore other equally important policy directives which require the Commission to take into account "any efficiencies and other benefits that might be gained through increased ownership or control," and to "not impose limitations that would impair the development of diverse and high quality programming." 47 U.S.C. 533(f)(2)(D) and (G). In assessing ownership in the MVPD marketplace, the Commission must balance *all* of these public interest objectives.

Petitioners seek to show, in various ways, that "the big cable companies are getting bigger and bigger."[60] Wholly apart from whether growth and consolidation is in all respects a bad thing, as petitioners seem to believe, their data seriously overstate the extent of horizontal concentration in the video programming market. Petitioners assert that "for the first time in the history of the industry, even at the national level, it has passed the moderately concentrated threshold as measured by the Herfindahl-Hirschman Index (HHI) of 1000."[61] However, petitioners base this finding on outdated information (1996 data) and, in any event, measure the *wrong* market.[62]

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59 Second Report and Order at ¶ 8. A host of other provisions in the Act are designed to protect against any anticompetitive conduct arising from horizontal and vertical ownership, including regulations on program carriage agreements, program access, must carry, and leased access. Id. at ¶¶ 26, 70.

60 Petition at 15.

61 Cooper Statement, ¶ 13.

62 Cooper Statement, Table 2.

As the Commission recognized in the *Third Annual Report*, it is necessary, in measuring concentration in the multichannel video programming market, to take into account *all* MVPDs and MVPD subscribers, and not just cable MSOs and cable subscribers.[63] As DBS, MMDS, telephone company video ventures and SMATV subscribership increases, their effect on the video programming market increases. Thus, as we showed in our comments for the Fourth Annual Report, applying the HHI index to the national MVPD market now indicates that the market is "unconcentrated" at 772.29 in 1997.[64]

In any event, petitioners provide no evidence of any specific *harm* from increased consolidation. They do not demonstrate, for example, that consolidation has impeded the flow of programming or promoted discrimination against unaffiliated video programmers. Petitioners offer nothing more than a generalized concern that growth and consolidation must be hurting competition. But the Commission never intended to adopt ownership restrictions that would freeze current levels of horizontal and vertical ownership in the cable television industry.[65] Nor should they adopt such restrictions given the strong evidence that consolidation is creating efficiencies that should have the effect of reducing costs.

As the Commission has recognized, cable companies are consolidating contiguous systems in order to develop regional *clusters*. These clusters create scale economies that facilitate advanced technology and system architecture, more efficient customer service,

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63 *Third Annual Report* at ¶ 131.

64 NCTA Comments, CS Docket No. 97-141, at 37 (July 23, 1997).

65 Second Report and Order, MM Docket No. 92-264, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, at ¶¶ 27, 45, 94.

centralized administration, regional programming and advertising, and improved personnel management.[66] Rather than impeding competition, as petitioners believe, this strategy is essential to cable's ability to compete with giant geographically concentrated RBOCs, electric utilities, and nationwide DBS.[67] Regional clustering is a integral component of cable operators' efforts to become full service providers of video, telephony and data. It has already facilitated the introduction of Internet access and digital boxes in particular markets.[68]

The Administration also has identified cable system clustering as a competitive strategy which serves the public interest in "at least" two important ways: reducing costs and facilitating entry into telephone service.[69] Thus, the Assistant Secretary of Commerce for Communications, Larry Irving, in a letter to the Chairman of the Federal Trade Commission, supported regional clustering, deeming any potential harms from clustering as "largely conjectural, speculative, or *de minimis*."[70]

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66 *Third Annual Report* at ¶ 138, citing Letter from Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce to Chairman Janet D. Steiger, Federal Trade Commission, January 12, 1995 ("Irving Letter"). *See also First Annual Report*, 9 F.C.C. Rcd 7442, 75

67 *See* Reply Comments of NCTA, Competition Inquiry, at 29-34 (describing efficiencies in advertising, promotion, regional program services; maintenance and customer service, new and advanced services.)

68 As recently explained by Leo Hindrey, Jr., President, Tele-Communications, Inc. in testimony before the Senate Antitrust Subcommittee "clustering allows us to focus more keenly on the local needs of our customers and, at the same time, create larger, regional systems that can obtain the economies of scale and scope that are absolutely necessary to the provision of telephony and future interactive video and information services." Testimony of Leo J. Hindery, Jr. before the Senate Subcommittee on Antitrust, Business Rights and Competition, October 8, 1997.

69 Irving Letter at 1.

70 *Id.*

For these and other procompetitive reasons, *every transaction* involving clustering of cable systems that has been reviewed by the Commission and the federal antitrust agencies to date has been approved. There is no reason for the Commission to intervene in the dynamic MVPD marketplace by launching a rulemaking on horizontal and vertical concentration in the cable industry.

B. Vertical Integration

Petitioners also urge the Commission to reevaluate the vertical ownership limits, particularly the channel occupancy rules, which limit the number of channels on a cable system that can be occupied by a video programmer in which the cable operator has an attributable interest. They claim that such curbs on cable ownership "have done nothing to prevent increasing market concentration."[71] And they claim that "the price of cable-owned programming, not subject to competition, has been artificially inflated to circumvent the goals of regulation."[72]

The Commission considered and denied CFA's petition for reconsideration of the ownership limits in 1994, which sought, among other things, to reduce the channel occupancy limit from 40% to 20%. Noting that Congress directed the Commission, in adopting "reasonable" ownership limits, to balance the risks of vertical integration against the benefits (such as the development of diverse and high quality video programming), the Commission reaffirmed that "the 40% limit strikes the appropriate balance between these competing

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71 Petition at 17.

72 *Id.*

objectives."[73] This conclusion has been subject to annual review in the video competition proceeding and there is no reason to reopen it now.

In particular, as with horizontal concentration, petitioners provide no evidence to support a reassessment of the vertical ownership limits, i.e., that cable companies are favoring their affiliated programmers or otherwise engaging in anticompetitive conduct as a result of vertical arrangements. Petitioners provide nothing because cable operators are carrying a diverse range of unaffiliated program networks, in addition to must carry, PEG and leased access channels, as witnessed by the fact that ten of the top 20 cable networks have no ownership affiliation with a cable operator.

Moreover, the evidence shows that vertical integration in the cable industry has decreased. As the Commission recognized in its Third Annual Report, Viacom networks, including MTV, VH-1, and Nickelodeon, are no longer affiliated with a cable operator. As noted above, ten of the top 20 cable networks in terms of subscribership have no ownership affiliation with a cable MSO. These networks include ESPN, the Weather Channel, A&E Television Network, TNN: The Nashville Network, Lifetime Television and CNBC. Four of the top seven networks by primetime ratings are non-vertically integrated. In light of these facts, the imposition of stricter vertical ownership restrictions would be entirely unwarranted.

Aside from the channel occupancy rules, petitioners assert that the Commission's rules implementing section 628, regarding access to programming, are "inadequate."[74] As evidence of

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[73] Memorandum Opinion and Order on Reconsideration of the Second Report and Order, MM Docket No. 92-264, rel. April 6, 1995 at ¶ 14.

[74] Petition at 17.

this claim, they allege that cable operators are entering into exclusive deals with independent programmers that freeze out overbuilders, are refusing to deal based on potential "loopholes" in section 628, and are engaging in tying arrangements.[75] Dr. Cooper asserts "a pattern of denial of programming to those who want to enter the MSO end of the business has also continued."[76]

The record here is irrefutable -- the program access rules have provided a fail-safe mechanism to satisfy Congress's goal that alternative providers of video programming have access to all of the most widely distributed national cable program networks. Today, cable's competitors are marketing packages of national satellite-delivered cable programming networks -- both vertically and non-vertically integrated -- as well as exclusive sports and big event programs.[77] Indeed, as demonstrated in the video competition proceeding, the top 20 most widely distributed cable networks are carried by competing MVPDs.[78] Over the past five years, the FCC has only received approximately 40 filings relating to program access issues -- and rendered only three rulings in favor of the complainant.[79]

With no facts to support their claims, the petitioners' call for more program access regulation is baseless. Less than a year ago, in its Third Annual Report, the Commission

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75 Petition at 17-18.

76 Cooper Statement at ¶16.

77 *See* Comments of NCTA, Competition Inquiry (illustrating the wide availability and wide distribution of both vertically integrated and non-vertically integrated cable networks on competing MVPDs, such as DirecTV and Ameritech systems.)

78 *See id.* at 12-13; Reply Comments of NCTA, Competition Inquiry, at 6, 10-11.

79 Based on our information, five matters were not complaints but instead sought clarifications or rulings on exclusivity.

declined to revisit the program access rules.[80] The record today shows that competition is increasing among providers of video programming.

The debate over program access is not about rates or about market concentration -- it is simply the desire of cable's competitors to obtain a free ride on cable's investment in programming of regional or local interest and to have the government dictate the affiliation decisions of independent programmers.[81] In particular, petitioners support proposals to extend the rules to non-satellite delivered, locally-produced programming services and to entities unaffiliated with cable companies. As we fully addressed in our comments for the Fourth Annual Report, such action would force cable operators to hand over original programming -- produced and nurtured at the local level -- to their competitors. And it would deny cable operators the opportunity to enter into exclusive contracts, a right freely enjoyed by their competitors. Indeed, there are many sound economic reasons why independent, non-vertically integrated programmers would want to grant exclusivity. Antitrust law and Commission precedent recognize that exclusivity is a normal competitive tool that more often than not promotes rather than inhibits competition.[82]

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80 *Third Annual Report*, at ¶ 152; *see also Second Annual Report*, 11 FCC Rcd 2060, 2136 (1995) (program access rules, as enforced by the Commission, successfully promote competition from existing and potential competitors in the video programming distribution market).

81 Petition at 18.

82 *See* Reply Comments of NCTA, Competition Inquiry, at 21-29 (discussing legitimate, procompetitive reasons for exclusive distribution arrangements). Section 628 identifies several potentially pro-competitive effects of exclusive agreements and authorizes the Commission to permit them where it finds that they are "in the public interest." *See* New England Cable News, 9 FCC Rcd 3231 (1994).

As to so-called "loopholes" in Section 628 regarding its inapplicability to terrestrially-delivered programming, Congress expressly limited the scope of the program access rules to satellite-delivered services that were arguably vital to entry into the video marketplace. Subjecting local news, sports and other terrestrially-delivered services to the commoditizing approach of the program access provisions would stifle operator incentives to produce such programming. Improved technology and lower costs may make terrestrial distribution of programming more efficient and cost-effective than distribution via satellite. But there is absolutely no evidence that program networks have moved to fiber optic distribution for anticompetitive reasons or for the purpose of avoiding section 628's requirements.

If MVPDs have problems obtaining programming under the Act, the Commission has authority to address them under the section 628 complaint process. And under section 616 of the Act,[83] MVPDs have recourse to address anticompetitive carriage-related behavior by cable operators, with or without an attributable interest in the program supplier, and regardless of the method of distribution. In short, if there is evidence of anticompetitive conduct regarding the distribution of cable programming, the existing rules provide the Commission with the tools it needs to address the problem.

CONCLUSION

The Commission's rules permit cable operators to increase their rates by more than inflation in order to pass through programming cost increases that exceed inflation, plus a mark-up that is necessary to justify and encourage investment in more and better cable service.

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83 47 U.S.C. § 536. Section 616's implementing rules grant standing to competing MVPDs to file complaints where they believe cable operators have coerced programmers into granting exclusivity.

Petitioners provide no evidence or reason to believe that cable rates exceed what the rules permit, nor do they identify any defects in the rules that would permit operators to implement excessive rate increases. Their call for a rate freeze while the Commission investigates whether to revise the rules should be rejected -- both because a rate freeze would stifle the development of programming and system improvements that would enhance consumer welfare, and because there is no reason to believe that the rules need to be revised.

Nor is there any reason for the Commission to launch an investigation of horizontal and vertical integration. The Commission's annual investigations of competition in the video marketplace have repeatedly led it to conclude that no changes in the rules are necessary or appropriate. And the record in its current investigation confirms that this is still the case.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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October 30, 1997

CERTIFICATE OF SERVICE

I, Tonya K. Bartley, certify that a copy of the foregoing OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, was mailed this 30th day of October, 1997, to:

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