in the instant proceeding, it does wish to note the certain effect on independent programming services in the event the Commission should adopt such a draconian proposal. As the Commission recognized in the Digital NPRM, the "immediate carriage" proposal would require cable operators to drop existing programming, such as C-SPAN and the Discovery Channel, in order to open up sufficient channel space for both the analog and digital signals of every broadcaster electing must-carry status.[40] As the Commission is bound to consider the impact of its other rules during its review of the horizontal ownership limits, it should recognize that the most real risk to independent programming services stems from the Commission's potential digital must-carry regulations, and not due to consolidation among cable operators or their affiliations with programmers.

C. Existing Behavioral Restrictions Fully Address Congress' Concerns Over Horizontal Concentration and Vertical Integration.

As the Commission properly assesses the state of its delicate balancing act with respect to horizontal ownership, it must take account of how the array of other existing regulatory safeguards and the emergence of competitive alternatives to cable address the concerns Congress articulated in the 1992 Cable Act. Specifically, the existence of the program carriage, program access and leased access rules severely constrains the ability of cable systems to foreclose unaffiliated programmers from their systems. Indeed, the Commission has recognized the "profound impact" these other rules have had on cable operators' and programmers' behavior.[41] 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

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[40] *Id.*

[41] FNPRM at ¶ 50.

additional outlets for independent video programming, all but eliminating concerns over monopsony power of horizontally concentrated MSOs. Therefore, in order to adhere to its statutory mandate to allow efficiencies so long as conditions exist to prevent the perceived harms of concentration, the Commission must substantially relax its sweeping, constitutionally defective horizontal ownership rules. With its inherent potential to deter pro-competitive as well as anti-competitive behavior, the artificial limit of 30% represents an overbroad regulatory tool that ought now to be relaxed, given the availability of other measures specifically aimed at preventing the behavior of concern to Congress in 1992.

Section 12 of the 1992 Cable Act, instructing the Commission to issue regulations on "program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors," represented a directive to the Commission to address the potential anti-competitive effects of large MSOs extracting concessions from programmers.[42] The Commission responded by adding the program carriage provisions to its rules, which prevent a cable operator or other MVPD from requiring a financial interest, in or exclusive rights to, programming as a condition of carriage and which forbid discrimination against unaffiliated programmers.[43] In spite of measures giving aggrieved video program vendors access to the Commission's complaint procedures,[44] only one carriage complaint has been brought since 1993, and that case was settled by the affected parties.[45] The

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[42]47 U.S.C. § 536(a).

[43]47 C.F.R. § 76.1301.

[44]*Id.* § 76.1302.

[45]*See* Classic Sports Network, Inc. v. Cablevision Systems Corporation, Joint Stipulation

(continued...)

strict language of the program carriage rules and empirical evidence of thriving independent video programming services[46] demonstrate that the program carriage provisions are more than adequate to redress any efforts by MSOs to force concessions from video programmers as a condition of carriage.

Second, the Commission's program access rules,[47] implementing Section 19 of the 1992 Cable Act,[48] also place a comprehensive set of conditions on the substance of negotiations between MVPDs and vertically integrated video programmers. The rules proscribe "undue influence" by a cable operator with an interest in an affiliated programmer in that programmers' decision to sell programming to other MVPDs, forbid certain discrimination in prices, terms and conditions of programming to nonaffiliated MVPDs, and place significant restrictions on exclusive contracts between cable operators and program vendors. Along with the emergence of DBS and other alternative distribution media, the program access rules address any potential anticompetitive behavior by cable operators in contract negotiations with video programmers. The paucity of complaints brought under the program access rules since their enactment demonstrates that concerns about unfair negotiations between MVPDs and video programmers are now unfounded.[49]

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[45](...continued)
of Dismissal, 12 FCC Rcd 22100 (1997).

[46]*See* Section II(B) *supra*.

[47]47 C.F.R. §§ 76.1001, 76.1002.

[48]47 U.S.C. § 548.

[49]*See* Comments of Time Warner Cable to the Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming
(continued...)

As the Commission has stated, "[t]o the extend that large MSOs use their power over vertically-integrated programmers to obtain exclusive distribution rights to satellite-delivered programming, and those exclusive rights disadvantaged competitors of those MSOs, the 1992 Cable Act's program access provisions and the Commission's program access rules appear to have largely addressed the problem."[50] It concluded that "[b]ecause these provisions have real and substantive impact on 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."[51]

Third, the leased access provisions of the 1992 Cable Act[52] provide yet another regulatory measure preventing vertically integrated cable operators from foreclosing unaffiliated programming from their systems. Under Section 612 of the 1992 Cable Act, upon request, cable operators must devote between 10 and 15 percent of their channel capacity to nonaffiliated programming, depending on the number of channels carried on their systems.[53] By carving out this capacity strictly for nonaffiliated programming, Congress directly addressed the concern that vertical integration would preclude access for such programming. In addition, Section 612 precludes any exercise of editorial control by the cable operator over the content of leased access

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[49](...continued)
Distribution and Carriage in CS Docket No. 97-248, RM No. 9097, Feb. 2, 1998, at 2.

[50]FNPRM at ¶ 50, *citing* 1994 Competition Report.

[51]*Id.*

[52]47 U.S.C. § 532.

[53]*Id.*

programming,[54] authorizes the Commission to regulate maximum rates that can be charged for use of the channels,[55] and provides for review of complaints by aggreived programmers.[56] Of course, in enacting revisions to Section 612 concurrently with the horizontal ownership restrictions, Congress in 1992 left it to the FCC to consider the mitigating effects of rate-regulated leased access on the channel availability for unaffiliated programming.

In addition to the rules described above, at least three other factors deter cable operators and video programmers from the kinds of behavior of concern to Congress in 1992. First, the Supreme Court's affirmance of the must-carry rules' constitutionality in Turner II, which was uncertain in 1992, ensures yet more channel capacity reserved for video programming unaffiliated with cable operators. Second, the channel occupancy limits serve to limit the extent of vertical integration between cable operators and video programming services.[57] Third, the strong competition cable operators face from other MVPDs means that cable operators must provide the most popular programming to their subscribers or risk losing customers to an MVPD that does carry such programming.

In summary, Section 11 of the 1992 Cable Act places difficult demands on the Commission to allow as many of the benefits from horizontal concentration and vertical integration as possible, so long as such consolidation does not directly impede the flow of unaffiliated programming services. The existence of other comprehensive restrictions on cable

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[54]The statute allows the operator to refuse to show obscene or indecent programming. *Id.* § 532(c)(2). *See also* 47 C.F.R. § 76.701.

[55]47 U.S.C. § 532(c)(4); 47 C.F.R. § 76.970.

[56]Review may either be at the Commission or in the federal courts. 47 U.S.C. § 532(d).

[57] 47 C.F.R. § 76.504(a).

operators' behavioral incentives, such as the program carriage rules, program access rules and the leased access provisions, supports a substantial relaxation of the constitutionally deficient, overbroad horizontal ownership restrictions. The exponential growth of DBS, MMDS and other multichannel video programming technologies ensures a stable distribution path for independent programming services. Empirical evidence of a vital, dynamic independent programming industry shows that the substantial relaxation of the horizontal ownership limits, which have not yet even been applied and thus have had absolutely no hand in achieving the current success of such independent programming services, complies with the Commission's mandate under Section 11. And of course, antitrust laws are fully adequate to address any allegations of anticompetitive abuse due to the size of any given entity. As a result, the Commission, under its obligation to review its regulations and allow efficiencies of horizontal concentration and vertical integration, should now eliminate or substantially relax the horizontal ownership rules to ensure that the benefits of concentration also identified in the 1992 Cable Act can be realized.

III. THE CURRENT 30% HORIZONTAL OWNERSHIP CAP MUST BE RAISED.

The Commission seeks comment as to "whether 30% remains the appropriate horizontal ownership limit in light of evolving market conditions."[58] Time Warner believes that the 30% limit was set too low in 1993 and that the Commission should take this opportunity now to raise the cap to a more realistic level if it is not to abandon the cap altogether. As demonstrated above, the independent programming services that the horizontal ownership rules are intended to protect have continued to flourish over the past four years even as many cable operators, including Time Warner and Tele-Communications, Inc. ("TCI"), have continued to

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[58]FNPRM at ¶ 78.

grow. This result is thoroughly predictable given the fact that traditional antitrust law analysis recognizes that a single firm ordinarily cannot exercise monopoly power if it controls less than 40% of a relevant market,[59] and indeed, numerous courts have determined that market share in excess of 50% is needed to find monopoly power.[60] Time Warner fully demonstrated in its initial comments in the horizontal ownership rulemaking that antitrust case law and antitrust experts all agree that an entity controlling 30% of any given market cannot possibly exercise monopoly power.[61] Clearly, the current 30% horizontal ownership limit is not supported either by current competitive realities or by standard antitrust analysis.[62]

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[59]*See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (30% share insufficient as a matter of law to show market power in tying case); United Airlines v. Austin Travel Corp., 867 F.2d 737 (2d Cir. 1989) (31% share insufficient); Dimmit Agric. Indus. v. CPC Int'l Inc., 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 4082 (1983) (16-25% share insufficient); Pacific Coast Agric. Export Ass'n v. Sunkist Growers, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 429 U.S. 1094 (1977) (share of 45% plus other factors could show monopoly power).

[60]*See, e.g.*, Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 (3d Cir. 1992) (55% share insufficient); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413 (6th Cir. 1990) (50% share insufficient); Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29 (7th Cir. 1976) (60% share insufficient); Twin Cities Sportservice Co. v. Charles O. Finley & Co., 512 F.2d 1264 (9th Cir. 1975) (50% share insufficient); Cliff Food Stores v. Kroger Co., 417 F.2d 203 (5th Cir. 1969) (more than 50% share required); AT&T v. Delta Communications Corp., 408 F. Supp. 1075 (S.D. Miss. 1976), *district court opinion adopted and affirmed per curiam,* 579 F.2d 972 (5th Cir. 1978), *modified on other grounds,* 590 F.2d 100 (5th Cir. 1979), *cert. denied,* 444 U.S. 926 (1979) (less than 50% share insufficient).

[61]*See* Comments of Time Warner Entertainment Company, L.P. in MM Docket No. 92-264, filed Feb. 9, 1993, at 22-24.

[62]Time Warner notes that for purposes of antitrust analysis with respect to the cable industry, the relevant market is not limited to MVPDs. Broadcast television, radio, theatrical motion pictures, videocassettes, the Internet, concerts, sporting events, printed publications and a multitude of other video and non-video sources of news, information and entertainment

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In fact, considering the statutory horizontal ownership limits currently in effect in the analogous broadcast context, it is clear that a horizontal ownership limit of at least 35% is more than sufficient to ensure that no cable operator is able to impede the development of independent programming services. In adopting Section 11(c) of the 1992 Cable Act, Congress acknowledged the analogies between the cable horizontal ownership cap and the FCC's television multiple ownership rules. For example, in explaining the rationale behind the cable horizontal ownership cap, the House Report noted that "a wide array of rules limits horizontal and vertical integration in the broadcasting industry."[63] Similarly, at the time of the adoption of the current cable horizontal ownership limits, the Commission recognized that the broadcast ownership rules presented issues which were "relevant to addressing the concerns at issue in this proceeding relating to the ability of cable operators to unduly influence the programming marketplace."[64] Notwithstanding its recognition that the broadcast ownership context was analogous to the cable ownership context, the Commission decided to set the 30% cable horizontal ownership limit at an amount *greater* than the 25% broadcast horizontal ownership limit in existence at the time.

After the Commission adopted the current 30% cable horizontal ownership cap in 1993, Congress in 1996 established a new horizontal ownership limit for television stations of

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[62](...continued)
antitrust analysis.

[63]House Report at 42.

[64]1993 Order, *supra*, at ¶ 35.

35% of television households nationwide (up 10% from the previous 25% limit).[65] In fact, due to the 50% discount for UHF stations provided for in the Commission's rules,[66] a broadcaster now can reach up to 70% of the nation's television households. Indeed, according to a recent trade publication, Paxson Communications Corp. now has an actual reach of 61.4% due to the UHF discount in the Commission's rules.[67] It is clear that, in light of Congressional recognition through its passage of Section 202(c)(1)(B) of the Telecommunications Act of 1996 that 35% does not represent undue concentration in the context of television station ownership, at the very least, the Commission must now 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 threaten the ability of programming services to be successful. The Commission has recently recognized that the conventional understanding in the cable industry is that a successful launch of a new national programming network requires the new channel to be available to at least 15 to 20 million households nationwide.[68] Given the Commission's estimate of 73.7 million MVPD subscribers nationwide as of June 1997,[69] this means that a new programming network service can be considered to have launched successfully if it achieves a 20.4% to 27.1% national penetration rate -- well below the 65% penetration amount available if a 35% horizontal ownership cap is

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[65]Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), § 202(c)(1)(B).

[66]47 C.F.R. § 73.3555(e)(2)(i).

[67]"Special Report, Top 25 TV Groups," Broadcasting & Cable, Apr. 6, 1998, at 47.

[68]1997 Competition Report at ¶ 155.

[69]*Id.* at Appendix E, Table E-1.

adopted -- even in the unlikely even that an MSO approaching such cap would deny carriage outright to any desirable independent programming service. In fact, a horizontal ownership cap of up to 50% would still leave open the possibility of 50% nationwide penetration (*i.e.*, approximately 36.9 million subscribers nationwide) to any programming service -- a level at or below that achieved by many established programming services, such as fX (32.7 million subscribers); the Disney Channel (31 million subscribers); Animal Planet (27.6 million subscribers); Nick at Nite's TV Land (19.6 million subscribers) and Turner Classic Movies (18.3 million subscribers).[70]

The current 30% cap represents the absolute floor for any horizontal ownership limit. In an analogous context, the Communications Act and the Commission's rules provide that effective competition between a cable operator and a competing MVPD is presumed to exist where fewer than 30% of the households in a franchise area subscribe to the cable service of a cable system.[71] An operator with a penetration level below 30% in any given community would lack any meaningful ability to impede distribution of programming services at the local level. Similarly, a cable operator serving less than 30% of the MVPD subscribers nationwide could not thwart the development and distribution of programming services at the national level. As noted above, the time is ripe to now raise the horizontal ownership cap from the absolute minimum of 30% to a level that more accurately reflects current competitive conditions.

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

[71] 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

Finally, Time Warner submits that the Commission must not penalize an operator for internal growth that would cause it to exceed the horizontal ownership cap. Operators should not be discouraged from increasing their subscribership through the provision of new services or packages of services that benefit subscribers. Nor should they be penalized for succeeding in the competition for new subscribers by a forced divestiture. Rather, operators should have the normal economic incentives to market and extend their services to the segment of the population that does not yet receive any multichannel video programming service. Indeed, Congress has specifically directed the Commission not to impose regulations that would ban cable operators from serving previously unserved rural areas.[72] Application of the horizontal ownership cap to an operator's internal growth could effectively constitute such a ban. Similarly, the FNPRM seeks comment "as to whether the method of ownership calculation should be modified in some way to support cable overbuild competition."[73] Thus, whether the purpose is to serve previously unserved areas or areas served by another operator, the horizontal cap should not restrict any MSO from serving additional customers through plant extensions or other internal growth.

IV. ANY HORIZONTAL OWNERSHIP LIMIT SHOULD BE BASED ON TOTAL MVPD SUBSCRIBERS.

In the FNPRM, the Commission seeks comment on whether, in calculating a cable MSO's horizontal ownership percentage: (1) all MVPDs should be taken into account rather than cable operators alone; and (2) the rules should be based on actual subscriber numbers

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[72]47 U.S.C. § 533(f)(2)(F).

[73]FNPRM at ¶ 79.

rather than on homes passed.[74] Specifically, the Commission proposes to calculate a cable operator's horizontal ownership percentage by counting the operator's total attributable subscribers as part of the numerator, with the denominator consisting of the total number of MVPD subscribers (both cable and non-cable) nationwide.[75]

As an initial matter, Time Warner submits that the horizontal ownership calculation should be based on actual subscriber numbers and not on homes passed. Cable homes passed data (the data to be used for purposes of calculating an operator's horizontal ownership percentage under the rules as they now stand) is unreliable and difficult to obtain, making it virtually impossible for parties to evaluate their compliance with the horizontal ownership limits. The Commission has not yet provided any guidance as to the specific number of cable homes passed that would be used in the denominator under the current 30% cable homes passed limit. Indeed, while various industry analysts, such as Paul Kagan Associates, Inc., release estimates of nationwide cable homes passed, such estimates represent rough approximations due in part to the fact that many local cable systems do not keep accurate records of such data and that local cable systems may utilize differing definitions of what it means to "pass" a home in calculating their homes passed statistics.

In other words, one cable operator may consider a home to be passed when its cable plant comes within 50 feet of the home, while another may set the standard at 500 feet. Moreover, there is no industry consensus on how to count certain living quarters, such as prisons, college dormitories and extended stay hotels for purposes of determining a "homes

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[74] *Id.* at ¶ 79.

[75] *Id.*

passed" estimate. In contrast, any MVPD, including a cable operator, can easily produce a relatively accurate and current figure regarding the total number of its subscribers simply by consulting its billing records. The Commission recognizes this in its FNPRM, noting that a subscriber standard, as opposed to a homes passed standard, is "easier to measure" and provides for "greater accuracy."[76] Moreover, the statute itself specifically directs 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 . . . ."[77] The statute clearly refers to *subscribers*, not to homes passed, as the proper measuring unit for purposes of any horizontal ownership rules.

Indeed, a measure based on cable homes passed does not take into account the reality that certain cable operators will have low penetration in certain communities due to competition from other MVPDs. The Commission recognizes in the FNPRM that "[a]s alternative MVPDs continue to grow in the future, the number of homes passed by a cable operator may become an increasingly inaccurate measure of its actual subscribership and thus of its actual market power."[78] Beginning with its third annual video competition report, the Commission determined that it would change from a calculation of national cable concentration which focused solely on subscribership in the cable industry to a calculation which focused on all MVPD subscribers nationwide. The Commission noted that:

> [I]n assessing the true impact national concentration may have . . . we believe that it is now appropriate to consider the presence of *all* MVPDs and MVPD subscribers in

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[76] *Id.* at ¶¶ 83, 86.

[77] 47 U.S.C. § 533(f)(1)(A) (emphasis added).

[78] FNPRM at ¶ 84.

> national concentration figures, and not just cable MSOs and cable subscribers. As their subscribership increases, the significance of DBS, MMDS and SMATV operators . . . also increases. As a result, in this and future *Reports*, we will examine national concentration measures for all MVPDs.[79]

As reported in the Commission's most recent annual competition report, cable operators face substantially greater competition today than just four years ago, particularly from DBS. For example, cable subscribers constituted 94.89% of all MVPD subscribers in December 1993, but only 87.10% in June 1997.[80] DBS subscribership has grown from a mere 70,000 subscribers nationwide in December 1993 to over 5,000,000 in June 1997.[81] A recent trade press report indicates that current DBS subscribership now hovers at just over 7,000,000 subscribers nationwide,[82] and that number could grow but for the Commission's persistent inaction in the Primestar license transfer proceeding -- inaction that is harming consumers and competition each day it continues by resulting in one of the three full CONUS DBS slots remaining fallow. Despite these drastic changes, the current horizontal ownership rules focus exclusively on the percentage of households passed by a particular cable operator without accounting for the fact that total cable households represent a steadily declining percentage of total MVPD households.

Thus, the horizontal ownership calculation must focus on subscribers, not homes passed, and specifically, as the Commission suggests, any horizontal ownership limit should

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[79] 1996 Competition Report at ¶ 131.

[80] 1997 Competition Report at Appendix E, Table E-1.

[81] *Id.*

[82] Monica Hogan, "DBS Sales Heat Up In June," Multichannel News, July 20, 1998, at 3. Projections regarding the continued growth of DBS estimate approximately 15,000,000 DBS subscribers by sometime between 2001-2002. 1997 Competition Report at ¶ 55.

have as its denominator *all* MVPD subscribers, not just total cable subscribers.[83] A denominator consisting solely of cable subscribers would not accurately assess achievement of the goals underlying the horizontal ownership limits. Due to increasing competition from non-cable MVPDs, as noted above, a denominator based solely on total cable subscribers nationwide would result in the perverse result that, as competing MVPDs garner a growing share of total MVPD subscribers, a cable operator could remain stagnant and still fall into violation of the horizontal ownership rules if total U.S. cable subscribers decrease. Accordingly, in order to establish an essentially self-adjusting mechanism, the denominator in any horizontal ownership cap calculation should account for all MVPD subscribers nationwide.

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.[84] 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, the possibility that any given cable operator could block distribution of a programming service would be even less likely due in part to the increasing number of such alternative distribution outlets as well as increased competitive pressure to provide popular programming that potential customers will want to watch.

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[83]FNPRM at ¶ 79.

[84]The 1997 Competition Report calculates a total of 73,646,970 MVPD subscribers in the U.S. as of June 1997. 1997 Competition Report at Appendix E, Table E-1.

Further, the numerator for the horizontal ownership cap calculation must consist of the total number of subscribers served by franchised cable systems in which a particular entity holds an attributable interest. As noted above, the statute directs the Commission to establish limits on the number of "*cable subscribers* a person is authorized to reach *through cable systems* . . . ."[85] It is clear that the statute intends to place limits on the number of cable subscribers served by any particular entity through its cable systems, and not to place limits on the number of non-cable MVPD subscribers that particular entity may serve through distribution technologies other than franchised cable systems.

V. THE PRESENCE OF MANAGERIAL CONTROL SHOULD FORM THE BASIS FOR ATTRIBUTION UNDER THE HORIZONTAL OWNERSHIP RULES.

The current horizontal ownership rules adopt the existing attribution criteria contained in the Notes to Section 76.501 of the Commission's rules for purposes of determining what constitutes an "attributable interest" for purposes of those rules.[86] Thus, for example, "partnership and direct ownership interest and any voting stock interest amounting to 5% or more of the outstanding voting stock of a . . . cable television system will be cognizable" for purposes of determining attribution under the horizontal ownership rules.[87] This minuscule 5% threshold simply bears no relationship to the policy goals that underlie the horizontal ownership rules.

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[85]47 U.S.C. § 533(f)(1)(A) (emphasis added).

[86]*See* 47 C.F.R. § 76.503(f); Notes to 47 C.F.R. § 76.501.

[87]Notes to 47 C.F.R. § 76.501.

In requiring the Commission to adopt new horizontal and vertical ownership restrictions in 1992, Congress did not mandate the use of the existing broadcast attribution standards. As the Commission's Notice of Proposed Rulemaking to implement the new requirements recognized, "[t]he 1992 Cable Act and the Conference Report are silent regarding the appropriate standard for determining ownership of cable systems in connection with the application of the subscriber limits."[88] The Senate Report provided that the Commission could either use the existing broadcast attribution standards or such other criteria as the Commission deemed appropriate.[89] The Commission stated that the existing criteria "may be useful" for determining ownership, but also recognized that

> these attribution criteria were intended to include ownership thresholds which may impart the ability either to influence or control management or programming decisions of a broadcast licensee, and consequently *these criteria may not be appropriate to address the concerns at issue in this proceeding*.[90]

During the initial horizontal ownership rulemaking proceeding, Time Warner submitted that for purposes of horizontal ownership limits, the Commission's attribution criteria should focus on management control -- *i.e.*, the ability of a given cable operator to control the day-to-day operations of a particular cable system.[91] Nevertheless, the Commission adopted sweeping

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[88]Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992/Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, Notice of Proposed Rulemaking and Notice of Inquiry in MM Docket No. 92-264, 8 FCC Rcd 210, ¶ 38 (1992) ("Horizontal and Vertical NPRM").

[89]Senate Report at 80.

[90]Horizontal and Vertical NPRM at ¶ 38 (emphasis added).

[91]*See, e.g.*, Comments of Time Warner Entertainment Company, L.P. in MM Docket No. 92-264, filed Feb. 9, 1993, at 30-31.

attribution standards for the new cable ownership rules mirroring those in Sections 76.501 and 73.3555 of its rules. Time Warner continues to firmly believe that only actual managerial control should form the basis for attribution under the horizontal ownership rules and that the Commission should take the opportunity presented both by the pending FNPRM and the pending Cable Attribution NPRM to revise its horizontal ownership rules accordingly.

A. Managerial Control is Sufficient to Carry Out the Policy Goals of the Horizontal Ownership Limit.

In directing the Commission to set horizontal ownership limits, as discussed earlier, Congress was clearly motivated by a concern that large, vertically integrated cable operators may be able to restrict the distribution of unaffiliated video programming services. Thus, in setting horizontal ownership limits, the Commission is directed to ensure, among other public interest objectives, that large cable operators cannot "unfairly impede" or "unreasonably restrict" the flow of video programming from the video programmer to either consumers or other video distributors, and that large cable operators cannot favor affiliated programmers in determining carriage on their cable systems.[92]

The current 5% attribution threshold does not address the congressional objective of ensuring that cable operators do not improperly impede the flow of independent programming from programmers to consumers. With respect to that objective, a 5% interest is so small as to be essentially irrelevant, and such a low threshold could render cognizable the interests of many entities with absolutely no control over the day-to-day operations of a cable system. A person having a 5% ownership interest in a cable system has little, if any, influence over the

[92] 47 U.S.C. § 533(f)(2)(A)-(B).

management or operations of that system and thus could not have any meaningful ability to dictate the system's dealings with programmers.

Thus, the horizontal ownership attribution standard should be modified to focus only on the ability of a given cable operator to control the day-to-day operations of a particular cable system. It is this managerial entity whose interest should be attributed for purposes of determining compliance with the horizontal ownership limits.

B. In Pending or Existing Joint Ventures Involving Tele-Communications, Inc., the Subscribers Should Be Attributed to the Entity Exercising Managerial Control.

As the Commission has noted, Time Warner and various other cable operators have entered into agreements to form various joint ventures with TCI. In such transactions, TCI will contribute certain of its cable systems to the joint ventures, with those contributed systems to be managed and controlled by other cable operators. These joint ventures are innovative approaches to establish regional clusters of cable systems in a cost-effective manner in order to produce efficiencies that will benefit consumers. The net result of these joint ventures is that TCI's control and management over cable systems nationwide will be significantly reduced.

In a joint venture between two or more cable operators, typically one of the cable operators will be assigned sole managerial duties for the cable systems covered by the joint venture, thus assuming responsibility for all of the day-to-day operations of the cable systems. As explained above, it is that managerial entity alone whose interest should be attributed for purposes of the horizontal ownership rules.

Moreover, to the extent that the joint venture partner with a non-managerial role retains certain generally accepted minority investor protections in order to safeguard its investment, the existence of such protections is not inconsistent with a finding of managerial control by the

joint venture's managing entity. In fact, prior Commission decisions outline the types of minority protections that are acceptable and will not result in attribution of the interest of the minority investor.[93] For example, in In re Applications of Roy M. Speer and Silver Management Company,[94] the Commission found that TCI's nonvoting interest in Silver Management was exempt from attribution where TCI contributed virtually all of the equity in Silver Management but ceded to Barry Diller, the sole holder of voting stock in Silver Management, nearly all of its potential influence and control over the company. Importantly, the Commission held that even though TCI's approval of certain "Fundamental Matters" was required, such matters were "permissible investor protections" that did not rise to the level of attributable influence.[95]

Time Warner submits that involvement in the overall corporate governance by a non-managing joint venture partner should be allowed so long as the non-managing joint venture partner does not control a majority of the joint venture's Managing Board. Time Warner further submits that the non-managing joint venture partner also should be permitted to participate in the approval of the venture's overall budget without having its interest attributed as a result, particularly where it is the managing partner that is responsible for the preparation of that budget. The budget of the venture is one of its most basic governing documents, which maintains the overall nature of the business, and thus constitutes a fundamental matter such as those on which minority investors routinely have been allowed to vote under FCC standards. Just as a minority

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[93]*See, e.g.*, National Broadcasting Co., Inc., 69 RR 2d 1099 (1991); McCaw Cellular Communications, Inc., 66 RR 2d 667 (1989); News International, PLC, 55 RR 2d 945 (1984).

[94]11 FCC Rcd 14147 (1996).

[95]In re Applications of Roy M. Speer and Silver Management Company at ¶ 25.

investor may negotiate and agree on the partnership agreement or articles of incorporation and bylaws underlying a company, and on material amendments to those documents, such an investor should be permitted to vote on the venture's budget as well. Nor would the right to participate in the approval of the budget provide the investor control over day-to-day management decisions involving personnel or the expenditure of funds within the budgetary guidelines, particularly where the managing partner holds the sole power to prepare the budget and propose increases or decreases to any specific line items.[96]

Time Warner is aware that in Roy M. Speer, *supra,* the Commission required deletion of a provision in a loan agreement providing the lender with "virtual veto power" over a licensee's budget.[97] Although that case involved a minority shareholder, the Commission found it significant that the shareholder was also the company's principal lender, network programmer, and had already exercised impermissible *de facto* control over the construction of the station. Clearly, that decision did not involve an ordinary minority investor.[98] There is no reason to deny a budgetary role to an investor that does not otherwise enjoy the right to direct the day-to-day management of the venture.

In sum, in any of the pending or existing joint ventures involving TCI, or any other similar arrangements, the subscribers to the joint venture cable systems should be attributed only to the entity with managerial control -- *i.e.*, the other cable operators who are parties to

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[96]At the very least, the right to participate in the budget approval process should not result in attribution under the horizontal ownership rules in any case where the managing partner can continue the operations of the venture pursuant to a default budget if the proposed budget is not approved.

[97]*Id.* at ¶ 102.

[98]*Id.* at ¶103.

and the managing entities of the joint ventures with TCI. The current attribution standards discourage such beneficial transactions that reduce TCI's control over cable systems nationwide because all of the subscribers to the cable systems served by such joint ventures will be double-counted, once to TCI and once to the joint venture partner. This double-counting produces the perverse result that *more* subscribers will be counted toward TCI's national total (both the TCI subscribers that are contributed to the joint venture *and* the subscribers contributed by the joint venture partner) just as TCI is in fact *reducing* the total number of subscribers to cable systems it controls. In fact, the joint venture subscribers should only be counted toward the subscriber total for the entity that actually manages and controls the day-to-day operations of the joint venture cable systems. It is the managing entity that could theoretically block the free flow of video programming, not the joint venture partner that has taken a non-managerial role with respect to the joint venture's cable system operations. 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.

VI. THE COMMISSION SHOULD NOW RELAX ITS CABLE ATTRIBUTION RULES GENERALLY, TO ENCOURAGE FURTHER INVESTMENT INTO NEW TECHNOLOGIES, PROGRAMMING, AND ENTRANTS INTO THE COMMUNICATIONS BUSINESSES.

The Commission also has initiated a general review of all its cable attribution rules in light of recent transactions in the cable industry, other FCC proceedings related to cable ownership such as the biennial review mandated by the Telecommunications Act of 1996, and the Commission's ongoing review of its *broadcast* attribution rules which formed the original

basis for the cable standards.[99] The Commission's cross-ownership, horizontal ownership, and program access regulations are implemented by attribution standards that define the kinds of interests in a cable system or programmer that will be subject to their limitations. The Cable Attribution NPRM seeks comment on a number of specific issues, several of which the Commission already identified in its broadcast attribution rulemaking, including whether to raise the voting stock ownership benchmarks, recognize otherwise nonattributable interests through an "equity or debt plus" proposal, or attribute certain kinds of "contractual or other business relationships."[100]

The time is now ripe for the Commission to reduce the unnecessary breadth of all of the cable attribution standards, particularly those underlying the cable horizontal ownership rules. The Commission has had ample experience with the regimen 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.[101] As the Commission itself has recognized, overly broad 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.

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[99]Cable Attribution NPRM at ¶ 1.

[100]*Id.* at ¶ 12. The program access attribution rules are even more restrictive than the cable horizontal ownership attribution rules, and attribute all 5% equity interests, voting or nonvoting. 47 C.F.R. § 76.1000(b).

[101]47 U.S.C. § 161.

Time Warner fully supports any effort by the Commission to streamline and simplify its ownership attribution rules. As Commissioner Ness and others have aptly recognized,[102] attribution rules which are unduly ambiguous or are applied in an arbitrary, *ad hoc* basis only serve to introduce unnecessary uncertainty into commercial transactions involving communications properties. Moreover, unclear and inconsistent attribution standards only impose impediments to the advancement of any legitimate regulatory goals. Thus, while clarity and the establishment of bright lines are important goals, Time Warner appreciates that different attribution criteria may be necessary in light of the varying policy goals underlying each applicable substantive provision. Thus, for example, the Commission has applied more strict attribution criteria under the program access rules. Similarly, Time Warner has described above why a management control test is the most appropriate standard for any cable horizontal ownership restrictions. Nevertheless, to the extent that the broadcast ownership criteria form the basis of attribution rules applicable in the context of numerous cable ownership restrictions, Time Warner offers certain specific proposals to streamline and clarify these underlying benchmarks.

A. The Commission Should Not Now Extend the Reach of the Attribution Rules.

Initially, Time Warner opposes what appears to be an unheralded expansion of the traditional function and scope of the attribution rules generally in the Commission's Cable Attribution NPRM. In implementing the cable ownership rules, the Commission relied upon the existing broadcast attribution standards because their objectives were "consistent": to identify interests that would "enable a broadcast licensee to influence or control management or

[102] *See Attribution FNPRM*, Separate Statement of Commissioner Susan Ness.

programming decisions."[103] The present Cable Attribution NPRM, however, appears to adopt a far more sweeping purpose for the attribution rules, well beyond the Commission's traditional focus on management or programming decisions. Thus, the Cable Attribution NPRM states that:

> The attribution rules seek to identify those corporate, *financial*, partnership, ownership and *other business relationships* that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holders should be subject to the Commission's regulation.[104]
>
> We note that the ownership attribution rules are intended to identify those relationships that confer on their holders a degree of influence or control over *key business decisions, including* budget, personnel, programming, and *technology practices* of cable entities, such that the holders should be subject to the Commission's regulations.[105]

These clearly are not the traditional formulations of the attribution standards underlying the broadcast or the cable ownership rules, and thus should not be allowed to set the tone for this proceeding. For example, the broadcast attribution rules traditionally have not encompassed "financial" relationships apart from ownership interests. Thus, the rules have deemed debt nonattributable. Nor have the broadcast or cable attribution rules ever attempted to address the vague category of "other business relationships." Certain business relationships among media entities competing in the same community have been subject to the separate cross-interest policy, but only because they were not otherwise attributable.

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[103] 1993 Order, *supra,* at ¶¶ 35 (quoted above) and 62.

[104] Cable Attribution NPRM at ¶ 1 (emphasis added).

[105] *Id.* at ¶ 12 (emphasis added).