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August 14, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CS Docket No. 98-82
Review of the Commission's
Cable Attribution Rules

Dear Ms. Salas:

Transmitted herewith, on behalf of Time Warner Inc. ("Time Warner"), are an original and nine copies of comments in the above-referenced proceeding.

Because Time Warner's comments also bear on issues raised in the Commission's Further Notice of Proposed Rulemaking in MM Docket No.92-264, Time Warner is concurrently submitting, under separate cover, an original and nine copies of these comments to be included in that docket as well.

Should there be any questions regarding this matter, kindly communicate with the undersigned.

Very truly yours,

Arthur H. Harding

Arthur H. Harding
Counsel for
Time Warner Inc.

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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AUG 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Review of the Commission's Cable Attribution Rules	)	

To: The Commission

COMMENTS OF TIME WARNER INC.

TIME WARNER INC.

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Date: August 14, 1998

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SUMMARY

Time Warner Inc. ("Time Warner"), by its attorneys, submits these comments in response to the Commission's recent notice of proposed rulemaking with respect to its cable horizontal ownership rules as well as to the Commission's notice of proposed rulemaking regarding proposed changes to the cable attribution standards. The time is ripe for the Commission to eliminate or raise and otherwise modify the potential horizontal ownership cap, as well as to relax its overly-broad cable attribution standards.

Time Warner submits these comments without prejudice to the arguments made in its pending constitutional challenge to the statutory provision and associated FCC rules before the U.S. Court of Appeals for the D.C. Circuit. Cable operators clearly are First Amendment speakers, and any government-imposed limitation upon speaking to 70% of their potential audience must be analyzed under the most exacting scrutiny. Under either strict or intermediate scrutiny, the horizontal ownership restrictions are unconstitutional. Any defense of the current version of the horizontal ownership rules must both establish the existence of a current, concrete problem that warrants an intrusion on cable operators' free speech, and demonstrate how the rules adopted directly address any such deficiency. Given the evidence of an increasingly competitive independent video programming industry, as well as the presence of other Commission rules aimed at furthering the same diversity goal, it is clear that the horizontal ownership rules cannot be justified as necessary to preserve the "free flow" of video programming or to advance the goal of program diversity.

Indeed, the empirical data regarding the success and proliferation of independent video programmers illustrates that current competitive conditions assure the "flow" of video programming as directed in the 1992 Cable Act. Given the evidence that independent

programming services have not only achieved parity with, but have surpassed, the availability of vertically integrated programming services, if the FCC can convince itself of the constitutionality of any horizontal rules, which we dispute, the Commission must substantially liberalize the horizontal ownership restrictions so that consumers can benefit from the significant economies of scale and other tangible benefits of horizontal concentration.

The Commission is also bound to consider the impact of its other rules during its review of its horizontal ownership limits. First, the Commission should recognize that the most real risk to the continued development of independent programming services is the possible imposition of digital must-carry requirements on cable operators while broadcasters transition to digital television -- requirements that, if imposed, would force cable operators to drop existing programming in order to open up sufficient channel space for both the analog and digital signals of every broadcaster electing must-carry status. The Commission must also recognize that the existence of the program carriage, program access and leased access rules already severely constrains the ability of cable systems to foreclose unaffiliated programmers from their systems and the common sense proposition that cable operators will carry popular or desirable programming, whether affiliated or not. In addition, the growth of DBS, MMDS, OVS and other new video distribution technologies, as well as the forthcoming availability of multichannel digital television broadcasts, ensures additional outlets for independent video programming, all but eliminating concerns over monopsony power of horizontally concentrated cable MSOs. In order to adhere to the statutory mandate to allow the efficiencies to be gained from horizontal concentration so long as conditions exist to prevent the perceived harms of concentration, the

Commission must now substantially relax its sweeping, constitutionally suspect cable horizontal ownership rules.

Initially, the current 30% horizontal ownership cap must be raised. Traditional antitrust analysis recognizes that a single firm ordinarily cannot exercise monopoly power if it controls less than 40% of a relevant market, and indeed, numerous courts have determined that market share in excess of 50% is needed to find monopoly power. Moreover, in light of congressional recognition that 35% does not represent undue concentration in the analogous broadcast horizontal ownership context, at the very least, the Commission must raise the cable horizontal ownership limit to match the current broadcast horizontal ownership limit. A cable horizontal ownership limit of at least 35% would not even remotely threaten the ability of programming services to be successful. Even assuming that an MSO serving up to 35% of the nation's subscribers would deny carriage to a popular programming service entirely, such a limit would still leave open the possibility of at least 65% nationwide penetration -- a level well below which many successful programming services have thrived.

The calculation of any given cable operator's horizontal ownership percentage should use as its numerator the number of cable subscribers served by any particular entity through its cable systems (but not through other distribution media), with the denominator consisting of all MVPD subscribers (both cable and non-cable) nationwide. With respect to the numerator calculation including only an entity's cable subscribers, the statute is clear that any horizontal ownership limit must place limits on the number of *cable* subscribers served by any particular entity, and not place limits on the number of non-cable MVPD subscribers that particular entity may serve through distribution technologies other than franchised cable systems.

With respect to the denominator consisting of all MVPD subscribers, such a calculation is dictated due to the fact that cable homes passed data (the data to be used for the current horizontal concentration denominator) is unreliable and difficult to obtain. Moreover, a test based solely on cable homes passed is an inaccurate measure in that it fails to account for increasing competition from other MVPDs. Total MVPD subscriber figures are published annually in the Commission's competition reports, providing a single, readily accessible number that all parties can use to plug into the equation when calculating their compliance with the horizontal ownership limits. Not only does this measure provide a uniform value for all calculations of the horizontal ownership cap, but it also better reflects current competitive realities. Such an approach recognizes that non-cable MVPDs provide an alternative programming distribution outlet for video programmers, and that as the number of subscribers served by such non-cable MVPDs increases, so too does the potential for alternative distribution.

With respect to determining what interests are attributable for purposes of the horizontal ownership limits, the current use of existing strict broadcast attribution standards ignores the fact that it is management control -- *i.e.*, the ability of a given cable operator to control the day-to-day operations of a particular cable system -- that serves as an appropriate gauge as to whether or not a particular cable operator is blocking the free flow of independent video programming. It is the interest of the entity responsible for the management and day-to-day operations of a given cable system that should be attributable for purposes of determining compliance with the horizontal ownership limits. Thus, in a joint venture between two or more cable operators, the subscribers to the joint venture's cable systems should be attributed *only* to the entity exercising operating managerial control. The other non-managing joint venture partners' interests should remain

nonattributable even where such non-managing entities retain certain generally accepted minority shareholder protections in order to safeguard their investments. In the alternative, if the Commission is unwilling to attribute all the subscribers in a joint venture to the managing partner, then the numerator for horizontal ownership calculation purposes should consist of a pro rata number of subscribers equivalent to each partner's equity interest in the venture, thus avoiding double counting.

By adopting the revisions to the horizontal ownership limits suggested herein, the Commission will better achieve the delicate, statutorily-mandated balance between encouraging the benefits of horizontal concentration and vertical integration, while still affording opportunities to independent programming services.

Finally, Time Warner believes that the time is now ripe for the Commission to reduce the unnecessary breadth of *all* of the cable attribution standards, particularly those underlying the various cable ownership rules. The Commission now has had ample experience with the regime of regulations imposed by the 1992 Cable Act, and may safely tailor its attribution rules to the overall regulatory environment. Moreover, Congress has mandated that the Commission periodically review all of its regulations to determine if they still serve the public interest, and to narrow or eliminate those that do not. As the Commission itself has recognized, overly restrictive attribution standards disserve the public interest by limiting the capital available for implementing new technologies, developing new program services, and financing new entrants into the industry, policy goals which today are of critical importance. Indeed, recent court decisions demonstrate that the Commission *must* reassess its rules in light of marketplace changes.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
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Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal Ownership Limits	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Review of the Commission's Cable Attribution Rules	)	

To: The Commission

COMMENTS OF TIME WARNER INC.

Time Warner Inc. ("Time Warner"),[1] by its attorneys, submits these comments in response to the Commission's Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking in MM Docket No. 92-264, FCC 98-138, released

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[1]Time Warner is a publicly traded Delaware corporation. Time Warner is the majority owner of Time Warner Entertainment Company, L.P., a partnership conducting business principally through three unincorporated divisions: Time Warner Cable, which operates numerous cable television systems in various areas across the United States; Home Box Office ("HBO"), which operates pay television programming services; and Warner Bros., which produces theatrical motion pictures and television programs. Time Warner also directly and indirectly owns or holds interests in various basic cable programming services other than those owned by HBO. In addition, an affiliate of Time Warner holds an interest in PRIMESTAR, Inc., a direct-to-home satellite programming service provider.

June 26, 1998 ("FNPRM"), as well as to the Commission's Notice of Proposed Rulemaking in CS Docket No. 98-82, FCC 98-112, released June 26, 1998 ("Cable Attribution NPRM").

Adhering to the congressional mandate that the horizontal ownership rules must reflect the "dynamic nature of the communications marketplace"[2] and recognizing the fact that the nearly five-year-old horizontal ownership rules[3] may thus need to be revised, the FNPRM seeks comment on, among other issues, whether the 30% horizontal ownership limit remains appropriate in light of changing competitive conditions; whether the rules should take into account the presence of all multichannel video programming distributors ("MVPDs") and not just cable operators; and whether the rules should be changed to count actual subscriber numbers rather than homes passed.[4]

A Time Warner affiliate is a party to the pending constitutional challenge to the horizontal ownership rules and was the prevailing party when the Federal District Court for the District of Columbia considered the constitutionality of this statutory restriction.[5] Time Warner establishes herein and in its pending court challenge that the horizontal ownership limits violate the rights of cable operators under the First Amendment to the United States Constitution. Time Warner submits these comments without prejudice to its claims and arguments in the pending lawsuit.

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[2]47 U.S.C. § 533(f)(2)(E).

[3]47 C.F.R. § 76.503.

[4]FNPRM at ¶¶ 78-79.

[5]*See* Daniels Cablevision, Inc. v. U.S., 835 F. Supp. 1 (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).

Much has changed since the Commission undertook in 1992 to promulgate rules implementing the horizontal ownership restrictions. For one thing, it is now abundantly clear that the congressional concern that independent programmers might be impeded has been fully addressed, obviating the need to resort to the blunt instrument of a restrictive cap on horizontal ownership. Various other behavioral rules now in effect, but unable to be thoroughly evaluated by the Commission in 1992 -- the programming carriage rules,[6] the program access rules,[7] and the leased access rules[8] -- address the primary statutory goal of the horizontal ownership rules. Moreover, it is now clear that independent programming services have been thriving, not because of regulatory intervention, but because the ever-increasing competition faced by cable operators drives the expansion of channel capacity in order to respond to the appetite of the American public for more high quality programming options. In fact, the most immediate threat of foreclosure to such programming services is the possible imposition of digital must-carry obligations on the nation's cable operators. Simply put, the current overly strict horizontal ownership rules, if they were to be applied, would deny consumers the benefits of horizontal concentration and vertical integration in order to "protect" independent programming services that do not need additional protection.

Time Warner believes that the Commission set the current 30% horizontal ownership cap too low in 1993, and that increasing competition from other MVPDs and intervening changes in analogous broadcast rules over the last five years demonstrate that the 30% limit is

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[6]47 C.F.R. § 76.1301.

[7]*Id.* §§ 76.1001, 76.1002.

[8]47 U.S.C. § 532.

particularly inappropriate today. Time Warner additionally believes that any horizontal ownership rules must include all MVPD subscribers in the denominator of any formula used to calculate the horizontal ownership limit. These rules also should not deem an ownership interest to be an "attributable interest" to any entity lacking managerial control. Absent a managerial control test for purposes of attribution, the current attribution standard must be relaxed in order to encourage further investment in new technologies, programming and entrants into the communications industries.

I. THE HORIZONTAL OWNERSHIP LIMITS ARE UNCONSTITUTIONAL.

Time Warner first challenged the constitutionality of various portions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[9] including the horizontal ownership limits, in Daniels Cablevision, Inc. v. U.S., *supra*, immediately after the law's enactment. In Daniels, the Federal District Court for the District of Columbia held that even if Section 11(c) of the 1992 Cable Act, directing the Commission to promulgate regulations restricting the number of subscribers that could be reached by cable operators, were analyzed under intermediate constitutional scrutiny, rather than strict scrutiny, "there would appear to be no circumstances under which the FCC could adopt constitutionally compatible regulations."[10] However, the court stayed the grant of relief to the plaintiffs pending appeal by the government, and the Commission voluntarily stayed the horizontal ownership restrictions pending the appeal.[11] Meanwhile, Time Warner challenged a variety of the regulations promulgated pursuant to the

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[9]Pub. L. 102-385, 106 Stat. 1460 (1992).

[10]835 F.Supp. at 10.

[11]*Id.* at 12.

1992 Cable Act, including the horizontal ownership restrictions, in the D.C. Circuit Court of Appeals. In an opinion consolidating the Daniels and Time Warner cases, the Court of Appeals held the proceedings in abeyance pending Commission review of the horizontal ownership restrictions.[12]

It is clear that any limit on the number of cable subscribers that a cable operator may serve impinges on the operator's First Amendment rights. It is also now established that for either Congress or the Commission to do so, a requisite showing under either the strict or intermediate scrutiny constitutional tests must be made.[13] The Commission has not, and cannot, demonstrate that the horizontal ownership restriction qualifies as a compelling or important governmental interest or that it is sufficiently narrowly tailored to meet the purported governmental interests at stake. Thus, the Commission cannot maintain its 30% limit -- or any limit -- under the prevailing constitutional principles.

Judicial precedent has firmly established cable operators as First Amendment speakers deserving of the full panoply of speech protections. As such, a governmental restriction on 70% of cable operators' potential audience faces exacting constitutional scrutiny under either the strict or, at a minimum, the intermediate constitutional scrutiny tests. Even under intermediate scrutiny, the Supreme Court has made clear that the government must "do more than simply 'posit the existence of the disease to be cured'" to justify a regulation on cable operators' speech but must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in

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

[13]Turner Broadcasting v. FCC, 512 U.S. 622, 636 (1994) ("Turner I") ("there can be no doubt . . . cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

fact alleviate these harms in a direct and material way."[14] The vitality of the independent programming industry makes it impossible for the Commission to point to any "harms" alleviated by the 30% limit and not addressed by the host of other, more narrowly tailored Commission rules.

A simple application even of intermediate scrutiny to the current version of the horizontal ownership restrictions reveals their patent constitutional infirmity.[15] Under Turner I, a defense of the current version of the horizontal ownership rules based on preserving a "free flow" of video programming, as articulated in the statute,[16] must identify specific problems related to the production and distribution of video programming that warrant such an intrusion on cable operators' speech and how the 30% limit directly addresses those deficiencies. For example, if the Commission argued that a governmental interest in programming diversity justified the restrictions, it would have to show that current levels of programming diversity are insufficient and how the 30% limit directly cures the lack of diversity. Indeed, recent decisions of the D.C. Circuit Court of Appeals illustrate a skepticism that program diversity, which does, in fact,

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[14] *Id.* at 664.

[15] Obviously, as a direct limit on a cable operator's ability to speak to a vast potential audience, the 30% limit would fail the strict scrutiny test, pursuant to which direct restrictions on speech will be upheld only if necessary to achieve a compelling governmental interest and if they are "properly drawn" to achieve that interest. *See, e.g.*, Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582 (1983); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1978) (prohibitions aimed at speech can only survive if compelling interest exists, and government has the burden to show interest is compelling); Elrod v. Burns, 427 U.S. 347, 362 (1976) (government must show interest that is "paramount" or "one of vital importance").

[16] 47 U.S.C. §533(f).

represent one of the purported government interests underlying the horizontal subscriber limits,[17] qualifies as a compelling or even important governmental interest.[18]

As explained below, the Commission's decision to relax the current horizontal ownership restrictions should be a fairly easy one, given the presence of other rules that address any purported problem addressed by the horizontal ownership limits. Moreover, the emergence of rival video distribution competitors to cable and the empirical evidence showing the growth of independent video programming providers confirm that a substantial relaxation of such a blatant restriction on the free speech rights of cable operators is in the public interest.

II. CONGRESSIONAL OBJECTIVES CAN BE ACHIEVED UNDER SUBSTANTIALLY RELAXED HORIZONTAL OWNERSHIP RULES.

The Commission should eliminate or greatly liberalize the cap on total subscribers nationwide which may be reached by a given cable operator. Existing regulatory safeguards and the emergence of alternative MVPDs to cable already ensure that such a relaxation of the horizontal ownership rules would not jeopardize Congress' goal of minimizing the perceived risks of anti-competitive behavior resulting from horizontal concentration and vertical integration. By loosening the current horizontal ownership rules, the Commission would bring into greater

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[17]H.R. Rep. No. 628, 102d Cong., 2d Sess. 42 (1992) ("House Report") ("[H]orizontal concentration provides incentives for MSOs to impede competition by discouraging the formation of new cable programming services."). *See also* S. Rep. No. 92, 102d Cong. 1st Sess. 32-33 (1991) ("Senate Report") (Congress was concerned about "concentration of the media in the hands of the few who may control dissemination of information and will slant information to their own biases or provide no outlet for unpopular speech.").

[18]*See* Bechtel v. FCC, 957 F.2d 873 (D.C.Cir. 1992) (requiring the Commission to show concretely that its preference for integration of ownership and management in broadcasting license was still in the public interest); *see also* Lutheran Church-Missouri Synod v. FCC, 1998 U.S. App. LEXIS 7387 (D.C.Cir. 1998) (voiding on constitutional grounds the Commission's broadcast EEO regulations as a mechanism to advance programming diversity).

equilibrium its twin mandates in the 1992 Cable Act to encourage the considerable and well-recognized benefits of horizontal concentration and vertical integration while maintaining a competitive environment for the creation, sale and distribution of video programming.

A. The Commission's Mandate Under Section 11 of the 1992 Cable Act Is To Allow Efficiencies Resulting From Increased Ownership And Control So Long As Its Rules Ensure The "Flow" Of Video Programming.

The 1992 Cable Act's statutory text and legislative history illustrates that while Congress speculated as to risks of anti-competitive behavior resulting from horizontal concentration and vertical integration, it sought to avoid regulatory measures that would hamper the significant benefits derived from consolidation in the cable industry. The 1992 Cable Act's language and legislative history indicate a concern that, without regulatory intervention, horizontal concentration and vertical integration could "unfairly impede" or "unreasonably restrict" the "flow of video programming"[19] through two possible scenarios: (1) the monopsony effect in which a large cable operator by virtue of the number of subscribers it reached could extract unfair concessions or otherwise limit the distribution of video programming;[20] and (2) affiliation agreements between cable operators and programmers could result either in discrimination in carriage against nonaffiliated programming or restrictions on the circulation of affiliated

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[19]47 U.S.C. § 553(f)(2)(A)-(B).

[20]Section 11 to the 1992 Cable Act cites "the size of any individual operator" as a potential impediment to a free "flow" of video programming. 47 U.S.C. § 533(f)(2)(A). The House Report to the 1992 Cable Act identified a concern that "the size of certain MSOs could enable them to extract concessions from programmers, including equity positions, in exchange for carriage." House Report at 42. The Senate Report echoed this concern that, by virtue of their the number of subscribers individual MSOs reached, "programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest or some other added consideration as a condition of carriage on the cable system." Senate Report at 24. These concerns are unfounded. For example, Time Warner has done no such thing since 1992.

programming to nonaffiliated video distribution outlets.[21] The Commission itself recognized the primacy of these two goals in its 1993 Order promulgating the current horizontal ownership regulations.[22]

Concurrently, this same statutory text and legislative history demonstrates a strong interest in preserving the benefits of vertical integration and horizontal concentration, and therein lies the Commission's delicate balancing act in evaluating its horizontal ownership restrictions. While expressing the aforementioned concerns, Congress exhibited a keen awareness in Section 11 that horizontal growth and vertical integration produced "efficiencies and other benefits,"[23] warning the Commission not to "impose limitations which would impair the development of diverse and high-quality video programming."[24] The House Report to the 1992 Cable Act recognized the significant efficiencies from horizontal concentration in "administration, distribution, and procurement of programming," the reduction of programmers' transaction costs in negotiating carriage agreements, and the encouragement of new programming made possible by increased

---

[21]The text reveals that Congress feared that "cable operators affiliated with video programmers" would "favor such programmers in determining carriage on their cable systems" or "restrict the flow of the video programming of such programmers to other video distributors." 47 U.S.C. § 533(f)(2)(B). The Senate Report cited the "incentive and ability" of cable operators "to favor their affiliated programming services . . . or refuse to carry other programmers" and the corresponding incentives of "vertically integrated cable programmers . . . to favor cable operators over other video distribution technologies" or "simply to refuse to sell to potential competitors." Senate Report at 25-26.

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

[23]47 U.S.C. § 533(f)(2)(D).

[24]*Id.* § 533(f)(2)(F).

horizontal concentration.[25] Similarly, the Senate Report highlighted the benefits of vertical integration, pointing out the increased diversity of programming made possible by larger MSOs who could incur the risks of more speculative ventures.[26] In its 1990 report on the cable industry, the Commission also acknowledged the "significant benefits for subscribers" of concentration, such as "promot[ing] the introduction of new services . . . providing needed capital and a ready subscriber base for new services" and "reducing transaction costs."[27]

In particular, "clustering", in which MSOs consolidate ownership of cable systems into regional clusters, offers consumers significant benefits obtained from economies of scale while preserving advantages associated with local ownership. For example, clustering provides the economic base necessary for cable systems to make the significant financial investments needed to offer consumers new communications services, such as Internet telephony, interactive video, Internet access and other non-video services. Indeed, the incumbent telephone companies have established massive clusters dwarfing those of any cable operator, and pending telephone company mergers would create even more expansive clusters. Thus, cable system clustering is essential as cable systems and incumbent telephone companies are increasingly offering competing services.

Cable system clustering provides more efficient management, offering consumers centralized, more responsive customer service, and allows for better signal quality through integrated system architecture. Moreover, cable has faced difficulties in the past in selling local

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[25]House Report at 43.

[26]Senate Report at 26-27.

[27]Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, ¶¶ 82-84 (1990) ("1990 Cable Report").

and regional advertising, again because advertisers can reach only a limited number of subscribers and because efforts to form advertising cooperatives are unwieldy. Through clustering, advertisers can reach many times the subscribers reached through advertising sold on a per system basis, and are provided with an alternative medium comparable in reach with other regional advertising outlets such as radio, television or newspapers. The Commission itself has recognized the benefits of clustering in its 1997 Competition Report, noting, *inter alia*, that clustering enhances "MSOs' ability to compete successfully with LECs and major electric utilities as providers of data transmission and local telephone services."[28] In short, as argued by the NTIA, clustering is crucial to cable's efficiency and to its provision of advanced communications services, while any potential harms from clustering are "largely conjectural, speculative, or *de minimus*."[29]

Thus, the text and legislative history of the 1992 Cable Act require the Commission to allow as many of these efficiencies to benefit consumers as possible while ensuring that horizontal concentration and vertical integration do not threaten the flow of video programming services. The combination of the clear statutory directive that the Commission "make such rules and regulations that reflect the dynamic nature of the communications marketplace" and the Commission's own admission in 1993 that "periodic review of the ownership limits is necessary"[30]

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[28]In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 140 (rel. Jan. 13, 1998) ("1997 Competition Report").

[29]Letter from Larry Irving, Assistant Secretary of Commerce, to the Honorable Janet D. Steiger, Chairman, Federal Trade Commission, January 12, 1995, at 2.

[30]1993 Order at ¶ 40.

and that the record supported a national cable subscriber limit of "at least 30%"[31] all dictate a comprehensive review of the necessity for elimination or substantial relaxation of the horizontal ownership cap in light of intervening circumstances.

B. The Growth Of Independent Programming Services Since 1992 Provides Empirical Support For Relaxing The Horizontal Ownership Limits.

The empirical data regarding the success and proliferation of independent video programmers illustrates that current competitive conditions assure the "flow" of video programming as directed in the 1992 Cable Act. In fact, independent programming services have eclipsed programming produced by vertically integrated entities and no impediments exist to their reaching subscribers, either through cable or through new MVPDs such as DBS and MMDS that compete vigorously with cable. It is clear that without the horizontal ownership limits in place, independent programming services are thriving. Therefore, the Commission should fulfill the other half of its mandate under Section 11 of the 1992 Cable Act by eliminating or relaxing the horizontal ownership rules to allow more consumers to benefit from the efficiencies of horizontal concentration.

The Commission's own review of competition in the multichannel video services industry confirms that independent programming services are proliferating. As shown in Table A, the number of independent programming services has risen steadily since 1994, and has done so at a faster rate than the growth in programming from programmers affiliated with cable operators.

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[31] *Id.* at ¶ 27.

Indeed, programming produced without affiliation to cable operators now comprises a majority of all video programming services available to MVPDs.[32]

Table A: Vertical Integration of Existing Programming Services 1994-1997[33]

Year	Total Program. Services	Total Independent Services	Percent Independent Services	Total Vertically Integrated Services	Percent Vertically Integrated Services
1994	106	50	47%	56	53%
1995	129	63	49%	66	51%
1996	147	80	54%	67	46%
1997	172	104	60%	68	40%

In addition, as demonstrated by Table B, fears that new programming services would be inhibited by vertical integration have not been realized. Since 1994, proposed launches of independent programming services have constituted an increasing percentage of total new programming launches as compared to launches of vertically integrated programming services. In fact, independent programmers accounted for nearly all proposed launches in 1997.

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[32]Time Warner notes that because the Commission determines which programming services are vertically integrated with cable operators by reference to attributable interests and not managerial control, certain programming services classified as "vertically integrated" with a cable operator may in fact be controlled by another entity entirely. Thus, the number of programming services that are not controlled by cable MSOs is actually underestimated under the Commission's current analysis. Moreover, focusing on the total number of vertically integrated programmers overstates any potential problem arguably within the purview of the horizontal ownership rules since one MSO has no incentive to favor a programming service affiliated with some other MSO.

[33]*See* 1997 Competition Report at ¶ 158.

Table B: Vertical Integration of Proposed Launches 1994-1997[34]

Year	Total Proposed Launches	Total Non-Affiliated Proposed Launches	Percent Non-Affiliated Proposed Launches	Total MSO-Affiliated Proposed Launches	Percent MSO-Affiliated Proposed Launches
1994	98	68	69%	30	31%
1995	80	62	78%	18	22%
1996	63	53	84%	10	16%
1997	77	72	94%	5	6%

As the raw number of independent programming services has increased and such services have found their way onto more and more MVPD systems, they have reached a larger number of subscribers nationwide and have attracted higher ratings due to this increased exposure. Tables C and D demonstrate that the number of subscribers and the prime time ratings for unaffiliated programming have increased steadily since 1994.

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[34]*See id.* at Appendix F, Table F-3, Table F-4; In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, 12 FCC Rcd 4358 at Appendix G, Table 3, Table 4 (rel. Jan. 2, 1997) ("1996 Competition Report"); In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, 11 FCC Rcd 2060 at Appendix H, Table 3, Table 4 (rel. Dec. 11, 1995) ("1995 Competition Report"); In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442 at Appendix G, Table 5 (rel. Sept. 28, 1994) ("1994 Competition Report").

Table C: Vertical Integration of Top 25 Programming Services by Number of Subscribers[35]

Year	Total Vertically Integrated Services In Top 25 (By Subscribers)	Total Independent Services In Top 25 (By Subscribers)
1994	17	8
1995	17	8
1996	12	13
1997	10	15

Table D: Vertical Integration of Top 15 Programming Services by Prime-Time Rating[36]

Year	Total Vertically Integrated Services In Top 15 (By Prime-Time Rating)	Total Independent Services In Top 15 (By Prime-Time Rating)
1994	12	3
1995	11	4
1996	8	7
1997	7	8

These statistics indisputably illustrate the increasing success of independent programming services and demonstrate that the competitive position of independent programming is secure even in the face of consolidation among MSOs. Even were the horizontal ownership limits to be raised to 35%, and in the implausible event that an MSO serving up to 35% of the nation's

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[35]*See* 1997 Competition Report at Appendix F, Table F-6; 1996 Competition Report at Appendix G, Table 6; 1995 Competition Report at Appendix H, Table 6; 1994 Competition Report at Appendix G, Table 7.

[36]*See* 1997 Competition Report at Appendix F, Table F-7; 1996 Competition Report at Appendix G, Table 7; 1995 Competition Report at Appendix H, Table 7; 1994 Competition Report at Appendix G, Table 8.

subscribers would deny carriage outright to any desirable programming service, there is no evidence to support the fear that independent programming could not survive under such circumstances. Indeed, significant evidence exists that independent programming services have flourished at subscriber penetration levels of well under 65%.[37] Given this evidence that independent programming services have not only achieved parity with, but have surpassed, the success of vertically integrated programming services, the Commission should allow the substantial economies of scale and other benefits of horizontal concentration to occur fully by eliminating or significantly liberalizing the horizontal ownership restrictions.

Indeed, the most serious threat to the continued growth of independent programming on cable systems comes not from consolidation among cable MSOs but from the possible imposition of digital must-carry requirements on cable operators while broadcasters undertake the transition to digital television. The Commission recently issued a Notice of Proposed Rulemaking in which it presented options for any obligations which may be imposed on cable operators regarding broadcasters' second channel during the transition to digital.[38] The first option presented by the Commission is to require all cable systems to carry both broadcasters' analog and digital signals during the transition.[39] While Time Warner does not seek to argue the merits of digital must-carry

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[37]*See* discussion at Section III *infra*. *See also* 1996 Competition Report at ¶ 135 ("The available evidence suggests that a successful launch of a new mass market national programming network -- that is, the initial subscriber requirement for long-term success -- requires that the new channel be available to at least ten to twenty million households."); 1997 Competition Report at ¶¶ 155, 165.

[38]In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules, Notice of Proposed Rule Making in CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998) ("Digital NPRM").

[39]*Id.* at ¶ 41.