

However, the Commission would continue to follow its previous rulings with respect to calculating the ownership and voting benchmarks.¹⁷⁰

Time Warner believes that the brevity of this Order may lead to confusion as to exactly how the Commission will now treat uninsulated alien limited partners for purposes of Section 310(b) of the Communications Act. Time Warner thus requests that the Commission make clear, in the context of this proceeding, that alien entities legally may now hold (1) uninsulated limited partnership interests in a broadcast licensee (or other entity covered by Section 310(b) of the Communications Act) of up to 20% of equity, or (2) indirect uninsulated limited partnership interests in a broadcast licensee, through intervening entities, of up to 25% of equity. Finally, Time Warner requests that the Commission confirm that the Commission's multiplier *will* be used to calculate the equity held indirectly by uninsulated alien limited partners through intervening entities for purposes of the 25% benchmark.

VII. CONCLUSION

Time Warner continues to believe that the horizontal ownership rules clearly violate its rights under the First Amendment to the United States Constitution and that such rules will ultimately be overturned when a final decision is rendered with respect to its pending court challenge. Time Warner's participation in this rulemaking proceeding is without prejudice to its claims and arguments in the pending constitutional challenge.

The fact that independent programming services are currently thriving dictates that there is no need for burdensome horizontal ownership regulations to "protect" such independent programming services -- and in fact, such burdensome rules only deny consumers the benefits of horizontal concentration and vertical integration. Indeed, the largest threat to the continued

¹⁷⁰*Id.*

growth of independent programming services is the possible imposition of digital must-carry requirements on cable systems, leading to further squeezing of limited channel capacity and less space for carriage of such independent video programming. The congressional objectives of protecting independent programmers from foreclosure from distribution outlets and allowing efficiencies from horizontal concentration and vertical integration can be achieved under substantially relaxed horizontal ownership rules. In fact, various other behavioral rules currently in effect, such as the programming carriage, program access and leased access rules, as well as the emergence and growth of alternative MVPDs, already address the goals Congress identified in 1992.

Several changes must be made to the current horizontal ownership rules in order to achieve the delicate balance between preserving the benefits of horizontal concentration and vertical integration and protecting independent programming services. First, the 30% cap must be raised to at least 35% -- the horizontal concentration level found by Congress to be appropriate in the analogous broadcast context. Further, due to increasing competition from non-cable MVPDs, any horizontal ownership limit must account for increasing competition from such non-cable MVPDs and recognize the alternative programming distribution outlets they provide. The horizontal ownership cap should be based on all MVPD subscribers and not just on cable homes passed due to the fact that homes passed information is unreliable and difficult to obtain. In addition, any test based on homes passed fails to account for increasing competition from other MVPDs. Thus, a cable operator should calculate its horizontal ownership percentage by using as the numerator the number of cable subscribers it serves nationwide and by using as the denominator the number of MVPD subscribers (both cable and non-cable) nationwide. All of these suggested revisions to the horizontal ownership limits will

better achieve the delicate balance between encouraging the benefits of horizontal concentration and vertical integration while still affording protection to independent programming services.

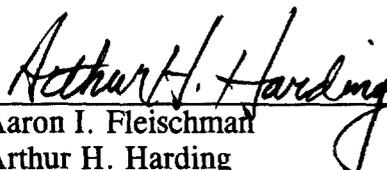
Moreover, the Commission should now modify the attribution standard applicable to the horizontal ownership limits to encompass only managerial control, since it is the entity that actually controls the day-to-day operations of any given cable system that will have an impact on the degree of distribution of independent programming services. The presence of generally accepted minority shareholder protections should not factor into the analysis of an entity's attribution so long as that entity does not exercise managerial control. The Commission also should take this opportunity to reduce the unnecessary breadth of the remaining cable attribution standards, particularly as they may apply to other ownership rules. Overly restrictive attribution standards lead to limitations on the capital available for implementing new technologies, developing new program services, and financing new entrants into the industry, thus disserving the public interest.

WHEREFORE, Time Warner respectfully urges the Commission to modify its horizontal concentration and cable attribution rules in accordance with the proposals described above.

Respectfully submitted,

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