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

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In the Matter of	)	
	)	
Implementation of Section 11(c)	)	
of the Cable Television Consumer Protection	)	
and Competition Act of 1992	)	MM Docket No. 92-264
	)	
	)	
Horizontal Ownership Limits	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: June 23, 1998 **Released: June 26, 1998**

Comment date: August 14, 1998
Reply comment date: September 3, 1998

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement; Commissioner Tristani dissenting in part and issuing a separate statement.

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I. INTRODUCTION

1. This *Second Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking* ("*Second Order on Reconsideration*" or "*Further Notice*") addresses petitions for reconsideration of the *Second Report and Order* in MM Docket No. 92-264[1] ("*Second Report and Order*") filed by the Center for Media Education/Consumer Federation of America ("CME/CFA") and Bell Atlantic Corporation ("Bell Atlantic").[2] Among other things, the *Second Report and Order* promulgated rules pursuant to Section 613 of the Communications Act, which requires the Commission to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such a person, or in which such a person has an attributable interest" ("horizontal ownership rules").[3] The Commission's horizontal ownership rules established in the *Second Report and Order* provide that "no person or entity shall be permitted to reach more than 30% of all homes passed nationwide through cable systems owned by such person or entity or in which such person or entity holds an attributable interest."[4] In addition, ownership of cable systems that reach up to 35% of all homes passed nationwide is permitted "provided the additional cable systems, beyond 30% of homes passed nationwide, are minority-controlled."[5]

2. In the *Second Report and Order*,[6] the Commission voluntarily stayed the effective date of the horizontal ownership rules pending final judicial resolution of the District Court decision in *Daniels*

[1]8 FCC Rcd 8565 (1993).

[2]Petition for Reconsideration of Center for Media Education & Consumer Federation of America (filed Dec. 15, 1993); Petition of Bell Atlantic for Limited Reconsideration (filed Dec. 15, 1993).

[3]Section 613 was adopted as Section 11(c) of Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. § 533(f)(1)(A).

[4]47 C.F.R. § 76.503. As specified under 47 C.F.R. § 76.503, note 1 (c), "Attributable Interest" is defined by reference to the criteria set forth in the Notes to the Commission's cable cross-ownership rules, 47 C.F.R. § 76.501.

[5]47 C.F.R. § 76.503(b). For purposes of this regulation, "minority-controlled" is defined as "more than 50% owned by one or more members of a minority group." 46 C.F.R. § 76.503, note 1(a).

[6]*Second Report and Order* at ¶ 3.

Cablevision, Inc. v. United States,[7] which held that the underlying statute violates the First Amendment. The *Daniels* court expressly recognized that "there is substantial ground for difference of opinion" as to the constitutionality of the underlying statute, meriting an immediate appeal of its judgment.[8] Accordingly, rather than enjoining the Commission from adopting and enforcing horizontal ownership rules, the court stayed further court proceedings, including determination and imposition of relief for the plaintiffs, pending appeal.[9] On December 15, 1993, CME/CFA moved that the Commission lift its administrative stay.[10] The following month, Time Warner challenged the stayed rules in the D.C. Circuit Court in *Time Warner Entertainment Co., L. P. v. FCC*.[11] In August 1996, the D.C. Circuit Court consolidated the *Daniels* appeal regarding the facial validity of the statute and the *Time Warner* challenge to the Commission's rules, and determined to hold court proceedings in abeyance while the Commission reconsidered the horizontal ownership rules.[12]

3. In this *Second Order on Reconsideration*, the Commission maintains the current 30% horizontal ownership limit and denies the motion to lift the voluntary stay on enforcement of that limit. We note that, while the most established programmers can obtain favorable terms from even the large cable multiple system operators ("MSOs"), the cable horizontal ownership rules remain necessary to prevent MSOs from exercising market power against new, independent, and less prominent programmers.[13] In order to facilitate monitoring of cable ownership interests, the Commission hereby lifts the voluntary stay insofar as it applies to the information reporting requirements of 47 C.F.R. § 76.503(c). Prior to acquiring attributable interests in any additional cable systems, a person holding an attributable interest in cable systems reaching 20% or more of homes passed nationwide will be required to notify the Commission of the incremental change the acquisition makes in terms of the 30% of homes passed standard, i.e. specifying the ownership in terms of homes passed before and after the acquisition is complete.

4. In the *Further Notice*, we seek comment on possible revisions of the horizontal ownership rules and the method by which horizontal ownership is calculated. Specifically, we ask whether changes are needed to provide a more accurate measure of horizontal concentration to reflect changes in the market as alternative MVPDs continue to grow in the future. The *Further Notice* seeks comment on two possible

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[7]*Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993), *aff'd in part, rev'd in part, Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

[8]*Id.* at 12.

[9]*Id.*

[10]CME/CFA Motion to Lift Stay (filed Dec. 15, 1993).

[11]*Time Warner Entertainment Co., L. P. v. FCC*, No. 94-1035 (D.C. Cir. 1994).

[12]*Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979-80 (D.C. Cir. 1996).

[13]The consequent growth of these alternative programmers ultimately may help to check the exercise of market power by the most established programmers.

changes in the manner that the rules are applied: (1) whether the rules should consider the presence in the market of all MVPDs rather than cable operators alone; and (2) whether the rules should be based on actual subscribers rather than on homes passed. Specifically, comment is sought on whether the rules should provide that the number of cable subscribers an entity is authorized to reach through cable systems, when combined with the number of subscribers reached by that entity through other MVPD systems, may not exceed 30% of all MVPD subscribers nationwide.

II. BACKGROUND

5. The 1992 Cable Act and its legislative history indicate heightened Congressional concern regarding horizontal concentration among cable multiple system operators. Witnesses at the Congressional hearings, including representatives of the MSOs themselves, testified to the need for cable horizontal ownership limits to preserve competition and protect the public interest.[14] Section 613(f) of the Communications Act (Section 11(c) of the 1992 Cable Act) requires that the Commission, "[i]n order to enhance effective competition . . . prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such a person, or in which such a person has an attributable interest."[15]

6. In adopting Section 613, Congress also recognized that multiple system ownership can benefit consumers. The House Report stated that cable industry consolidation has benefited consumers by allowing efficiencies in the administration, distribution and procurement of programming, and also noted that concentration of cable MSOs may help promote the introduction of new programming services by providing capital and a ready subscriber base for new services.[16] The House Report also observed that large cable MSOs can take competitive and programming risks that smaller operators cannot.[17] Similarly, the Senate Report acknowledged that horizontal concentration can create efficiencies from lower transaction costs in carriage negotiations between programmers and cable operators.[18]

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[14]*See, e.g., Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991) ("Senate Report") (testimony of John Malone, TCI Chairman, regarding need for cable horizontal ownership limits).

[15]47 U.S.C. § 533(f)(1)(A).

[16]*Report of the House Committee on Energy and Commerce*, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 43 (1992) ("House Report").

[17]*Id.*

[18]Senate Report at 33.

7. Recognizing these conflicting factors, Congress directed in Section 613(f)(2) that, in addition to other public interest concerns, the Commission must consider and balance seven particular public interest objectives:

(1) to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer;

(2) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programmers to other video distributors;

(3) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;

(4) to take into account any efficiencies and other benefits that might be gained through increased ownership or control;

(5) to make rules and regulations that reflect the dynamic nature of the communications marketplace;

(6) to impose no limitations that prevent cable operators from serving previously unserved rural areas;

(7) to impose no limitations that will impair the development of diverse and high quality programming.[19]

8. Based on an assessment of these factors, in the *Second Report and Order*, the Commission adopted a horizontal ownership limit prohibiting any person from having an attributable interest in cable systems that in the aggregate reach more than 30% of cable homes passed nationwide. We found that this 30% ownership limit struck the proper balance between (1) ensuring that the structure of the cable

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[19]47 U.S.C. § 533(f)(2). Beginning in 1994, the Commission has issued annual reports on the status of competition in the delivery of video programming. In these annual *Competition Reports*, the Commission has noted the potential benefits as well as the potential competitive concerns of increased national horizontal concentration among cable MSOs. *See First Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 94-235, CS Docket No. 94-48, 9 FCC Rcd 7442 at ¶¶ 148-155 (1994) ("*1994 Competition Report*"); *Second Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 95-491, CS Docket No. 95-61, 11 FCC Rcd 2060 at ¶¶ 131, 146 (1995) ("*1995 Competition Report*"); *Third Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 96-496, CS Docket No. 96-133, 12 FCC Rcd 4358 at ¶¶ 138-139 (1997) ("*1996 Competition Report*"); *Fourth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 97-423, CS Docket No. 97-141 at ¶¶ 140-14, 149 (rel. Jan. 13, 1998) ("*1997 Competition Report*").

industry nationwide limited the possibility that large cable MSOs might exercise excessive market power in the purchase of video programming, and (2) ensuring that the majority of MSOs could continue to expand and benefit from the economies of scale necessary to encourage investment in new video programming services, diverse program offerings, and the deployment of advanced cable technologies.[20] In order to promote minority ownership and diversity, we also adopted the minority-control allowance, which allows an MSO to reach an additional 5% of homes passed by cable nationwide if these homes are reached by cable systems that are more than 50% owned by one or more members of a minority group.[21]

III. ISSUES ON RECONSIDERATION

A. Requests to Lower the Current 30% Ownership Limit

9. In its reconsideration petition, CME/CFA requested that the Commission lower the current limit on the number of homes passed by cable systems owned by any one entity from 30% to 10%-20%.[22] Viacom, in its comments, argued for a 15% limit.[23] The arguments raised by CME/CFA and Viacom against the Commission's 30% limit fall into five broad categories -- consideration of diversity issues; alteration of the status quo; divestiture by Tele-Communications, Inc. ("TCI"); current levels of horizontal concentration; and impact of other statutes and rules. We address the arguments for each category below.

1. Consideration of Diversity Issues

a. Background

10. CME/CFA argued that the Commission did not give sufficient consideration to media diversity concerns in setting the 30% limit and that "[p]romoting First Amendment diversity may well require limits below that needed to address anticompetitive concerns alone."[24]

11. Opposing reconsideration of the 30% limit, TCI noted that the CME/CFA diversity argument does not even attempt to balance the pros and cons of horizontal concentration, as the Commission is required to do by Section 613. TCI noted that Congress, the Commission, the courts, and antitrust scholars and economists uniformly have recognized that horizontal ownership can enhance

[20] *Second Report and Order* at ¶ 25.

[21] *Id.* at ¶ 28.

[22] CME/CFA Petition at 4.

[23] Viacom Comments on CME/CFA Petition at 2.

[24] CME/CFA Petition at 3-4.

consumer welfare and that this enhancement must be considered in addition to diversity aims. CME/CFA's diversity argument focuses only on the potential negative consequences of horizontal concentration.[25]

b. Discussion

12. Congress specifically directed that the Commission "impose no limitations that will impair the development of diverse and high quality programming."[26] Promoting diversity of ownership has been a long-standing policy of the Commission.[27] Diversity of information sources and viewpoints can be threatened by substantial concentration among cable system operators. Moreover, as the Commission has found, entry by new MVPDs is neither cheap nor easy and cable system operators remain the dominant distributors of video programming.[28] As a result, decreases in diversity of information sources or viewpoints that accompany increased concentration among purchasers of programming may not be easily remedied.

13. Diversity is not the sole factor the Commission must consider in promulgating the cable horizontal ownership limits. As indicated above (paragraph 7), Section 613 lists seven public interest factors that the Commission must balance in making a decision.[29] Before reaching a determination that 30% was a proper limit, the Commission twice requested public comment regarding the benefits and problems of horizontal concentration among cable MSOs.[30] In addition to considering diversity aims, the Commission considered the possibility that large MSOs might have the ability to preclude the launch of new video programming services (as required by public interest factors (1) and (2) above), the benefits and efficiencies that result from horizontal concentration (as required by public interest factor (4)), and

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[25]TCI Opposition to CME/CFA Petition at 2-3.

[26]47 U.S.C. § 533(f)(2)(G); *see also* House Report at 42-43 ("[D]iversity 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"); Senate Report at 32 ("[T]here are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both.").

[27]For a broad assessment of the Commission's diversity analysis in the mass media context, *see Further Notice of Proposed Rule Making, Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, 10 FCC Rcd 3524 at ¶¶ 54-80 (1994).

[28]*1997 Competition Report* ¶¶ 126, 128, 150.

[29]*See* 47 U.S.C. § 533(f)(2).

[30]*See Notice of Proposed Rule Making and Notice of Inquiry, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 210 at ¶ 37 (1992) ("*First Notice and NOI*"); *Report and Order and Further Notice of Proposed Rule Making, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6928 at ¶¶ 139-52 (1993) ("*First Report and Further Notice*").

the relative impact of other statutes and rules in addressing competitive concerns regarding large MSOs.[31] In the *Second Report and Order*, the Commission specifically noted that Section 19 of the 1992 Cable Act (the program access requirements), Sections 4 and 5 of the 1992 Cable Act (the must-carry requirements), and Section 612 of the Communications Act (the leased access requirements), combined with the 30% ownership limit, "will be appropriate to address the diversity aims which underlie the statutory horizontal ownership provisions."[32] The Commission also considered diversity in allowing ownership of additional cable systems up to 35% of cable homes passed, provided the additional cable systems are minority-controlled.[33]

14. We believe the 30% horizontal ownership limit adopted by the Commission provides considerable protection for diversity concerns. The record in this docket clearly demonstrates that the Commission took into consideration diversity concerns in adopting the 30% cable horizontal ownership limits. The Commission balanced those considerations, as required by Section 613, with many other factors, some of which support the growth of cable MSOs. In fact, the Commission's consideration of diversity concerns is reflected by the fact that we adopted a horizontal ownership limit lower than one that might have been indicated by a traditional antitrust analysis alone.[34] The Commission was concerned that a lower horizontal ownership limit could "impair the development of diverse and high quality programming."[35] The Commission properly concluded that a 30% limit is generally appropriate to prevent the largest MSOs from gaining excessive leverage, and also ensures that the majority of MSOs continue to expand and obtain the economies of scale necessary to encourage investment in new video programming services and the deployment of advanced cable technologies.[36]

2. Alteration of the Status Quo

a. Background

15. CME/CFA asserted that the 30% horizontal ownership limit is too high because it does not alter the status quo. CME/CFA contended that the Commission "failed to acknowledge that existing levels of horizontal concentration are too high," citing a passage from the Senate Report stating that large

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[31]*Second Report and Order* at ¶¶ 25-26.

[32]*Id.* at ¶ 26.

[33]*Id.* at ¶ 28.

[34]House Report at 42-43. In monopolization cases, the burden is on the plaintiff to prove that the defendant has monopoly power and this "virtually never" occurs when a defendant has a market share less than 50%. ABA Section of Antitrust Law, *Antitrust Law Developments (Fourth)* 236 (1997).

[35]47 U.S.C. § 533(f)(2)(G).

[36]*Second Report and Order* at ¶ 25.

MSOs have market power vis-a-vis programmers.[37] Arguing that Congress had made a specific finding that MSOs have the power to exact equity from programmers in exchange for carriage, CME/CFA asserted that Congress sought to change the status quo in the 1992 Cable Act.[38] In their reply comments, CME/CFA argued, without citing any specific legislative history, that the 1992 Cable Act was intended to reverse the Commission's decision in the *1990 Cable Report* not to adopt ownership limits.[39] CME/CFA stated that the 30% limit in the *Second Report and Order* resembles the balance struck by the Commission in its *1990 Cable Report* more than those envisioned in the 1992 Act, and that the *Second Report and Order* substituted the *1990 Cable Report* judgment for the requirements of the 1992 Cable Act.[40]

16. Time Warner Entertainment Co., L.P. ("Time Warner") and the National Cable Television Association ("NCTA") argued the Commission was given the discretion to balance competing concerns by Congress and disagreed that the 1992 Cable Act requires the Commission to alter the status quo.[41]

b. Discussion

17. The issue here is one of statutory interpretation -- whether Congress, in enacting Section 613, made a final determination that then current levels of horizontal concentration were too high, requiring the Commission to adopt rules to force divestiture and to reduce horizontal concentration. We believe that the text of Section 613 is clear that the Commission was given the discretion to adopt limits that may or may not require divestiture.

18. Section 613 gives the Commission the discretion "to prescribe rules and regulations establishing *reasonable limits* on the number of cable subscribers a person is authorized to reach ...."[42] CME/CFA's argument ignores that the statute does not direct the Commission to alter the status quo by ordering divestiture by any cable MSO. Instead, Congress required that the Commission set "reasonable limits" and left the parameters of what "reasonable limits" would be to Commission discretion.

19. Further, we note that this construction of the statute is supported by the legislative history. The Senate Report explicitly states that "[t]he legislation does not imply that any existing company must

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[37]CME/CFA Petition at 4 (citing Senate Report at 24, 33).

[38]*Id.* at 4-11.

[39]CME/CFA Reply to Oppositions at 2-4 (citing *Rate Deregulation & the Commission's Policies Relating to the Provision of Cable Television Serv., Report on Competition*, 5 FCC Rcd 4962 (1990) ("*1990 Cable Report*")).

[40]*Id.* at 2-4.

[41]Time Warner Opposition to CME/CFA Petition at 7-8; NCTA Opposition to CME/CFA Petition at 7-8.

[42]47 U.S.C. § 533(f)(1)(A) (emphasis added).

be divested and gives the FCC flexibility to determine what limits are reasonable."[43] The House Report states that: "Currently, the largest MSO controls access to almost 25 percent of all US cable subscribers. Although this percentage may appear low relative to other industries, the Committee believes that it may be quite significant depending on the subscriber level needed to launch and sustain a cable programming service."[44] The language of the House Report is significant on this point. While it demonstrates Congress' concern about current levels of horizontal concentration, it expressly does not make a final conclusion, but simply states that current levels "may be quite significant depending on" the number of subscribers needed to launch and sustain a programming service.[45]

20. The statute and the legislative history make clear that the Commission was not required to alter current industry structure, but to consider the potential public interest concerns associated with the industry structure. The Commission fully considered such interests.

3. Divestiture by TCI

a. Background

21. CME/CFA asserted that the *Second Report and Order* was too concerned about avoiding divestiture by TCI and was not focused on consumer welfare.[46] Arguing that the legislative history of Section 613 indicates that divestiture might be warranted, CME/CFA contended that a passage in the Senate Report stating that the legislation "does not imply that any existing company must be divested" expressly left open the possibility of divestiture.[47] CME/CFA urged that the Commission not be deterred from imposing horizontal limits which would require TCI to divest, as Congress required the Commission to weigh seven public interest considerations, none of which was to ensure that MSOs could continue to expand.[48]

22. Viacom agreed with CME/CFA that the *Second Report and Order* placed too much reliance on language in the Senate Report which states that the limit "does not imply that any existing company must be divested." Viacom argued that the legislative history does not prohibit the Commission from adopting a limit that would require divestiture, but, at most, only indicates that the Commission should not promulgate rules which would impose divestiture if the divestiture were not in the public interest. Viacom stated that divestiture is relevant and should be considered by the Commission in

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[43]Senate Report at 34.

[44]House Report at 42.

[45]*Id.*

[46]CME/CFA Petition at 4-11.

[47]*Id.* (quoting Senate Report at 34).

[48]CME/CFA Reply at 2-4.

adopting horizontal ownership rules, but that avoiding divestiture should not override the public interest concern regarding excess MSO market power against unaffiliated programmers.[49]

23. Time Warner, TCI, Liberty Media Corporation ("Liberty Media"), and NCTA responded that the Commission's decision not to order divestiture by TCI was based upon the finding that there was an "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."[50] Liberty Media argued that, since no programmer claimed in the original proceeding that any cable operator had exercised horizontal market power and no commenter introduced empirical evidence of such power, it was proper for the Commission to make this finding.[51] NCTA argued that avoiding divestiture was not the driving factor in the Commission's decision, as the Commission considered a number of factors in proposing and adopting the limits, including avoiding potential disruption in existing ownership and the absence of definitive evidence that existing levels of ownership are harmful.[52]

b. Discussion

24. We agree with Viacom and CME/CFA that the Commission has the authority under Section 613 to order divestiture. We disagree with CME/CFA to the extent they argue that the Commission should not consider the full impact divestiture would entail before promulgating such rules. Inquiry into the impact divestiture would have upon subscribers, programmers and industry investment are legitimate public interest objectives that the Commission is entitled to consider. A rule requiring divestiture must be based on consideration of all relevant factors.[53] We believe that the *Second Report and Order* properly considered whether the substantial structural change that divestiture would entail was warranted.

25. We reject CME/CFA's argument that the impact of ordering divestiture should not have entered into the Commission's decision-making because it is not one of the seven specifically-enumerated public interest factors of Section 613. The statute explicitly contemplates that the factors enumerated are

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[49]Viacom Comments at 7-8.

[50]Time Warner Opposition at 7-8; NCTA Opposition at 7-8; Liberty Media Reply at 9-11 (quoting *Second Report and Order* at ¶ 27).

[51]Liberty Media Reply at 9-11.

[52]NCTA Opposition at 7-8 (quoting *Second Report and Order* at ¶ 27); NCTA Reply Comments at 3-4.

[53]In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court held that courts reviewing agency action under the arbitrary and capricious standard must make a "searching and careful" examination of "whether the decision was based on a consideration of the relevant factors. . . ." *See also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (the function of a reviewing court "is to assure that the agency has given reasoned consideration to all the material facts and issues").

"among other public interest objectives" that the Commission is to consider.[54] Assessing the impact of divestiture is consistent with Section 613's directive that the Commission "take particular account of the market structure" and "not impose limitations which would impair the development of diverse and high quality video programming."[55]

26. In both the *First Report and Further Notice* and the *Second Report and Order*, the Commission considered arguments for low limits that would require divestiture. The Commission based its final decision not solely on a determination to avoid divestiture, as CME/CFA suggested, but, more importantly, upon the public interest requirements of Section 613. In its initial comments, the Association of Independent Television Stations, Inc. argued for a 10% subscriber cap.[56] In the *First Report and Further Notice*, the Commission stated that this proposal not only would require divestiture but "would sacrifice the efficiencies achieved by horizontal concentration."[57] The Commission determined that the proposal would "be contrary to the legislative history" of Section 613.[58] The Commission asked in the *First Report and Further Notice* that parties "favoring limits below 25%" that would require divestiture "discuss the effect that such divestiture would have on service to subscribers, programming carriage agreements, and on future MSO investment in new programming and technology."[59] The Commission emphasized the over-arching importance of striking "the proper balance among the competing public interest objectives Congress directed us to consider" in setting the horizontal ownership limit, without excluding the possibility of divestiture.[60]

27. In the *Second Report and Order*, the Commission again considered proposals that would have required divestiture by the largest MSO, TCI, and also discussed the other effects divestiture would create. The Commission, after considering the "statutory factors and . . . the preponderance of the data provided in the record," concluded that a 30% limit was appropriate because it would "prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration" while "ensur[ing] that the majority of MSOs continue to expand and benefit" from the positive aspects of increased

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[54]47 U.S.C. § 533(f)(2); *see Greater Boston Television*, 444 F.2d at 850-53 ("Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest.").

[55]47 U.S.C. §§ 533(f)(2)(C), (E), (G).

[56]*See* Association of Independent Television Stations, Inc. Initial [Feb. 1993] Comments at 7; *First Report and Further Notice* at ¶ 146.

[57]*First Report and Further Notice* at ¶ 148.

[58]*Id.*

[59]*Id.* at ¶ 149.

[60]*Id.* at ¶ 134.

concentration.[61] The Commission expressly confronted the divestiture issue and explicitly determined that "in 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, existing arrangements should not be disrupted."[62]

4. Current Levels of Horizontal Concentration

a. Background

28. CME/CFA asserted that the *Second Report and Order* did not sufficiently address the evidence that the largest MSO, TCI, already has market power and uses its market power to disadvantage competing program services.[63] CME/CFA argued that, from a competitive standpoint, the Commission "fail[ed] to acknowledge that existing levels of horizontal concentration are too high."[64]

29. Viacom argued that a lower limit is needed because, based upon its own experience, 40 million subscribers are necessary for an advertising-supported, basic cable programming network to be successful.[65] Viacom extrapolated from this figure its argument that no MSO should be allowed to come close to controlling access to enough subscribers that would prevent a programmer from reaching 40 million homes -- i.e., based on 1993 cable subscribership figures, no MSO should be allowed to come close to controlling access to 30.9% of cable subscribers. Viacom also asserted that the then current levels of market concentration allowed large MSOs to drive down the license fees they pay to programmers. This, Viacom argued, affects the entire market for license fees and drives them down across the board. The result is that programmers cannot spend as much on development, thus potentially reducing the diversity and quality of programming available to subscribers.[66]

30. Both CME/CFA and Viacom provided anecdotal evidence to support their belief that TCI, the nation's largest MSO, is too large. CME/CFA cited the Federal Trade Commission's ("FTC") agreement with TCI and Liberty Media forcing divestiture of QVC, Inc. ("QVC") as evidence that TCI possesses currently anticompetitive influence resulting from its large horizontal size.[67] In addition,

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[61]*Second Report and Order* at ¶ 25.

[62]*Id.* at ¶ 27.

[63]CME/CFA Petition at 4-11.

[64]*Id.* at 2-4.

[65]Viacom Comments at 9. Viacom estimated that 40 million subscribers equaled approximately 69.1% of cable subscribers nationwide at the time of Viacom's filing. *Id.*

[66]*Id.*

[67]CME/CFA Petition at 7-8 (citing *TeleCommunications, Inc., et al.; Proposed Consent Agreement with Analysis to Aid Public Comment*, 58 Fed. Reg. 63167 (Nov. 30, 1993)).

CME/CFA cited Viacom's antitrust complaint against TCI and claimed that, according to the Viacom complaint, TCI had dropped Viacom's The Movie Channel in favor of TCI affiliate Encore Media, and had withheld affiliation with Viacom's Showtime to force Showtime either to merge with Encore Media or be destroyed.[68] CME/CFA asserted that, if TCI can wield power over Viacom and its popular networks, it certainly has power to preclude the launching of new programming from smaller programmers.[69] CME/CFA also cited a passage in the Senate Report stating that "[w]itnesses at the hearings testified that. . . [MSOs have the power] to determine what programming services can 'make it' on cable."[70] CME/CFA argued that independent programmers' failure to argue for lower levels of concentration previously in this docket indicates "their reasonable fear of offending the MSOs who, after all, have it in their power to put them out of business."[71]

31. Viacom stated that TCI's anticompetitive conduct led Viacom, after the initial comment periods in this proceeding closed, to file its antitrust complaint against TCI, Liberty Media and others and also convinced Viacom that stricter horizontal rules are necessary to prevent anticompetitive conduct in the market for programming services.[72]

32. All other cable operators filing comments strenuously opposed the argument that current levels of horizontal concentration are "too high." TCI stated that the arguments of CME/CFA and Viacom fail to recognize the current benefits of horizontal concentration, which the Commission is required to consider under its statutory mandate.[73] TCI also asserted that horizontal concentration allows MSOs to achieve economies of scale in research and development of transmission and distribution technology and achieve considerable savings in administrative costs such as billing operations, advertising, marketing, and management. In addition, Time Warner stated that the costs of negotiating with programmers are reduced on both sides of the table.[74]

33. TCI argued that under traditional antitrust analysis, the then current ownership level of MSOs did not equate to high concentration, citing legislative history which reported that the Herfindahl-Hirshman Index ("HHI") of the top 20 MSOs was 491 and the Four-Firm Ratio was 36%, well below the Department of Justice thresholds of 1,000 and 50%. TCI stated that these levels did not indicate that

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[68]*Id.* at 8-9 (citing *Viacom International, Inc. v. Telecommunications, Inc., Liberty Media, et. al*, Civ. No. 93-CIV6658(KC) (filed S.D.N.Y. Sept. 23, 1993)); CME/CFA Reply at 3.

[69]CME/CFA Petition at 7-11; CME/CFA Reply at 3.

[70]*Id.* (quoting Senate Report at 33).

[71]CME/CFA Petition at 3, 7-11.

[72]Viacom Motion for Leave to File Response and Response at 2-3. Pursuant to Section 1.415(d) of the Commission's rules, we deny Viacom's motion to submit its late-filed response. However, we will consider Viacom's response as informal comments under Section 1.419(b).

[73]TCI Opposition at 2-3.

[74]Time Warner Opposition at 3-5; *see also* House Report at 43.

MSOs are able to extract unreasonable concessions from their suppliers.[75] Time Warner pointed out that an MSO's incentive to undertake a foreclosure strategy is counterbalanced by desires to increase subscribership and decrease churning of programming.[76] TCI also submitted a report from a group of economists that recommended against setting low ownership limits because, due to MSOs' recognition that their own success depends on the availability of a high quantity and quality of programming, increased concentration "will not affect the array of programming selected and distributed by the cable operator and therefore will not distort the allocation of resources in the production of program services."[77]

34. Cable MSOs and programmers also strongly disputed Viacom's suggestion that 40 million subscribers are required for success. Several pointed out that a number of successful cable networks had never achieved penetration levels above 60% to 70%.[78] Time Warner argued that there is no "magic" level of penetration that necessarily assures, or prevents, a programming service's commercial success.[79] Turner Broadcasting System, Inc. ("TBS") pointed out in its opposition that ESPN2, an unaffiliated programmer, already had over 10 million subscribers, one million more than the vertically affiliated Cartoon Network, and the then-unaffiliated Sci-Fi Channel was regarded as successful with 15 million subscribers.[80] Liberty Media stated that 46 of the 68 listed national basic cable networks then had fewer than 40 million subscribers.[81]

35. TCI and Liberty Media responded to CME/CFA and Viacom's specific charges of anticompetitive conduct by arguing that the charges were unsupported. TCI argued that the consent decree cannot be used as evidence against TCI. TCI also stated that no competitive problems were ever proved in the QVC matter and that TCI divested its interest solely because it did not want to interfere with QVC's tender offer for Paramount.[82] Liberty Media argued that the agreement with the FTC was intended to

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[75]*See* TCI Opposition at 4-5.

[76]Time Warner Opposition at 8-9; *see also* Senate Report at 24.

[77]Stanley M. Besen, Steven R. Brenner and John R. Woodbury, *An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions* at 19-22 (attached to TCI Opposition).

[78]*See* Time Warner Opposition at 6-7 (BET and Country Music Television in operation for years with levels below 60-70%).

[79]Time Warner Reply to Viacom Comments at 6; Time Warner Opposition at 6-7.

[80]TBS Opposition to CME/CFA Petition at 2.

[81]Liberty Media Opposition at 10-11.

[82]*See* Testimony of John C. Malone (TCI Chairman and CEO) before the Senate Subcommittee on Antitrust, Monopolies and Business Rights (Dec. 16, 1993) (attached to TCI Opposition).

address vertical concerns and not horizontal size.[83] TCI and Liberty Media stated that Viacom's antitrust suit was filed in the context of its attempt to prevent QVC from acquiring Paramount. Given this history, TCI and Liberty Media argued that it would be improper for the Commission to decide its cable horizontal ownership limits based upon unproven allegations made by a competitor with the desire to enhance Viacom's efforts to increase its own ownership concentration in several markets.[84] TBS discounted Viacom's allegations against TCI as "an extension of its current jihad with TCI."[85] Time Warner stated that Viacom's argument consists of unproven allegations.[86]

36. Time Warner also pointed out that during the prior comment period, no programmer, either failed or successful, proposed or well-established, claimed that any cable operator exercised horizontal market power, and no commenter introduced any empirical evidence of the exercise of such market power.[87] Liberty Media argued that without this evidence, the Commission appropriately determined that cable horizontal ownership limits that freeze or reduce existing ownership levels were unjustified.[88]

b. Discussion

37. As stated above, the Commission found in the *Second Report and Order* that 30% was an appropriate limit "in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse affect on diversity ..."[89] The legislative history of Section 613 indicates Congress' concern that excessive horizontal concentration had the potential to facilitate the anticompetitive exercise of monopsony power and adversely impact the diversity of programming.[90] Because cable MSOs generally purchase cable programming on a national level and at the same time distribute that programming to consumers on a local level through the locally franchised cable system, assessing the impact of cable concentration by examining both the national programming market and the local distribution market is appropriate. In the *Second Report and Order*, the Commission

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[83]*See* Liberty Media Opposition at 9, quoting Statement of Mary Lou Steptoe before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary 5-6 (Nov. 18, 1993) ("Since the alleged competitive problems stem from the vertical link between TCI/LMC and QVC, the FTC's consent order addresses them by severing that link.").

[84]TCI Opposition at 6-7; Liberty Media Opposition at 8-12; Liberty Media Reply at 12-15.

[85]TBS Response to Viacom's Comments at 1.

[86]Time Warner Reply at 3-5.

[87]*Id.* at 3-5.

[88]Liberty Media Opposition at 6.

[89]*Second Report and Order* at ¶ 27.

[90]Senate Report at 32-33.

found that a 30% limit was "appropriate to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration."[91] The Commission then concluded that the 30% limit is "reasonable to prevent the types of anti-competitive conduct which concerned Congress, particularly when coupled with the behavioral restrictions contained in [the program access and program carriage provisions] . . . . "[92] In this reconsideration proceeding, no one has proffered any new evidence that requires the Commission to alter this finding. Moreover, we believe the 30% limit complies with the intent of Congress and satisfies the criteria specified in Section 613.

38. In enacting Section 613, Congress expressed concern about concentration of the media in the hands of a few "media gatekeepers" who could control dissemination of information.[93] The accumulation of market share on a national level by a single or small number of large cable MSOs could diminish the diversity of programming available to most households in the United States. As of June 1997, there were more than 64 million cable subscribers representing more than 66% of all television households in the United States.[94] As such, cable television remains a primary source of information and programming for many households in the United States. The 30% rule limits the extent to which one or a few large cable MSOs could reduce the diversity of programming in the United States.

39. The 30% limit diminishes the likelihood that either a large cable MSO acting unilaterally or a group of cable MSOs acting in concert could exercise market power in the purchase of programming.[95] While the exercise of market power could result in lower negotiated programming costs for these MSOs in the short run, it could also adversely affect the development of diverse and innovative programming in the long run. In addition to preserving the development of programming, the 30% limit decreases the likelihood that a large cable MSO acting unilaterally could coerce nonaffiliated programmers into denying programming to alternative MVPDs, such as a DBS provider.[96]

40. The 30% limit may serve to facilitate the development of competition in those markets where cable MSO market power already exists. The rule limits the extent to which large cable MSOs can merge and result in one or two MSO's controlling local cable markets nationwide. Limiting this merger potential may preserve opportunities for entry by overbuilders or other MVPD providers and reduce the

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[91] *Second Report and Order* at ¶ 25.

[92] *Id.* at ¶ 26.

[93] Senate Report at 32, 33.

[94] *1997 Competition Report* at ¶¶ 14 and 15.

[95] *See generally*, David Waterman and Andrew Weiss, VERTICAL INTEGRATION IN CABLE TELEVISION (1997) at 55-86 and 128-141.

[96] *See also* 47 U.S.C. § 548(b), which makes it "unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

likelihood that large MSOs can coordinate their behavior by mutually forbearing from overbuilding each other's service territories. Coordinated activity between cable MSOs, whether tacit or overt, is more likely with few firms than many (due to greater ease in reaching a consensus, monitoring compliance, and punishing cheaters), and such behavior will have a greater impact the larger combined share of the market these collusive firms control. The 30% limit also reduces the likelihood of coordinated activity between large cable MSOs in areas such as program purchasing and equipment purchasing (e.g., set top boxes and converters).[97]

41. The 30% limit permits cable MSOs to cluster systems in order to gain efficiencies related to economies of scale and scope in administration, deployment of new technologies and services, extension into previously unserved territories, etc..[98] Accordingly, the 30% limit simultaneously guards against the potential anticompetitive effects of horizontal concentration and allows cable MSOs to realize the benefits of clustering.

42. The 30% limit is a structural complement to the program access provisions.[99] The horizontal ownership rules limit the potential for anticompetitive abuses of purchasing power in areas outside of the core areas covered by the program access rules, such as programming contracts between cable operators and non-vertically integrated programmers or contracts involving programming that is not delivered to cable operators via satellites. In addition, structural regulation generally is more easily enforced and detected than conduct regulation. We recognize that a large market share does not in and of itself indicate that a firm or a collection of firms has the ability to exercise market power or engage in anticompetitive behavior.[100] Nevertheless, structural regulation imposes far fewer economic costs on the market than regulatory models that use primarily price or case-specific conduct regulation as a way to mitigate strategic, anticompetitive behavior.[101]

43. It appears that the current level of concentration among cable MSOs has not prevented an expansion in programming sources and networks. The nation's largest cable MSO reached 24% of

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[97]*See generally*, James L. Langenfeld and Louis Silvia, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, ANTITRUST LAW JOURNAL (1993); Alexis Jacquemin and Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, HANDBOOK OF INDUSTRIAL ORGANIZATION, Richard Schmalensee and Robert Willig, ed., (1990); *see also*, *NCAA v. University of Oklahoma*, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*, 105 S.Ct. 2613 (1985).

[98]*E.g.*, *Second Report and Order* at ¶¶ 25-26; *1997 Competition Report* at ¶¶ 140-148.

[99]47 U.S.C. § 628; 47 C.F.R. § 76.1000 et seq.

[100]*See, e.g.*, *In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995). We also recognize that the courts have generally found that a firm can not successfully obtain a monopoly with less than a 30% market share. *Antitrust Law Developments (Fourth)* 298-99 and cases cited therein.

[101]*Cf.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, *reh'g denied*, 509 U.S. 940 (1993).

homes passed by cable in 1990;[102] grew to 27% by 1993;[103] and reached 29.32% at the time of the *1997 Competition Report*.[104] At the same time, our annual competition reports indicate a gradual but continuous growth and expansion in both cable-affiliated and independent programming sources and programming networks.[105] This evidence tends to suggest that the Commission properly struck a reasonable balance between concentration and diversity concerns. Thus, contrary to CFA's allegations, the actual evidence to date suggests that allowing a cable MSO to own systems reaching 30% of homes passed has not significantly hampered new video programmers' entry in the programming market.

44. Viacom's argument that 40 million subscribers are needed for a national cable programming network to be successful is not supported by the record. Other parties in the proceeding have presented evidence disputing Viacom's 40 million figure, including several examples of cable programming services (such as BET, Nickelodeon, ESPN2) that were successful before reaching 40 million subscribers. Prior comments in this docket also provide data that 40 million subscribers are not necessary for a national, basic cable programming network to be successful.[106] Commenters, including new networks, in other proceedings before the Commission likewise have stated that a new national, advertiser-supported network requires a threshold subscriber base of ten to twenty million subscribers.[107]

45. The *1997 Competition Report* estimates the total number of MVPD subscribers nationwide to be 73,646,970.[108] Consequently, a programmer that fails to sell its product to an MSO having 30% of

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[102]Senate Report at 32.

[103]*Second Report and Order* at n. 40.

[104]*1997 Competition Report* at Appendix E, Table E-3. Because the Commission's reporting requirements have been stayed along with the horizontal ownership limit, we currently do not have sufficient information regarding the many joint ventures and other transactions, recently announced by cable MSOs such as TCI, Cablevision, Adelphia, Falcon, Time-Warner, etc., to determine conclusively whether these transactions will result in attributable ownership interests that would place some MSOs above the 30% threshold.

[105]*Id.* at ¶ 158.

[106]*See* Time Warner Initial [Feb. 1993] Comments at 27-29 and TCI Initial [Feb. 1993] Comments at 24-25 (both listing several apparently successful national basic cable programming networks with below 40 million subscriber penetration).

[107]*See* Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz, and America's Health Network Comments at 11-13, 34, 36 in *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176; Affidavit of Christopher H. Murvin at 8, Affidavit of Jefferi K. Lee at 6, and Affidavit of Roger Williams at 8 in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (Leased Access)*, MM Docket No. 92-266 & CS Docket No. 96-60; Program Providers Comments at 12 in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (Going Forward)*, MM Dockets Nos. 92-266 & 96-215.

[108]*1997 Competition Report* at Appendix E, Table E-1.

cable homes passed nationwide still would have the opportunity to reach (through the remaining MVPDs) over 50 million subscribers, well over the threshold for national success. Many among the top 50 programmers nationwide, including MSNBC, the Disney Channel, and Turner Classic Movies, reach substantially less than 40 million subscribers.[109] Neither Viacom nor CME/CFA has provided sufficient grounds to warrant a lowering of the 30% horizontal ownership limit and freezing or reducing existing levels of cable ownership.

5. Impact of Other Statutory Provisions and Rules

a. Background

46. CME/CFA argued that the Commission's reliance in the *Second Report and Order* upon existing statutes and regulations, such as the program access and carriage rules, as a justification for higher ownership limits was improper because structural regulations provide "a superior means of promoting diversity compared to behavioral regulations."[110]

47. Viacom also asserted that the Commission should not have relied on other sections of the 1992 Cable Act, such as program carriage and access provisions,[111] must-carry requirements,[112] channel occupancy limits,[113] and leased access requirements.[114] Viacom argued that Congress did not indicate that the Commission should calibrate the cable horizontal ownership rules to take these provisions into account, as these provisions were enacted with purposes separate from the cable horizontal ownership provision. Viacom stated that these other provisions probably will not have any practical impact on restraining anticompetitive conduct of cable operators: leased access is probably not a viable option for programmers, must-carry provisions are for television broadcasters (not unaffiliated programmers like Viacom), and the program access provisions only require MSOs to offer their own programming to other distributors. Viacom also argued that although the program carriage provisions prohibit cable operators from extracting a financial interest or exclusivity rights in exchange for programming carriage, the statute does not address the issue arising when an MSO "solely by virtue of the size of its subscriber base" has market power to determine whether a programming service can reach the critical mass of subscribers

[109] *Id.* at Appendix F, Table F-6.

[110] CME/CFA Petition at 3. The Commission notes that in its original comments in this proceeding, CFA argued that the Commission should "proceed with great caution and consider the effect of implementation of the rate regulation and program access provisions of the 1992 Cable Act when creating rules with respect to cable ownership limits and concentration." CFA Initial [Feb. 1993] Comments at 3.

[111] 47 U.S.C. §§ 536, 548.

[112] 47 U.S.C. §§ 534, 535.

[113] 47 U.S.C. § 533(f)(1)(B).

[114] 47 U.S.C. § 532.

needed to succeed. Viacom also stated that programmers are not likely to bring program carriage complaints against the largest MSOs, who are their biggest customers and therefore essential to success.[115]

48. Liberty Media and Time Warner responded by arguing that the existing restrictions in the 1992 Cable Act support maintaining the 30% ownership limit. Liberty Media argued that the Commission properly considered the cumulative effect of these regulations to protect against the exertion of undue power over the success of new video services.[116] Time Warner agreed, stating that the cable horizontal ownership limits should not be viewed as an isolated measure and that the cumulative effect of all provisions and rules should be taken into account.[117] Liberty Media also pointed out that Viacom had taken completely the opposite position on this point in the initial comment round in this docket.[118] NCTA stated that Congress directed the Commission to take into account the market structure, ownership patterns and other relationships in the industry in establishing these limits, and that the Commission found that the cumulative effect of all these rules should protect against any one cable operator's exertion of excessive market power.[119]

b. Discussion

49. We believe that the *Second Report and Order* properly considered the impact of other rules and statutes since the public interest requirements of Section 613 require the Commission to examine the marketplace as it currently operates, which includes the effects of current Commission rules and statutes. Specifically, the public interest factors of Section 613 state that the Commission is to "take particular account of the market structure, ownership patterns, and other relationships of the cable television industry," "account for any efficiencies and other benefits that might be gained through increased ownership or control," "make such rules and regulations reflect the dynamic nature of the communications marketplace," and "not impose limitations which would impair the development of diverse and high quality video programming."[120]

50. Statutes and rules such as the program access, program carriage, channel occupancy limits, and must-carry requirements all affect the way the cable television industry currently operates and have a profound effect on current industry structure and performance. For example, in the *1994 Competition Report*, the Commission stated that, "[t]o the extent that large MSOs used their power over vertically-integrated programmers to obtain exclusive distribution rights to satellite-delivered programming, and those exclusive rights disadvantaged competitors of those large MSOs, the 1992 Cable Act's program

[115]Viacom Comments at 4-5.

[116]Liberty Media Opposition to CME/CFA Petition at 6-7.

[117]Time Warner Opposition at 5.

[118]Liberty Media Reply at 5-9.

[119]NCTA Opposition at 7-8; NCTA Reply at 3-5.

[120]47 U.S.C. § 533(f)(2)(C), (D), (E), (G).

access provisions and the Commission's program access rules appear to have largely addressed the problem."[121] In the *1997 Competition Report*, the Commission noted that "the program access rules have been credited as having been a necessary factor in the development of both the DBS [direct broadcast satellite] and MMDS [multichannel multipoint distribution service] industries."[122] Because these provisions have real and substantive impact upon the market, the Commission, in setting the horizontal ownership limit, may properly consider the impact of these provisions in alleviating some of the public interest and anticompetitive concerns about horizontal concentration.[123]

51. In addition to CME/CFA's argument that the Commission should not have placed any reliance on the impact of these other statutes and rules, both CME/CFA and Viacom argued that the Commission placed too much weight on the impact of these other statutes and rules on alleviating competitive concerns. In the *Second Report and Order*, the Commission recognized that anticompetitive concerns might indeed be present under the current market structure. The Commission did not conclude that statutory provisions and rules such as the program carriage and access provisions, the must-carry requirements, and the channel occupancy limits were sufficient by themselves to address anticompetitive concerns about horizontal concentration. The Commission did find that, when combined with these other statutory provisions and rules addressing similar concerns, the 30% horizontal ownership limit was "reasonable" and stated that: "The cumulative effect of these regulations coupled with a horizontal ownership limit of 30% should protect against any one cable system exerting undue power that could prevent the success of new video programming services or 'unfairly impede the flow of video programming to the consumer.'"[124] The Commission's weighing of these other statutory provisions and rules in crafting the rules adopted in the *Second Report and Order* was appropriate.

B. Requests to Revise the Calculation Factors

1. Inclusion of Affiliated Telephone Companies

a. Background

52. CME/CFA requested that the Commission take into account in the calculation of "homes passed" the number of telephone households of a telephone company affiliated with an MSO. CME/CFA

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[121] *1994 Competition Report* at ¶ 149.

[122] *1997 Competition Report* at ¶ 230. *See also Second Report and Order* at ¶ 54 ("carriage of broadcast, PEG [public, educational, and governmental] and leased access channels promote diversity and provides alternative sources of unaffiliated programming to cable subscribers in furtherance of the statutory objectives"); *First Order on Reconsideration* at ¶ 27 (reaffirming same).

[123] To insure that our other rules have their continued efficacy, we have explored, where necessary, suitable adjustments to these rules. *See, e.g., Memorandum Opinion and Order and Notice of Proposed Rulemaking, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, FCC 97-415, CS Docket no. 97-248, RM No. 9097 (rel. Dec. 18, 1997).

[124] *Second Report and Order* at ¶ 26 (quoting 47 U.S.C. § 533(f)(2)(A)).

argued that the current regulations do not take into account proposed mergers and joint ventures between telephone companies and cable companies -- e.g., the (then) proposed merger of Bell Atlantic and TCI that would have resulted in access to 40% of all U.S. households, either through Bell Atlantic telephone lines or TCI's cable systems. CME/CFA argued that just as "homes passed" measures potential cable subscribers, telephone customers should be viewed as potential "cable subscribers" via video dialtone or broadband networks. CME/CFA argued that if cable and telephone companies merge, the potential for direct competition in their overlapping areas is removed and smaller video programmers are threatened.[125] CME/CFA further stated that its proposed expansion of the horizontal ownership rules is a logical outgrowth of the "homes passes" standard, as potential VDT subscribers are functionally indistinguishable from potential cable subscribers.[126]

53. MSOs and telephone companies uniformly responded that the Commission does not have the authority under Section 613 to treat telephone customers as "cable subscribers."[127] NCTA and Bell Atlantic argued that Section 613 specifically refers to "cable subscribers" reachable through "cable systems" and that VDT and other systems are not regarded as "cable services or systems" in their respective proceedings.[128] U S West Communications, Inc. ("U S West") argued that the Communications Act's definition of "cable system" specifically excludes common carrier facilities subject to Title II of the Communications Act.[129] In addition, Bell Atlantic argued that VDT service is not a single "facility" that includes the necessary signal generation, reception and control equipment required of a "cable system," since a VDT network's generation and transmission equipment will generally be provided by the programmers.[130] GTE Service Corporation ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth") and Bell Atlantic also stressed that unlike cable, VDT is an open-access, subscriber controlled system where the subscriber will not be the programming captive of the telephone company, because the telephone company is a common carrier.[131] Liberty Media pointed out that the proposal ignores the Commission's rules prohibiting a telephone company from acquiring a cable system within its telephone service area.[132]

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[125]CME/CFA Petition at 11-13.

[126]CME/CFA Reply at 5-7.

[127]Time Warner Opposition at 9-10; TCI Opposition at 8; Liberty Media Opposition at 12-13; U S West Communications, Inc. Opposition to CME/CFA Petition at 1-3; GTE Service Corporation Opposition to CME/CFA Petition at 2; BellSouth Telecommunications, Inc. Opposition to CME/CFA Petition at 3-7; Bell Atlantic Opposition to CME/CFA Petition at 2-5.

[128]NCTA Opposition at 9-10; Bell Atlantic Opposition at 2-5.

[129]U S West Opposition at 2 (citing 47 U.S.C. § 522(7)).

[130]Bell Atlantic Opposition at 4.

[131]*Id.* at 4-5; GTE Opposition at 2; BellSouth Opposition at 5-7.

[132]Liberty Media Opposition at 12-13 (discussing 47 C.F.R. § 63.54(d)(3)).

54. Time Warner argued that the CME/CFA proposal would discourage telephone investment in cable and would be fundamentally at odds with the Commission's "two wires" policy.[133] NCTA also stated that CME/CFA's proposition is absurd because it would require the Commission to consider all telephone subscribers as "potential cable customers" in determining the percentages.[134]

55. Bell Atlantic posited that the proposal would impose an arbitrary limit on the very companies capable of succeeding as new entrants against the cable companies and would provide a disincentive in creating and upgrading VDT services. According to Bell Atlantic, under its then proposed merger with TCI, Bell Atlantic would have upgraded TCI's systems to allow telephone service in competition with incumbent telephone companies. TCI would have divested itself of cable systems in Bell Atlantic's region and Bell Atlantic would have upgraded its networks to compete with these systems. Bell Atlantic noted that similar arrangements were included in other cable-telco transactions proposed at the time the comments were filed.[135]

56. Liberty Media also stated that since the Commission Notices in this docket did not mention potential application of the limits to telephone customers, to extend the limits would violate the Administrative Procedure Act ("APA").[136]

57. CME/CFA responded that the Commission always has the authority to regulate in ways "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[137] The Commission has authority under the "reasonably ancillary" test to achieve "long established" goals or "ultimate purposes."[138] CME/CFA asserted that, since the Commission had power before Section 613 to impose horizontal limits on the cable industry, the Commission certainly has authority to adopt limits which include affiliated telephone subscribers under the "reasonably ancillary" standard.[139] However, CME/CFA stated, that if the Commission finds that considerations of fairness and the APA require further rulemaking, the Commission should initiate such a procedure.

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[133]Time Warner Opposition at 9-10.

[134]NCTA Opposition at 9-10.

[135]Bell Atlantic Opposition at 5-8.

[136]Liberty Media Opposition at 12-13 (citing *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022-23 (2d Cir. 1986) (although final rule need not be an "exact replica of the rule proposed in the Notice," the Notice must be sufficient "to give the public advance notice of the scope of its proceedings")).

[137]CME/CFA Reply at 5-7 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

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

[139]CME/CFA Reply at 7.

b. Discussion

58. Section 613 specifically authorizes the Commission to place limits on "cable subscribers" a person may reach through "cable systems."[140] Where the use of a telephone company's lines is limited to the provision of local exchange services, we see no reason why that company's telephone subscribers should be counted as cable subscribers for the purposes of the cable horizontal ownership limit.[141] Likewise, the cable horizontal ownership limit does not apply to subscribers of a telephone company that offers multichannel video programming distribution service solely through means other than a "cable system."[142]

59. We note, however, that if a telephone company offers multichannel video programming distribution service to subscribers through a "cable system," the households passed by that cable system would be regarded as "cable households" for purposes of the cable horizontal ownership rules.[143] As discussed below, the Commission will be seeking further comment on possible revisions to the rules to take into account all MVPD subscribers, such that a person would be allowed to reach fewer subscribers through cable systems if that person also reaches a large percentage of MVPD subscribers nationwide through other MVPD systems, including video distribution by a telephone company.

2. Exemption for Systems Facing Effective Competition

a. Background

60. Bell Atlantic proposed that homes in franchise areas facing "effective competition" not be included in calculating whether an operator has reached the 30% limit.[144] To illustrate Bell Atlantic's proposal, assume that cable company A passed 25% of cable homes nationwide, but 5% of these cable households were in areas subject to "effective competition." Under Bell Atlantic's proposal, if 10% of the cable homes passed nationally were in franchise areas subject to "effective competition," cable

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[140]NCTA Opposition at 9-10; Bell Atlantic Opposition at 2.

[141]We note that the proposed TCI-Bell Atlantic merger was never consummated.

[142]*See* 47 U.S.C. § 651 (setting forth options for telephone companies entering the video marketplace). We note that the Commission's VDT rules and policies were repealed by Section 302(b)(3) of the 1996 Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56.

[143]This standard is consistent with the current horizontal ownership limit, which is based on the cable system's potential reach, i.e., the number of homes passed. We note, however, that we are revisiting this issue under the *Further Notice of Rulemaking* and seek comment on the possibility of changing the method of calculating the horizontal ownership limit from potential reach to actual reach, i.e., the number of subscribers served.

[144]Bell Atlantic Petition at 1-2.