in development in 1993 and "Internet-Protocol," or "IP," technology was not part of the cable landscape. Cable subscribers' set-top "converters" were relatively simple devices for tuning cable services to the consumers' television.

Today, these technologies are transforming the cable system into a truly interactive broadband infrastructure, capable of providing a diverse range of communications services. Technology has increased dramatically the capacity of cable systems and the quality of the services they can deliver. It also has changed the nature of the services cable can provide. No longer simply a system for delivering one-way video, cable systems now can deliver the complete range of video, voice, and data services.

The best evidence of the promise of these new technologies is the recently announced merger of AT&T and TCI. The new company will provide the most powerful selection of high-quality, high-value communications products and services ever offered by a single entity. After the merger is completed, AT&T will combine its current consumer long distance, wireless, and Internet service divisions with TCI's cable, telecommunications, and content-rich Internet businesses to create a new subsidiary -- AT&T Consumer Services. AT&T Consumer Services will offer consumers an extraordinary range of communications services, all under the AT&T brand name. AT&T Consumer Services will be the first truly one-stop communications shopping center for all consumers, making it easier for them to subscribe to, upgrade, downgrade, and customize the communications services of their choice.

The merged AT&T and TCI will offer these services over a highly sophisticated broadband network platform. This platform will have three primary parts: (1) a rebuilt broadband network infrastructure; (2) upgraded headends; and (3) advanced digital multi-purpose customer terminals.

The broadband infrastructure will consist of two-way capable systems upgraded to 550 MHz and 750 MHz. TCI's cable headends will be transformed into the nerve centers of a high-tech network based on Internet-Protocol technology. IP technology will make it possible to offer consumers video, voice, and data signals in electronic "packets" over the same wire.

On the household side of the network, the merged company will provide its customers with an advanced digital customer terminal. This terminal is not simply a device which descrambles signals and passes them through to TVs and VCRs. Rather, it is a highly complex network computer with enormous processing power and memory which will allow it to deliver a wide array of interactive video, data, and telephony services to consumers.

In fact, in TCI's view, the digital customer terminal effectively renders the cable horizontal limit moot. That is because the device is fundamentally multi-purpose. It provides cable, but it also provides telephony, Internet access, high speed data and a host of other services. A consumer with one of these devices receives a broad range of services, and this makes "counting" the consumer as a cable subscriber overly simplistic. It no longer makes sense, and may actually reduce consumer welfare, to impose a discrete cable subscriber limit in an environment where

companies like TCI are trying to provide a much broader range of services. Stated another way, it would be tragic if TCI were prevented from providing a consumer with competitive telephony because of a cable horizontal rule.

B. The Importance Of Clustering And A Sufficient Network "Footprint" To The Delivery Of The Competitive Benefits Of This New Technology.

Two critical components of TCI's and the cable industry's ability to harness the power of this new technology to produce the array of services described above in an efficient and competitive manner are: (1) the restructuring of cable systems into regional clusters; and (2) the establishment of a sufficient network "reach" or "footprint."

1. The Importance of Clustering.

Over the past 18 months, TCI has entered into a series of transactions to create regional clusters that will enable TCI to fill in its current cable systems in markets such as Chicago, Denver, Portland, Dallas, San Francisco, Salt Lake City, and Central Michigan.[78] Similarly, where one of TCI's systems was adjacent to an operator which had a deeper presence in that market, TCI has sought to create a joint venture and let the other operator manage the system. These more dense cable systems allow TCI to

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[78] See Hindery Testimony at 9 ("Clustering allows us to focus more keenly on the local needs of our customers and, at the same time, create larger, regional systems that can obtain the economies of scale and scope that are absolutely necessary to the provision of telephony and future interactive video and information services.").

decentralize its operations and focus on more manageable and efficient regional units. This, in turn, brings decision-making down to the local level where managers can better serve the needs and interests of their customers.[79]

The Commission, the Department of Justice, and NTIA all have found that clustering provides very significant economic benefits to consumers and clustered cable operators.[80]

Perhaps most importantly, clustering will play a pivotal role in facilitating the creation of a truly competitive local telephony

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[79] In addition to localized management, clustering provides many other benefits, including the fostering of regional programming services, such as news and sports; improved maintenance and customer service; an increased ability on the part of cable operators to sell local and regional advertising; and enhanced compatibility of set-top boxes. For a more detailed description of the benefits and efficiencies of clustering, see Appendix B. The transactions referred to in this section are described in greater detail in Section III.D. of TCI's comments in the Commission's attribution proceeding. Comments of Tele-Communications, Inc. in Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Review of the Commission's Cable Attribution Rules, CS Docket No. 98-82, (filed Aug. 14, 1998).

[80] See 1997 Video Competition Report at ¶ 140 (explaining the many benefits of clustering including cost reduction, management efficiencies, increased attraction for advertising revenue, and enhanced position to compete with LECs and electric utilities in the provision of data transmission and local telephone service); Letter from Larry Irving, Asst. Secretary of Commerce, to the Honorable Janet D. Steiger, Chairman, Federal Trade Commission, Jan. 12, 1995 at 2 (voicing the strong opinion of the Administration that clustering is essential to the future of telecommunications and that any potential harms of clustering are "largely conjectural, speculative, or de minimis"). See also 1990 DOJ Reply Comments at 44-45 (noting that programming was increasing at the same time that MSO concentration was increasing and concluding that "there is considerable doubt regarding the basis for any regulation imposing generally applicable maximum size limits on MSOs").

market. Clustering is essential to the efforts of TCI and other cable operators to compete effectively with geographically concentrated incumbent LECs and electric utilities because clustering substantially reduces the cost of providing local telephony.[81] The profitability of offering telephony depends significantly on the proportion of cable subscribers who choose to take telephone service from their cable company. The ability to serve customers in dispersed cable systems from common routers, switches, and network computers is limited. Clustering allows cable operators to capture these types of economic efficiencies and that, in turn, makes telephony a much more attractive proposition.

The economics of clustering are particularly important because a cable operator seeking to provide telephone service will face a very well-established competitor with a very large market share, a ubiquitous footprint, and a well-established reputation.

Similarly, clustering will facilitate TCI's offering of new interactive video and high-speed data services. Delivering these services to a larger, more geographically focused number of subscribers will reduce the per-subscriber cost of expensive file servers, switches, and high capacity storage devices that are necessary to provide these services. Clustering is therefore important to the viability of these services because smaller

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[81] See 204 H.R. Rep. No., 104th Cong., 1st Sess., pt. 1, at 107 (1995) (noting that "the Committee intends that the scale and scope economies achievable through cable system clustering will . . . enhance the cable industry's ability to enter and compete in the local telephone business").

systems must bear the cost either of unused file server capacity, or of a smaller, less efficient file server. Moreover, the same efficiencies cannot be achieved by aggregating the demand from widely separated systems due to the high cost of transmitting a large number of channels from a remote file server to a local system -- either by satellite or leased long distance lines. In addition, many of the other benefits of clustering described above and in Appendix B -- such as lower maintenance and operating costs, reduced repair times and improved service quality, more efficient system architecture with fewer miles of cable plant, and reduced per-customer marketing costs -- will further enhance the attractiveness of providing interactive video and high-speed data services.

The merger between TCI and AT&T provides perhaps the best evidence regarding the pro-consumer and pro-competitive benefits of clustering. The merger is the first truly significant effort to achieve Congress' goal of creating competition in the local telephone marketplace. As such, the merger will provide numerous consumer benefits, including the provision of competition for local telephony and content-rich Internet services, as well as one-stop shopping for a "whole house" package solution for a consumer's communications needs.[82] AT&T Consumer Services is dedicated to

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[82] See William Kennard, Further Statement on Proposed AT&T/TCI Merger (June 24, 1998) ("If AT&T and TCI step up to the plate and make a serious commitment to invest in facilities for local phone service, then consumers could see real benefits from this merger.").

providing aggressive and widespread competition to incumbent local telephone companies and, because of the advances in IP and other technologies discussed above, it will be able to do so for about half the cost per line of a traditional circuit switched telephone system.

2. The Importance of a Sufficient Network Size To Promote Investment And Innovation By MSOs In New Services, Such As Competitive Local Telephone Service.

While clustering creates efficiencies necessary to allow cable operators to compete in the local telephony and interactive data and video businesses, that alone is not sufficient. TCI also requires the flexibility to grow to the point at which it can undertake and financially support the development efforts necessary to provide competitive local telephony and interactive broadband services.

As AT&T has made clear in its public statements and in its valuation of the TCI cable systems, one of the principal reasons AT&T is acquiring TCI is the significant regional clusters and the overall network footprint potentially represented by TCI's cable systems.[83] Drs. Besen and Woodbury reach the same conclusion

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[83] See, e.g., S. Rosenbush, "AT&T's Big Gamble: Long-Distance Firm Guns for Local Market," USA Today, at 1B (June 25, 1998) (quoting AT&T Chairman C. Michael Armstrong as saying, "I would have had to buy SBC and Ameritech to get the same footprint as TCI."); K. Maney, "AT&T Going Wrong Way to Greatness," USA Today, at 2B (July 9, 1998) (stating that increased access to customers is one of the reasons for the TCI/AT&T merger). See also S. Schiesel, "With Cable Deal, AT&T Makes Move to Regain Empire," N.Y. Times, at A1 (June 25, 1998); A. Leckey, "Premium Blend: AT&T-TCI Deal has Investors on Prowl," Chicago Tribune, at C3 (July 5, 1998); P. (continued ...)

regarding the significant additional consumer and competitive benefits associated with allowing cable systems to achieve a larger network size:

> [S]ignificant costs must be incurred to carry out the research and development activities that are necessary to permit Internet Protocol telephone over cable. However, small cable operators will not undertake these activities because they will capture only a small portion of the benefits that result from the development effort. Because the development activities are most likely to be undertaken by large cable operators, placing limits on the size of cable MSOs makes it less likely that these promising research and development activities, among others, will be undertaken. Moreover, size creates an additional advantage in bringing new technologies forward .... Many new telecommunications services that can be offered over cable require a significant degree of interoperability among different cable systems. For example, IP telephony will require uniform addressing systems and directory services to permit subscribers to one cable system to communicate with subscribers to another. Large cable operators are in a unique position to promote the development of industry-wide standards that will be needed to promote the development of these new services because they can be confident that other, smaller operators will follow their choices. The introduction of new services that require standardization is thus likely to be more difficult if cable system ownership is fragmented. Limiting the size of cable MSOs, by reducing the ability of any one cable operator to promote interoperability among cable systems, may threaten, or delay, the introduction of new services by the cable industry.[84]

(... continued)

Farhi, "AT&T Buys TCI, Looks to One-Stop Future," Washington Post, at A1 (June 25, 1998).

[84] Besen and Woodbury at 17-18 (emphasis added) (footnote omitted).

The Commission has recognized the efficiencies and benefits of a larger network size in prior orders approving the mergers of various Bell Operating Companies.[85] Given the importance of larger MSO size in terms of increasing network innovation, standardization, and the ability to deliver competitive local telephony and interactive broadband services, the Commission should be even more willing in this context to approve a higher horizontal limit.

In short, TCI respectfully submits that as the Commission considers an appropriate horizontal limit, it must accord significant weight to the additional benefits that larger network size will provide in terms of increasing the ability of a cable operator to fund and offer competing local telephony and other services to American consumers. 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 in these services.

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[85] See In re Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Co., 10 FCC Rcd 13368, at ¶ 46 (1995) (Commission found that the larger size of the combined company would improve customer service and competitiveness); In re McCaw and AT&T, Memorandum Opinion and Order, 9 FCC Rcd 5836, at ¶ 57 (1994); In re Pacific Telesis Group and SBC Communications, Inc., Memorandum Opinion and Order, 12 FCC Rcd 2624, at ¶¶ 80-83 (1997) ("The proposed transfer will enable the companies to [become] a more effective new entrant .... SBC/PacTel should be able to achieve some savings in overhead and support systems, and to offer 'one-stop shopping' of some services that is now impossible."); In re NYNEX and Bell Atlantic Corp., Memorandum Opinion and Order, 12 FCC Rcd 19985 at ¶¶ 176-178 (finding that the merger, combined with the commitments proposed by Bell Atlantic and NYNEX, would have the pro-competitive benefit of enhancing competition).

While TCI believes that a cable horizontal limit significantly higher than the current limit is justifiable -- and indeed that the antitrust standard of 50% is entirely defensible in the current marketplace -- TCI proposes in the next section a more conservative approach. This approach reasonably accommodates the theoretical monopsony and vertical foreclosure concerns of Congress and the real-world need to promote local telephone competition and other benefits to American consumers.

IV. TCI'S PROPOSAL: ADOPT A 40% MVPD SUBSCRIBER-BASED FORMULA FOR THE HORIZONTAL LIMIT.

TCI recommends that the Commission: (1) adopt the MVPD subscriber-based formula proposed in the Further NPRM; and (2) increase the horizontal limit to 40%.

A. The Commission Should Adopt The MVPD Subscriber-Based Formula Proposed In The Further NPRM.

The Commission's proposed MVPD subscriber-based formula has several distinct advantages over the existing cable homes-passed formula in the current MVPD marketplace.[86] First, it takes into account the presence of cable's competitors which clearly impact the monopsony and vertical foreclosure concerns underlying the horizontal limit. Second, it is a self-adjusting formula, so as

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[86] TCI believes that the Commission's adoption of a cable homes-passed test was appropriate in 1993 because at the time cable faced limited competition, and MVPD homes were nearly synonymous with cable homes. As explained throughout these comments, however, the marketplace has significantly changed since 1993, thereby justifying a change from the cable homes-passed standard to an MVPD subscriber standard.

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, as demonstrated below, the Commission has ample authority to adopt an MVPD subscriber-based formula.

1. A Subscriber-Based Formula Takes Into Account The Impact Of Cable's Competition On The Monopsony And Vertical Foreclosure Concerns Underlying The Horizontal Limit.

As described above, the MVPD marketplace has changed in a number of ways since the Commission adopted the horizontal limit. Most significantly, the emergence and growth of competition has reduced the ability of cable operators to wield monopsony power or to engage in vertical foreclosure against programmers. This is so because non-cable MVPDs now provide an alternative distribution outlet to any programmer against which a cable operator may seek to exercise such power. The Commission already has acknowledged this important point:

> With the growth of alternative MVPDs, network programmers gain alternative avenues for distribution of their products, thus reducing operators' market power or influence in the purchase and distribution of network programming.[87]

Thus, in this new marketplace, an MVPD subscriber-based formula, because it gives effect to competition, provides a truer measure of

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[87] Further NPRM at ¶ 80.

a cable operator's ability to exercise market power than does the current homes-passed based test.

In recognition of the problems with the current formula, the Commission already has endorsed and implemented an MVPD subscriber-based methodology for the national concentration analysis done in its annual video competition reports. Although in the first two reports released in 1994 and 1995 the Commission calculated national cable concentration by focusing solely on subscribership in the cable industry, beginning with the third report in 1996, the Commission announced its intention to switch to an analysis based on all MVPD subscribers. The Commission's explanation for this change is precisely the reason why such a change should now also be incorporated into the cable horizontal rule in 47 C.F.R. § 76.503:

> [I]n assessing the true impact national concentration may have in the MVPD programming network market, we believe that it is now appropriate to consider the presence of all MVPDs and MVPD subscribers in national concentration figures, and not just cable MSOs and cable subscribers. As their subscribership increases, the significance of DBS, MMDS and SMATV operators in the MVPD programming network market also increases. As a result, in this and future Reports, we will examine national concentration measures for all MVPDs.[88]

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[88] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Third Annual Report, 12 FCC Rcd 4358, at ¶ 131 (1997) (emphasis in original) ("1996 Video Competition Report"). See also Further NPRM at ¶ 80.

2. An MVPD Subscriber-Based Formula Is Automatically Self-Adjusting As The Level Of Competition Changes.

Unlike the existing cable homes-passed formula, an MVPD subscriber-based formula is inherently self-adjusting in that an MSO's cable horizontal concentration will automatically decrease as the number of subscribers to other MVPDs increases, and vice versa. This is an important distinction given that the ability of a cable operator to thwart distribution of a particular program service will diminish as the number of subscribers served by alternative distributors increases.

As noted, the Commission already has accepted the fact that increasing competition diminishes a cable operator's ability to exercise market power. Thus, the fact that the current formula is not self-adjusting in the face of changes in the MVPD marketplace alone justifies a change in this formula. In addition, changing to a self-adjusting formula will obviate the need for the Commission to revisit the horizontal rules every few years, an attractive attribute especially in a marketplace as dynamic as the current one.

3. A Subscriber-Based Formula Is More Accurate And Easier To Administer.

An MVPD subscriber test is inherently more accurate than a cable homes-passed test because it focuses on the consumers that a cable operator actually serves. A homes-passed test, by contrast, looks at the number of potential customers which does not, and may never, correlate to the number of consumers an operator actually serves. This point is particularly relevant in the context of the horizontal rules. TCI, like most cable operators, deals with its

program suppliers based on the number of subscribers it serves, not the number of homes it passes. Thus, in the real world, any monopsony or vertical foreclosure power that a cable operator could wield is related to subscribers, not homes passed. It makes sense to amend the horizontal limit to reflect this fact.

The Commission already has recognized that a subscriber-based approach is more accurate than a cable homes-passed approach:

> While homes passed reflect the number of subscribers an MVPD has the potential of reaching, the MVPD often secures only a fraction of those potential subscribers. The MVPD typically does not purchase programming for all potential subscribers, only for those subscribers that it actually has. As 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.[89]

Moreover, there are additional problems with homes passed in terms of its accuracy. For example, the Commission has never specified the number of total cable homes that should be used as the denominator in the 30% calculation. There are published numbers on cable homes passed, but these reports are not sufficiently reliable to use in the horizontal formula. For example, Kagan Associates publishes a cable homes-passed number. On October 9, 1997, TCI submitted to the Commission a study conducted by Kagan regarding the number of television households in

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[89] Further NPRM at ¶ 84.

the U.S.[90] This study showed that there are approximately 12 million housing units that are counted by the Census Bureau but not included by Kagan in determining the number of cable homes passed (2-3 million if vacant units are subtracted). There are an additional 7.8 million people that are not counted by Kagan because they are in group housing (e.g., nursing homes, college dorms, military quarters). Kagan also has acknowledged that its numbers for cable homes passed are very rough (e.g., where no system estimate is available, Kagan estimates are based on population). All told, this study indicates that the number of cable television homes nationwide could be anywhere from 96 million to approximately 115 million. Thus, it is extremely difficult to accurately measure horizontal ownership under the current rules.

By contrast, an MVPD subscriber-based approach would be easy to administer and update since the Commission, through its annual video competition reports, already tracks MVPD subscriber numbers.[91]

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[90] See Letter from Michael H. Hammer, Willkie Farr & Gallagher, to William F. Caton, Secretary, Federal Communications Commission, Ex Parte Presentation, MM Docket No. 92-264 (October 9, 1997).

[91] Once the Commission decides to use a subscriber-based formula, it must determine how to count subscribers subject to bulk billing arrangements in multi-dwelling units and commercial establishments. As to MDU subscribers, the Commission should allow cable operators to count subscribers either on a strict subscriber basis or an Equivalent Billing Unit ("EBU") basis depending on how the operators count subscribers when calculating program license fees. Since this is also the way operators generally report their subscriber numbers to third parties, such as Kagan Associates, it makes sense to calculate subscribers this way to keep the numerator and the denominator in the new formula consistent. Moreover, the Commission has accepted the reporting of EBUs for purposes of rate

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4. The Commission Has Authority To Impose An MVPD Subscriber-Based Formula.

The Commission has the authority to adopt a subscriber-based formula for the cable horizontal limit and to include non-cable MVPD subscribers in the calculation of this limit.

a) Authority To Use A Subscriber-Based Formula.

The statute specifically requires the Commission to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such a person ...."[92]

An MVPD subscriber-based approach is also consistent with congressional intent as expressed in the legislative history of Section 613. All of the Senate and House reports relating to

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regulation. See Questions and Answers on Cable Television Rate Regulation, Public Notice, 75 R.R.2d 1016, 1017 (1994).

In TCI's view, it does not matter whether commercial subscribers are counted, particularly given that they represent a small percentage of a cable operator's business. However, it is important that commercial subscribers be treated the same in both the numerator and the denominator of the formula. For example, it is TCI's understanding that cable subscriber totals done by Kagan Associates do not include commercial subscribers, so if the Kagan number is used by the Commission in the formula's denominator, then an MSO should not be required to include commercial subscribers in the numerator. Also, if commercial subscribers are to be counted, as with MDUs, the operator should be able to use EBUs if that is how the cable operator determines how many subscribers it has when making payments to programmers for their license fees.

[92] 47 U.S.C. § 533(f)(1)(A).

Section 613 discuss the horizontal limit in terms of the number of subscribers that are reached by the cable operator.[93]

In addition, by giving the Commission broad authority to determine how to fashion the horizontal limit, Congress realized that historically the communications industry, including the cable television industry, has and will continue to evolve, rendering static measurements ineffective with time. A self-adjusting mechanism, such as a subscriber-based formula, is required to confront the dynamic nature of the MVPD marketplace.[94]

Finally, the statute does not dictate to the Commission the manner by which the appropriate horizontal limit must be calculated, and certainly does not contain any language mandating a homes-passed formula. Thus, establishing a subscriber-based formula is within the Commission's discretion under Section 613.

b) Authority To Include Non-Cable MVPD Subscribers In The Formula.

The Commission also has authority to include non-cable MVPD subscribers in the formula measuring cable horizontal concentration.

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[93] See House Report at 42 ("Horizontal concentration refers to the share of cable subscribers accounted for by the largest MSOs.") (emphasis added); Senate Report at 34 ("To address the issue of national concentration in the cable industry and enhance effective competition, the legislation directs the FCC to place reasonable limits on the size of MSOs (by the number of subscribers.") (emphasis added).

[94] See 47 U.S.C § 533(f)(2)(E) (the Commission's horizontal ownership rules must "reflect the dynamic nature of the communications marketplace.").

First, as noted, the statute does not dictate to the Commission the manner by which the appropriate horizontal limit is to be calculated. Rather, it accords the Commission broad discretion in this regard.

Second, the statute directs the Commission to ensure that its rules "reflect the dynamic nature of the communications marketplace."[95] As discussed above, the Commission simply cannot give effect to this congressional directive unless it revises its formula to reflect the increased competition from non-cable MVPDs. By expanding the relevant marketplace in the formula to include all MVPD subscribers, the Commission would properly update the formula to reflect this changed marketplace.

Third, as noted, failing to include all MVPD subscribers in the current marketplace could lead to odd results by, for example, allowing non-cable MVPDs to take a substantial portion of the subscriber marketplace without affecting cable's relative horizontal concentration.

Finally, the Commission possesses general authority to adapt its rules to reflect changes in marketplace conditions.[96] In fact,

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[95] Id.

[96] See, e.g., Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.").

this broader general authority is referenced in the list of public interest factors set forth in Section 613 which is, by its terms, not exhaustive. The Commission is directed to consider these factors, "among other public interest objectives."[97] Thus, both the statutory language and residual Commission authority clearly allow the inclusion of non-cable MVPD subscribers in the cable horizontal formula.[98]

B. The Horizontal Limit Should Be Increased To 40%.

For the reasons set forth above and expanded upon below, the Commission is justified in adopting a horizontal limit of 40%. TCI points out, however, that its proposal of a 40% limit takes into account TCI's proposed changes to the cable attribution rules which it is filing today in separate comments on the Commission's Attribution NPRM. Should the Commission decline to adopt changes to the attribution rules along the lines TCI has proposed, TCI maintains that a horizontal limit above 40% should be adopted by

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[97] See 47 U.S.C. § 533(f)(2) (emphasis added).

[98] Indeed, to the extent there is any potential limitation on the inclusion of all non-cable MVPD subscribers, it is that they may not be included in the numerator of the formula when counting the number of subscribers served by the MSO. This interpretation would be based solely on a literal construction of Section 613(f)(1)(A) which directs the Commission to "establish reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person." (emphasis added). However, in no event can this language be read to limit the Commission's authority to expand the relevant market considered in the formula (i.e., the formula's denominator). Moreover, TCI believes that the statutory and other bases cited above also authorize the Commission to include in the numerator the number of subscribers an MSO reaches through non-cable MVPDs with which the MSO is affiliated.

the Commission. This would be necessary to compensate for the application of the current attribution rules, which (as TCI demonstrates in its companion attribution comments filed today) in many instances improperly attribute to an MSO the subscribers of cable systems even where the MSO holds only a minority interest and has no control over the programming decisions of such systems.

1. The Many Bases Cited Above Fully Justify An Increase In The Horizontal Limit To 40%.

Throughout these comments, TCI has described numerous bases which justify an increase in the horizontal limit to 40%. These bases include, for example: (1) new empirical evidence demonstrating that MSOs do not exercise monopsony power or engage in vertical foreclosure; (2) the fact that programming services have experienced substantial growth under current levels of MSO concentration; (3) the emergence and growth of MVPD competition; (4) the success and strengthening of existing rules that address the same concerns as the horizontal limit; (5) the expansion of channel capacity made possible by digital technology; and (6) the substantial efficiencies and benefits associated with larger MSOs, particularly the expanded provision of competitive telephony and interactive broadband services.

2. Several Additional Reasons Further Justify An Increase In The Horizontal Limit To 40%.

In addition to the bases discussed above, there are several other bases which further support an increase in the horizontal limit to 40%. TCI discusses each of these bases in turn below.

a) Antitrust Jurisprudence Justifies A Horizontal Limit Above 40%.

The legislative history of the 1992 Cable Act recognizes that antitrust analysis is a relevant factor in determining the horizontal limit.[99] In the antitrust realm, courts and scholars have found that a single firm's market share of 50% (and, in some cases, above 50%) causes little concern in terms of monopoly or monopsony power.

In a famous statement in the Alcoa case, for example, Judge Learned Hand opined that a ninety percent share was sufficient to confer monopoly power but that "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[100] A frequently cited compendium of monopoly cases since that time concludes that "[a] market share in excess of 70% is almost always deemed sufficient to support an inference of monopoly power, although that inference may be overcome by other evidence. In contrast, a market share of less than about 40% virtually precludes a finding of monopoly power."[101]

Areeda and Hovenkamp note that "[i]t would be rare indeed to find that a firm with only 25 or 50 percent of the market could

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[99] See House Report at 42 (while the House Report notes that antitrust analysis should not be the sole measure, it does not forbid its use by the Commission).

[100] United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).

[101] I Antitrust Law Developments (Third), 213-14 (1992) (citations omitted).

control price over any significant period without substantial cooperation from other firms" and that "there is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power."[102] According to a leading antitrust economic scholar, Professor George Hay, the typical approach in assessing monopoly power would appear to be that of the Second Circuit in Broadway Delivery, which:

> suggested that the jury could be told that "a market share below 50 percent is rarely evidence of monopoly power, a share between 50 and 70 percent can occasionally show monopoly power, and a share above 70 percent is usually strong evidence of monopoly power."[103]

There have been fewer cases specifically addressing the issue of market power in monopsony cases. However, in United States v. Syufy Enterprises, 903 F.2d 659, 663-71 (9th Cir. 1990), single firm market shares variously calculated at 39%-75% were deemed insufficient to confer monopsony power where the buyer was dealing with sophisticated sellers. In this regard, the 1990 comments of the United States Department of Justice seem particularly relevant:

> If both the supplier and buyer have bargaining power, it is difficult to predict whether the prices they agree on will be above, below or within the range that would result if both industries were competitive in structure. In this case just as MSOs are becoming increasingly concentrated and have acquired some amount of bargaining power, it also appears that certain program suppliers have

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[102] Areeda and Hovenkamp, Antitrust Law 548-549 (1992 Sup.).

[103] George A. Hay, Market Power in Antitrust, printed in The Cutting Edge of Antitrust: Market Power, Selected Articles, 60 Antitrust L.J. 799, at 807, 826 (1992).

considerable bargaining power in their own right.[104]

The above analysis suggests that even a 50% horizontal concentration of a national market does not create a risk that a distributor could extract unreasonable concessions from suppliers or unfairly restrain competition from alternative distributors, the very concerns that underlie the horizontal limit. The cases cited have arrived at this conclusion in various industries operating under the same set of economic assumptions and incentives as those in the cable industry. There is no reason to suppose that market shares lower than those deemed innocuous in other industries could result in monopsony power in the cable industry.[105]

TCI believes that the Commission would therefore be justified in using the 50% antitrust standard in this context, particularly in light of the absence of any evidence that the concerns underlying the horizontal limit have materialized or are likely to materialize in the new, more highly competitive MVPD marketplace.

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[104] 1990 DOJ Reply Comments at 44.

[105] The Merger Guidelines of the Department of Justice and Federal Trade Commission specify a threshold of 35% for the market share above which a merged firm might have an incentive to take unilateral actions that lessen competition. The threshold in the Merger Guidelines, however, is not applicable to cable for reasons on which TCI has already elaborated. First, the effects of monopsony on cable consumers, even if monopsony exists, are ambiguous at best. Second, the FCC's other competitive concern -- vertical foreclosure -- is not intended to be addressed by the 35% threshold in the Merger Guidelines. Vertical foreclosure issues historically have arisen more frequently in antitrust cases on monopolization, which, as shown above, typically specify a higher threshold for determining the amount of market power in an industry.

Stated another way, TCI's proposed 40% limit is extremely reasonable in light of what could be justified under antitrust jurisprudence.

Finally, the following chart demonstrates that many industries have concentration levels well above 40%. While there may be factors which render these examples less than perfectly analogous, they nonetheless do underscore the reasonableness of TCI's 40% proposal.

COMPANY	PRODUCT	SHARE (%)	YEAR
IBM	MAINFRAME COMPUTERS	70.0%	1994
KODAK	PHOTOGRAPHIC FILM	70.0%	1995
GILLETTE	RAZORS	68.1%	1995
PROCTER & GAMBLE	LIQUID AND POWDER DETERGENT	57.0%	1996
JOHNSON & JOHNSON	FIRST AID NEEDS	54.0%	1996
WHIRLPOOL	WASHING MACHINE PRODUCTION	53.0%	1995
TAMBRANDS	TAMPONS	50.0%	1996
WM. WRIGLEY JR. CO.	CHEWING GUM	50.0%	1996
HALLMARK	GREETING CARDS	45.0%	1996
COCA-COLA	SOFT DRINKS	43.1%	1997
MCDONALD'S	BURGER RESTAURANTS	42.1%	1996
Source: MARKET SHARE REPORTER 1997, Gale Research Inc.			

b) Broadcasters Are Permitted To Have An Effective National Reach Up To Or Over 40% Given The UHF Discount, And Broadcasters Have Asked The Commission To Eliminate Their Horizontal Limit In Its Entirety.

Although Congress in the 1996 Act raised the national broadcast limit from 25% to 35%,[106] in fact, because the broadcast rules still allow for a discount for UHF stations, the effective horizontal limit for a broadcaster is above 35%.[107] For example, as the chart below illustrates, Paxson has an effective national reach of 61.4% and Fox has an effective national reach of 40.5% before discounting the reach of UHF stations by a factor of 50%.

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[106] See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1), 110 Stat. 56, 111 (1996). Even the 35% limit was subject to stiff criticism: "[Markey's 35% amendment] would limit the ability of broadcast stations to compete effectively in a multichannel environment.... The evidence, however, does not support [Markey's] claim.... The Commission noted that group ownership does not result in a decrease in viewpoint diversity. According to the Commission, the evidence suggests the opposite, that group television station owners generally allow local managers to make editorial and reporting decisions autonomously. Contrary to Mr. Markey's suggestion that relaxation of these limits are anticompetitive, the Commission has found that in today's markets, common ownership of larger numbers of broadcast stations nationwide, or of more than one station in the market, will permit exploitation of economies of scale and reduce costs and permit improved service." 141 Cong. Rec. H 8425, at H 8479 (daily ed. August 4, 1995) (statement of Chairman Bliley).

[107] See 47 C.F.R. § 73.3555(e)(2)(i).