

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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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)
)
Horizontal Ownership Limits)

MM Docket No. 92-264

COMMENTS OF TELE-COMMUNICATIONS, INC.

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August 14, 1998

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

Although not wishing to understate the significance of this proceeding, TCI maintains that this is a relatively simple matter. In 1993, the Commission adopted a cable horizontal limit pursuant to Section 11(c) of the 1992 Cable Act. For a variety of reasons, the limit was never imposed and is the subject of both a Commission

¹ Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, MM Docket No. 92-264, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 98-138 (rel. June 26, 1998) ("Second Order on Recon." and "Further NPRM," respectively).

stay and a court challenge. Now the Commission proposes to put the limit into effect. However, many things have changed in the nearly five years since the limit was adopted. Naturally, the Commission must update the limit to account for those changes. As discussed below, TCI believes that an entirely reasonable approach given the current marketplace environment is to increase the horizontal limit to 40% and adopt the MVPD subscriber-based test proposed in the Further NPRM.

While TCI describes below numerous important changes that have occurred in the MVPD marketplace in the past five years, it wishes to emphasize one particular development -- the emergence and growth of competitive alternatives to cable, particularly DBS. Today, over 12 million U.S. homes -- or 15 percent of all MVPD homes -- get their video programming from non-cable distributors. DBS alone, which was non-existent at the time the horizontal limit was adopted in 1993, has over 7 million subscribers today, and it is estimated that it will have nearly 13 million by the year 2000.

This competition has a direct impact on the concerns that underlie the horizontal limit: (1) monopsony power, the possibility that the size of certain MSOs could enable them to extract unfair concessions from programmers in exchange for carriage; and (2) vertical foreclosure/program diversity, the concern that large MSOs may be able to limit entry by programmers, thereby reducing the breadth of information available to consumers.

The presence of 12 million non-cable subscribers means that an MSO has less power today to force concessions on programmers than it did in 1993 since programmers now have more significant

alternatives for distributing their product. The growth of DBS and other non-cable MVPDs also reduces an MSO's ability to engage in vertical foreclosure or otherwise limit diversity. Again, the 12 million non-cable subscribers make programmers less dependent on any particular MSO today than they were in 1993. Stated another way, because programmers have other distribution options, an MSO's ability to restrict program diversity has been reduced.

That DBS and other non-cable MVPDs have had an effect on cable is beyond doubt. For example, in the 1997 Video Competition Report, the Commission explicitly recognized that "[a]s non-cable MVPD subscribership increases, the significance of DBS, MMDS and SMATV operators in the MVPD purchasing marketplace also increases ... thus reducing cable operators' market power or influence in the purchase and distribution of network programming."²

TCI does not propose that the increase in non-cable distribution means that the Commission should eliminate the horizontal limit. Instead, TCI only contends that increased competition affects the horizontal limit and that the limit must therefore be increased to reflect that impact.

Other changes in the MVPD marketplace discussed below further reduce the likelihood of monopsony and vertical foreclosure, namely: (1) the success and strengthening of existing cable

² Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034 at ¶ 150 (1998) ("1997 Video Competition Report").

restrictions, such as program carriage, channel occupancy, leased access, and must carry, which address the very same behavior targeted by the horizontal limit; and (2) the expansion in channel capacity made possible by digital video technology, which provides still further outlets for program services.

In addition, there is now a substantial body of evidence clearly indicating that the monopsony and vertical foreclosure concerns underlying the horizontal limit are vastly overstated. As TCI demonstrates below, independent programming sources have increased rapidly, and program diversity is at an all-time high. By contrast, vertical integration in the cable industry has actually declined.

Moreover, there is new empirical evidence -- not available to the Commission when it adopted the current limit -- which demonstrates that concerns about monopsony behavior or vertical foreclosure are not significant. TCI attaches to these comments an economic report prepared by Dr. Stanley M. Besen and Dr. John R. Woodbury ("Besen and Woodbury") which analyzes this new data and concludes that "[t]he bulk of empirical evidence indicates that vertically integrated cable operators do not disfavor ... program services in which they do not have ownership interests."³ Similarly, with respect to TCI, Besen and Woodbury find that "TCI

³ Dr. Stanley M. Besen and Dr. John R. Woodbury, Charles River Associates, Inc., "An Economic Analysis of the FCC's Cable Ownership Restrictions," August 14, 1998, at 19 ("Besen and Woodbury").

does not favor affiliated programming services in any way that significantly forecloses non-affiliated programming."⁴ To the contrary, Besen and Woodbury provide empirical evidence that "TCI actually favours non-affiliated services."⁵ Also, TCI is filing today companion comments in the Commission's cable attribution proceeding. In those comments and the accompanying economic appendix, TCI shows that even if TCI were to have a 40% share of all MVPD subscribers, its ability to engage in vertical foreclosure still would be remote.

Besen and Woodbury conclude that this new evidence, coupled with the growth of DBS and other non-cable MVPDs, "indicate that the Commission can significantly relax its cable ownership restrictions without being concerned that this will lead to anticompetitive behavior by large MSOs."⁶

The case for increasing the horizontal limit is even stronger when one considers the substantial efficiencies and consumer benefits created by the existence of large MSOs. These efficiencies are described in detail in TCI's comments and the Besen and Woodbury analysis. For example, larger MSOs have historically played a central role in developing innovative and diverse programming services and in supporting existing services through periods of financial difficulty.

⁴ Id. at A-1.

⁵ Id. at A-2.

⁶ Id. at 1.

Perhaps most importantly, larger MSOs will be able to efficiently provide to more American consumers a competitive alternative to the local phone company. New technology and the geographic clustering of cable systems make it possible for cable operators to provide local phone service in competition with incumbent LECs. The TCI-AT&T merger provides significant evidence that TCI and AT&T are serious about providing competition in the local telephone market.

The efficiencies associated with large MSOs also enhance cable operators' ability to offer interactive broadband and content-rich high-speed data services. In fact, the provision of these services, along with telephony, renders the cable horizontal limit increasingly moot. The digital customer terminal through which these services will be offered is fundamentally multi-purpose. It would be overly simplistic to define a consumer with one of these devices as a "cable" subscriber or to try to impose a discrete cable horizontal limit in an environment where TCI and others are trying to provide a much broader range of services. And it would be tragic if TCI were prevented from providing a consumer with competitive local telephony services because of a restrictive cable horizontal limit.

A higher horizontal limit is particularly warranted to enable cable operators to obtain a network size sufficient to support and further promote the extraordinary investment in new technology and system upgrades required to provide competitive telephony and interactive broadband services to more American consumers. It is simply critical that the Commission not allow an unnecessarily

narrow focus on vertical programming issues to hamstring the ability of companies like TCI to compete in this new broadband world. Purely theoretical concerns about monopsony and vertical foreclosure provide no basis to deprive a significant number of American consumers of the actual benefits of a vibrant competitor to their local telephone provider.

In short, TCI believes that the Commission can confidently increase the horizontal limit because: (1) there is evidence that cable operators are not exercising monopsony power and, in particular, there is new empirical evidence demonstrating that MSOs are not engaging in vertical foreclosure; (2) changes in the MVPD marketplace since the current rule was adopted make it much less likely -- in fact, as Besen and Woodbury conclude, "quite remote" -- that such anticompetitive behavior will occur in the future; and (3) there are substantial efficiencies and benefits associated with larger MSOs, including program cost reduction and program innovation, as well as the expanded provision of competitive telephony, that may be sacrificed if the current limit is not raised. For these reasons, TCI proposes that the Commission revise the current cable horizontal rules as follows:

- increase the horizontal limit to 40%; and
- calculate an MSO's concentration using the MVPD subscriber-based formula proposed in the Commission's Further NPRM.

Increase the Horizontal Limit to 40%. An increase in the horizontal limit to 40% is entirely reasonable in light of the new evidence, changed marketplace circumstances, and significant efficiencies and consumer benefits associated with larger MSOs as

described above. A 40% limit is further supported by the following:

- (1) The antitrust standard is 50%, which TCI believes would also be justified here in light of the absence of any evidence that the concerns which underlie the horizontal limit have materialized or are likely to materialize in the new, more highly competitive MVPD marketplace;
- (2) Several broadcasters already are near or over 40% without the benefit of the UHF discount. Indeed, Paxson Communications is at 61.4% and Fox is at 40.5% before discounting UHF station reach by a factor of 50%. Moreover, the Commission has proposed to increase the broadcast limit to 50%, and several broadcasters have supported elimination of the limit in its entirety; and
- (3) Many program services have flourished at subscriber penetration levels well below 60%. Consequently, a programmer that fails to sell its product to an MSO having 40% of MVPD subscribers still would have the opportunity to reach, through the remaining MVPDs, a number of subscribers well over the threshold for success.

Adopt an MVPD Subscriber-Based Formula. The Commission proposed an MVPD subscriber-based formula in the Further NPRM. TCI fully supports that proposal. As demonstrated below, an MVPD subscriber-based formula has several distinct advantages over the cable homes-passed formula in the current MVPD marketplace. First, it takes into account the presence of non-cable competitors which clearly reduce the concerns underlying the horizontal limit. Second, it is a self-adjusting formula, so as competition continues to grow, the horizontal limit is automatically and appropriately revised. Third, a subscriber-based formula is more accurate and easier to administer in today's more complicated MVPD marketplace.

* * *

Finally, TCI would like to point out that many, indeed most, of the predicates underlying its proposal already have been

accepted by the Commission. For example, the Commission already has acknowledged that the growth of non-cable competition reduces cable's market power in ways directly related to the horizontal limit. Likewise, it already has found that other behavioral restrictions, such as the program carriage rules, reduce concerns about monopsony power and vertical foreclosure and that independent programming sources are flourishing while cable vertical integration is decreasing. It already has identified a competitive local telephony market as a key policy goal. It already has noted the benefits of cable clustering and the efficiencies associated with larger MSO size. And, it already has recognized that an MVPD subscriber-based horizontal formula is superior to a cable homes-passed formula in the current marketplace. TCI's proposal to raise the limit to 40% and adopt a subscriber-based formula is a logical and moderate outgrowth of these predicates.

II. THE STATE OF THE MVPD MARKETPLACE TODAY STRONGLY JUSTIFIES RAISING THE CURRENT CABLE HORIZONTAL LIMIT.

The MVPD marketplace the Commission confronts today is fundamentally different from the one it faced in 1993 when the current cable horizontal limit was adopted. In particular, the marketplace has changed in ways that directly reduce the likelihood that cable operators will have the incentive or ability to engage in the type of behavior targeted by the limit. The Commission has correctly concluded that it must take these changes into account as it seeks to update the current horizontal limit.

A determination of the appropriate horizontal limit in today's MVPD marketplace necessitates a review of the objectives that led

to its adoption in 1992. As the Commission correctly points out in the Further NPRM, Congress enacted the horizontal limit based on the perceived concerns that cable operators could: (1) exercise monopsony power to force unfair concessions from programmers;⁷ and (2) vertically foreclose entry by programmers, thereby reducing program diversity.⁸ The Commission in 1993 summarized Congress' dual objectives as follows:

Congress concluded that [the] degree of [cable] concentration, though low relative to other industries, may enable some MSOs to

⁷ The legislative history of Section 613(f) clarifies Congress' concern that:

the size of certain MSOs could enable them to extract concessions from programmers, including equity positions, in exchange for carriage. The Committee believes that such practices could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction.

H.R. Rep. No. 628, 102nd Cong. 2d Sess. 42-43 (1992) ("House Report").

⁸ Congress expressed the view that:

[T]here are special concerns 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 unorthodox or unpopular speech because it does not sell well, or both.

S.Rep. No. 92, 102nd Cong, 1st Sess. 32 ("Senate Report"). See also House Report at 42 ("[H]orizontal concentration provides incentives for MSOs to impede competition by discouraging the formation of new cable programming services."); Senate Report at 33 ("With increased concentration, large MSOs can determine which program services can make it.").

exercise excessive market power, or monopsony power, in the program acquisition market. Congress was concerned in particular with preventing large vertically integrated cable systems from creating barriers to entry for new video programmers, and from causing a reduction in the number of media voices available to consumers.⁹

It is important to note that the concerns expressed by Congress were entirely anticipatory. Congress spoke of problems that "could" develop, but identified no significant evidence that problems actually had occurred. In fact, they have not. In Section II.B., infra, TCI provides evidence, including significant new empirical evidence not available to the Commission when it adopted the current limit, demonstrating that Congress' perceived concerns have not become manifest. To the contrary, programmers have flourished, and the programming industry is more diverse today than at any point in its history.

Before turning to a discussion of why the state of today's MVPD marketplace justifies a higher horizontal limit, TCI notes that a limit higher than 30% would have been justified even in 1993. In 1993, TCI urged the Commission to adopt a horizontal limit of 40%.¹⁰

⁹ Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 8 FCC Rcd 8565, at ¶ 10 (1993) ("1993 Second Report and Order"). See also Further NPRM at ¶ 5.

¹⁰ Comments of TCI in Implementation of Sections 11 and 13 of the 1992 Cable Act, Notice of Proposed Rulemaking, MM Docket No. 92-264 (filed on February 9, 1993), at 17 ("TCI 1993 Comments"); Comments of TCI in Implementation of Sections 11 and 13 of the 1992 Cable Act, Further Notice of Proposed Rulemaking, MM Docket No. 92-264 (filed on August 23, 1993), at 10 ("TCI 1993 Further Comments").

TCI attached to its 1993 Comments an economic analysis performed by Charles River Associates ("CRA") that fully supported TCI's position. CRA concluded that "neither the current level of horizontal concentration in cable ownership, nor an increase in that concentration, pose a substantial threat of increased market power and reduced program diversity."¹¹ With respect to the issues of monopsony power and vertical foreclosure, CRA concluded:

(1) there is very little risk that the exercise of monopsony power poses a threat to the diversity, quantity, or quality of programming available to consumers; (2) increased concentration in cable system ownership does not raise the risk that cable operators would collude, overtly or tacitly, as sellers; and (3) the threat of a successful foreclosure strategy is quite remote.¹²

By contrast, CRA noted that horizontal growth of MSOs produces the following significant benefits and efficiencies:

- With regard to innovation, large MSOs have historically played a central role in developing new services, including riskier services, and in supporting existing services through periods of financial difficulty.¹³
- Cable MSO size may reduce the financial burden on programmers associated with marketing and negotiating the sale of their programming properties. This is due to the reduced costs of marketing to, and negotiating with, fewer entities as opposed to many smaller MSOs.

¹¹ Stanley M. Besen, Steven R. Brenner, & John R. Woodbury, "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions," Charles River Associates Incorporated, at 2 (Feb. 9, 1993) ("1993 CRA Analysis").

¹² Id. at 2-3.

¹³ See id. at 8.

These reduced costs may result in lower wholesale prices, and ultimately in lower subscriber costs.¹⁴

- Economies of scale also exist in administration and planning for new technologies and services.¹⁵

In short, the small chance that MSOs could exercise monopsony power and/or engage in vertical foreclosure, and the even smaller chance that such activity would reduce consumer welfare supported a horizontal limit well in excess of 30% in 1993, particularly given the significant benefits and efficiencies associated with larger MSO size.¹⁶

In the sections below, and in the new economic analysis by Dr. Besen and Dr. John R. Woodbury ("Besen and Woodbury") (attached as Appendix A), TCI demonstrates that the case for a higher limit is even stronger today than it was in 1993. TCI focuses on the following factors in reaching this conclusion:

1. the fundamental changes that have occurred in the MVPD marketplace since 1993, in particular: (a) increased MVPD competition; (b) the success and strengthening of other existing cable restrictions aimed at addressing the very same behavior targeted by the horizontal limit; and (c) the expansion in channel capacity made possible by digital video technology, which provides additional outlets for

¹⁴ See id. at 7-8.

¹⁵ See id.

¹⁶ See id. at 22 ("Because of the absence of consumer harm from MSO growth, we would urge the Commission to adopt a very liberal limit on MSO size."). The Commission itself believed at the time of adoption of the current cable horizontal rule in 1993 that the record supported a higher limit: "There is ample support in the record for a limit of at least 30%." See 1993 Second Report and Order at ¶ 27 (emphasis added).

program services and thereby reduces an MSO's ability to limit program diversity;

2. a substantial body of evidence, including new empirical evidence, demonstrating that the concerns of Congress, which provide the basis of the Commission's rule, were vastly overstated and have never materialized; and
3. an analysis of the Commission's and other government agencies' prior efforts to regulate the program distributor-supplier relationship, the reasons why those efforts were abandoned, and why this precedent further supports a higher cable horizontal limit.

Besen and Woodbury fully support TCI's recommendation that a higher horizontal limit is justified based on current marketplace factors:

We concluded [in 1993] that concerns about anticompetitive behavior by large cable MSOs had been exaggerated and that, therefore, the Commission need not adopt stringent limits on the ownership of cable systems. This earlier conclusion is buttressed by developments since the passage of the 1992 Cable Act and the promulgation of the Commission's rules -- most importantly the growth of Direct Broadcast Satellite subscribership -- which support a relaxation of the limits the Commission previously adopted. In addition, there is now empirical evidence about the carriage behavior of vertically integrated Multiple System Operators that was not available at the time the rules were adopted. This new evidence demonstrates that the concerns of the Congress upon which the rules are based are largely unfounded. Together, these considerations indicate that the Commission can significantly relax its cable ownership restrictions without being concerned that this will lead to anticompetitive behavior by large MSOs.¹⁷

¹⁷ Besen and Woodbury at 1.

A. Significant Changes In The MVPD Marketplace Make The Case For A Higher Horizontal Limit Even Stronger Today Than In 1993, Because These Changes Reduce an MSO's Ability To Exercise Monopsony Power Or To Engage In Vertical Foreclosure.

As the Further NPRM correctly recognizes, there have been significant changes in the MVPD marketplace since the Commission adopted the horizontal limit nearly five years ago. Specifically, these changes include:

- the emergence of significant competitors to cable, particularly DBS, which reduce an MSO's ability to exercise monopsony and vertical foreclosure power or otherwise limit diversity of programming;¹⁸
- the success and strengthening of other existing behavioral restrictions imposed on cable operators aimed at the very same behavior targeted by the horizontal limit; and
- the emergence and widespread deployment of digital video technology which provides additional outlets for program services, thereby further weakening an MSO's ability to engage in monopsony or vertical foreclosure tactics.

These changed circumstances are highly relevant to an assessment of an MSO's ability to exercise monopsony power or to engage in vertical foreclosure. The current horizontal limit prevents the efficient growth of MSOs, despite the fact that the competitive and diversity concerns on which the rules are based have been substantially dealt with by marketplace developments.

¹⁸ TCI disputes any assertion that it possesses monopsony or vertical foreclosure power. Thus, all discussion in these comments regarding "reducing" an MSO's ability to exercise such power should be understood to address the theoretical concerns that underlie the horizontal limit.

1. **Principal Change #1: Significant Competition To Cable, Particularly DBS, Has Emerged Since Adoption Of The Existing Limit.**

Since the Commission adopted the horizontal limit in 1993, the MVPD marketplace has changed dramatically as numerous alternative programming distributors -- most noticeably DBS, but also telcos, MMDS, SMATV, and C-band systems -- have emerged and developed into significant competitors to cable. As explained below, these competitors limit an MSO's ability to exercise monopsony power or to engage in vertical foreclosure.

At the time the horizontal limit was adopted, DBS did not have a single subscriber. Today, there are more than 7 million DBS subscribers in the United States.¹⁹ A recent estimate projects that DBS alone will have 12.8 million subscribers by the year 2000.²⁰ In addition, several large, well-funded regional telcos are overbuilding cable operators in hundreds of franchise areas across the country.²¹ Also, C-band, MMDS, SMATV, and other cable

¹⁹ See Paul Kagan Assocs., Inc., Cable Program Investor, at 3 (March 13, 1998).

²⁰ See Donaldson, Lufkin & Jenrette study, the results of which are reproduced in Cablevision: The Handbook for the Competitive Market, Blue Book, Vol. VII, Spring/Summer 1998, at 10 ("Cablevision Blue Book").

²¹ For example, Ameritech has been authorized to operate cable systems in over 75 communities serving more than 2.5 million homes, and is already providing cable service to 54 of these communities. BellSouth has received cable franchises in at least 18 areas in Alabama, Florida, Georgia, South Carolina, and Tennessee, passing over 1.2 million homes, and is actively competing in many of these areas already. The Southern New England Telephone Company, which is in the process of being acquired by SBC, has begun cable service and has plans to serve the entire state of Connecticut. GTE offers
(continued ...)

competitors have increased their competitive presence. MMDS alone has tripled in size from 397,000 subscribers in 1993 to 1.1 million subscribers in 1997.²²

In total, the number of non-cable MVPD subscribers today exceeds 12 million, or over 15.4% of all MVPD subscribers.²³ It is estimated that by the year 2000, the number of non-cable MVPD subscribers will be 17.8 million, or 21% of the total estimated 84.9 million MVPD subscribers as of that date.²⁴

The presence of the current 12 million non-cable subscribers means that an MSO's power to force concessions from programmers is necessarily weaker today than it was in 1993. Programmers now have alternatives for distributing their product that simply did not exist (or existed at a much lower level) in 1993 when the current limit was adopted.²⁵ In this regard, DBS is particularly

(... continued)

video services to more than 500,000 homes in Florida and California.

²² 1997 Video Competition Report at Table E-1.

²³ This percentage is calculated using figures recently submitted to the Commission by NCTA (i.e., 12 million is 15.4% of 77.95 million MVPD subscribers). See NCTA Comments in Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Notice of Inquiry, CS Docket No. 98-102 (1998), at 6 (July 31, 1998) ("NCTA Video Competition Comments") .

²⁴ See Cablevision Blue Book at 10. See also recent study by the Strategis Group projecting that DBS alone "will continue strong growth and secure 22% of the multichannel video market by 2003." "Promise of Local Channels Will Not Significantly Impact Industry Growth," Press Release, July 21, 1998, www.strategisgroup.com/press/DBS2.htm.

²⁵ See Besen and Woodbury at 5 ("[T]he ability to wield buyer power is diminished by the availability of alternative distribution (continued ...)")

significant because it gives programmers an alternative way to reach virtually all U.S. homes; in fact, with DirecTV, EchoStar, USSB, and Primestar, the DBS industry gives programmers four alternative ways to reach all U.S. homes.²⁶

For the same reasons, the growth of non-cable MVPDs reduces a particular MSO's ability to engage in vertical foreclosure or otherwise limit diversity. Again, the presence of 12 million non-cable homes means that programmers are less dependent on any particular MSO to reach viewers than they were in 1993. Stated another way, a particular MSO's ability to restrict program diversity has been reduced by the emergence of competitive distribution alternatives.

(... continued)

outlets to which program suppliers can turn if a single cable operator, or a collection of operators, were to attempt to exercise such power. In particular, the rapid growth of DBS provides program suppliers with an increasingly important alternative to cable operators for the sale of their services.").

²⁶ See also id. at 24-25 ("[C]urrent DBS subscribership is likely to understate its competitive significance because DBS subscribership has been growing quite rapidly. In making their pricing, programming, and investment decisions, cable operators will take into account the fact that DBS is viewed as a good substitute by current and potential subscribers rather than focusing on DBS' current market share. Because of the long-lived nature of many of these decisions, cable operators must respond to DBS' competitive significance, not its current share.") (emphasis in original).

Besen and Woodbury arrive at the same conclusion:

[T]he growth in DBS subscribership, as well as the growth in subscribership of other non-cable MVPDs, has reduced whatever ability large cable MSOs may have had to engage in the kinds of practices that gave rise to Congress' concern about concentration in cable ownership. In particular, by creating additional outlets through which program services can reach potential subscribers, the growth of DBS has reduced any ability that a large cable MSO might have either to foreclose rival program services or to exercise monopsony power. Because the growth of DBS and other MVPDs has substantially reduced the percentage of potential viewers that might be foreclosed by a large cable MSO, it is important to take that growth into account in establishing a cable ownership cap. Were the Commission to do so, the limit on the size of a cable MSO would be increased because DBS, along with other MVPDs, provides an alternative route through which a foreclosed programmer could reach virtually all television households.²⁷

Even if one does not believe that the current level of competition is sufficient to justify rate deregulation,²⁸ it seems obviously wrong not to take these non-cable MVPDs into account in specifying a cable horizontal limit, since they clearly affect an

²⁷ Id. at 23. See also id. at 8 ("[T]he effectiveness of a foreclosure strategy is further weakened if other distributors can carry a rival service the MSO tried to foreclose. In light of developments that have occurred since the passage of the 1992 Cable Act and the adoption by the Commission of rules limiting the size of MSOs -- especially the rapid growth in the number of subscribers served by DBS operators -- this factor places an especially important constraint on the ability of a large vertically integrated MSO to foreclose a rival program service.").

²⁸ However, TCI notes that Congress felt sufficiently strong about the state of MVPD competition to deregulate cable rates as of March 31, 1999. See 47 U.S.C. § 543(c)(4).

MSO's monopsony and vertical foreclosure powers. Yet, that is precisely what the current horizontal rule does -- it fails to give any effect to non-cable MVPDs. This failure leads to odd results.

- **EXAMPLE**: If an MSO today had 30% of all cable homes passed and tomorrow the DBS industry captured half of the MVPD marketplace, the MSO would still be at 30% of cable homes passed with no ability to grow. Yet, the MSO's power in the marketplace, and particularly its ability to exercise monopsony power or vertical foreclosure, clearly would have been reduced dramatically.

Furthermore, it would be irrational for the Commission not to take into account the impact of non-cable MVPDs on the horizontal limit given its observations in the Further NPRM and the 1997 Video Competition Report:

The MVPD market has continued to evolve since our adoption of the horizontal ownership rules. The 1997 Video Competition Report noted the growth of MVPDs other than cable operators and suggested that a true measure of horizontal concentration ought to take into account all MVPDs and MVPD subscribers, rather than cable operators and cable subscribers alone: '[I]n assessing the impact that national concentration may have in the MVPD programming market, we believe that it is appropriate to consider the presence of all MVPDs and MVPD subscribers in national concentration figures, and not just cable MSOs and cable subscribers. As non-cable MVPD subscribership increases, the significance of DBS, MMDS and SMATV operators in the MVPD program purchasing market also increases.'²⁹

²⁹ Further NPRM at ¶ 80 (quoting 1997 Video Competition Report at ¶ 150).

Conversely, the Commission observed, the increase in non-cable MVPDs would reduce the market power or influence of cable operators:

With the growth of alternative MVPDs, network programmers gain alternative avenues for distribution of their products, thus reducing cable operators' market power or influence in the purchase and distribution of network programming.³⁰

Thus, the Commission already has concluded that the growth of non-cable MVPDs directly reduces the MSO's ability to exercise monopsony or vertical foreclosure power. It would be arbitrary not to increase the current horizontal limit to account for this non-cable MVPD growth and competitive impact.

2. Principal Change #2: Other Existing Behavioral Restrictions Have Been Successful And Even Strengthened Since Adoption Of The Existing Limit.

The Commission found in both its 1993 Second Report and Order and its recent Second Order on Recon. that the behavioral restrictions imposed on cable operators by the program access, program carriage, must carry, leased access, and channel occupancy rules have a direct impact on the behavior that the horizontal limit is intended to address.³¹ Stated another way, the fact that

³⁰ Id.

³¹ 1993 Second Report and Order at ¶ 26 ("We believe that this 30% limit is reasonable to prevent the types of anti-competitive conduct which concerned Congress, particularly when coupled with the behavioral restrictions contained in Sections 12 and 19 of the 1992 Cable Act, which are similarly intended to prevent cable operators from exercising undue power vis-à-vis video programmers and consumers"); Second Order on Recon. at ¶ 50 ("Statutes and rules such as the program access, program carriage, channel
(continued ...)")