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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of 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
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

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REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, respectfully submits these reply comments in the above-captioned proceedings.[1/] The evidence in the record demonstrates that the Commission should relax its cable attribution and horizontal ownership rules to reflect the sweeping changes that have taken place in the cable industry since passage of

[1/] In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Review of the Commission's Cable Attribution Rules, Notice of Proposed Rulemaking, CS Docket No. 98-82, FCC 98-112 (released June 26, 1998) ("Attribution NPRM"); In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, FCC 98-138 (released June 26, 1998) ("Horizontal MO&O and NPRM").

the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and encourage competition and consumer choice in a broad range of markets going forward.

INTRODUCTION AND SUMMARY

These proceedings can help to unlock the promise of the Telecommunications Act of 1996 ("the 1996 Act").[2/] As Cablevision and others have argued, there are pro-competitive and pro-consumer reasons for crafting new cable attribution and horizontal ownership rules. The cable industry is facing more competition in its core business while challenging incumbents in a range of new markets -- extending a host of benefits to consumers. The Commission should encourage these efforts. Competition in the digital future will not be well-served by outmoded rules that hinder the emergence of competition in new markets and the provision of new services. As cable operators evolve from multichannel video programming distributors into full-fledged wireline network service providers offering traditional broadcast and cable programming, new interactive video services, Internet access, and local telephony, the Commission's attribution and horizontal ownership rules also must evolve. By rejecting mechanistic attribution standards in favor of a qualitative analysis that focuses on an investor's capacity for control, and relaxing its horizontal ownership rules to reflect the benefits of pro-competitive clustering strategies, the Commission will help bring consumers the benefits Congress envisioned in the 1996 Act.

As set forth in its initial comments,[3/] Cablevision's clustering strategy is a critical component of its efforts to enter new markets, local telephony and high-speed data offerings, while continuing to provide consumers with new, innovative local and regional programming

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[2/] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[3/] See Comments of Cablevision Systems Corporation, CS Docket No. 98-82, MM Docket No. 92-266, filed August 14, 1998 ("Cablevision Comments").

services such as MSG Metro and News 12. Consistent with Congress' expectations, this strategy is the building block of local competition in voice, video, and data services.[4/] Cablevision's recent acquisition of TCI cable systems in the New York metropolitan area furthers its clustering strategy by adding an additional 800,000 subscribers to its presence in that market, thereby providing the company with the economies of scale and scope necessary to begin to compete with Bell Atlantic/NYNEX/GTE.

While a handful of commenters have attacked the clustering efforts and recent strategic transactions initiated by Cablevision and other cable companies, their objections are rooted in narrow, parochial concerns that fail to acknowledge the competitive and consumer benefits being delivered by transactions which promote clustering. Ironically, the most vociferous complaints regarding clustering and the recent transactions in the cable industry come from companies that have already achieved formidable size and scope, such as SBC/Pacific/Ameritech/SNET and General Motors' DirecTV, or are allied with partners that have achieved such scale economies, such as RCN/Boston Edison/PEPCO.[5/] Unsurprisingly, these commenters mischaracterize the purpose and benefits of Cablevision's recent transaction with TCI, since their interest in hampering the ability of Cablevision and other cable companies to grow and innovate is transparent.

The Commission, however, should focus on the central question underlying these proceedings: whether the constraints imposed by the present cable attribution and horizontal

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[4/] See H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 434 (1992).

[5/] See generally Comments of Ameritech New Media, Inc., at 7-10 ("Ameritech Comments") CS Docket No. 98-82, MM Docket No. 92-265, filed August 14, 1998; Comments of DirecTV, Inc., CS Docket No. 98-82, MM Docket No. 92-265, filed August 14, 1998, at 9 ("DirecTV ownership rules continue to benefit both competition and consumers. The record in this proceeding clearly demonstrates that the answer to that question is no. Accordingly, the Commission should revise those aspects of its attribution and horizontal ownership rules that hinder the strategies and transactions that are generating new competition, new services and consumer choice in the video, telephony and Internet services markets.

I. CABLEVISION'S CLUSTERING STRATEGY AND RECENT TRANSACTION WITH TCI BENEFIT CONSUMERS BY PROMOTING COMPETITION, INNOVATION AND NEW SERVICES

In its initial comments, Cablevision detailed the rationale and benefits of developing regional system "clusters," which provide the company with the economies of scale and scope necessary to rebuild its cable networks, enter new markets and develop new services, and remain competitive with rivals such as Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET.[6/] Clustering lowers the per-unit costs of both rebuilding the company's cable networks and competing against more powerful rivals in markets such as local telephony and Internet access.[7/] It also helps the company meet the financial risks and technical and marketing challenges associated with the deployment of new local and regional programming services such as MSG

Comments"); Comments of RCN Telecom Services, Inc., MM Docket No. 92-264, filed August 14, 1998, at 9-11 ("RCN Horizontal Comments").

6/ Cablevision Comments at 7-11. See also Comments of Tele-Communications, Inc., MM Docket 92-264, filed August 14, 1998, at 49-53 (commenting on the importance of clustering) and Appendix B (describing the benefits and efficiencies of clustering) ("TCI Attribution Comments").

7/ A number of parties have commented that, to compete with telephone companies, DBS, and other video programmers, and to fulfill an expanded role as a provider of increased capacity and multiple services, cable operators need freedom to attract new sources of capital and to achieve new efficiencies of scale. TCI Attribution Comments at 41-42; Comments of Tele-Communications, Inc., CS Docket No. 98-82, filed August 14, 1998, at 49-52 ("TCI Ownership Comments"); Comments of Time Warner, Inc., CS Docket No. 98-82, MM Docket No. 92-264, filed August 14, 1998, at 45-47 ("Time Warner Comments").

Metro, which will marry in-depth local content with advanced features such as interactive and two-way capabilities.[8] For these reasons, clustering has been favorably received by the Commission in the past,[9] and was not an object of the Federal Trade Commission's concern when it reviewed the Cablevision/TCI transaction.[10]

Cablevision's recent transaction with TCI furthers its clustering strategy by enabling the company to enhance its presence in the New York metropolitan area without losing any control over the business and operational decisions of any of its cable systems. By generating cost savings and economies of scope over several aspects of the company's business and facilitating a more efficient rebuild of its New York metropolitan area cable networks, the transaction already has begun to generate significant consumer benefits.[11] Indeed, the transaction has substantially strengthened Cablevision's ability to compete with local telephone monopolies, increase channel capacity, and deploy high-speed, "always-on" Internet connections,[12] while continuing to meet growing competitive challenges in its core cable business.[13]

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[8] Cablevision Comments at 9-10.

[9] In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket 97-141, 13 FCC Rcd 1034, 1115 ¶ 140 (1998) ("1997 Video Competition Report"). See also "State of Competition in the Cable Television Industry: Hearing before the House Committee on the Judiciary," 105th Cong., September 24, 1997 (Testimony of Reed E. Hundt) (generally supporting cable clustering as a response to major competition from the telephone industry).

[10] Cablevision Comments at 17.

[11] Id. at 12-14.

[12] See id. at 9 (describing company's rebuilds and forays into local telephony and high-speed data access).

[13] See id. at 7 n.8 (noting video competition faced by Cablevision in its Boston, Connecticut, Ohio, New York area, and New Jersey markets).

Rather than confront the continuing utility of the Commission's cable attribution and horizontal ownership rules on the merits, some commenters mischaracterize the Cablevision/TCI transaction in order support the imposition of restrictive attribution rules and ownership limits on cable operators. RCN, for example, claims that Cablevision and TCI have "combined their cable resources" to reduce competition and enhance Cablevision's market "dominance."[14] It also contends that the shares TCI received in the transaction "clearly would give TCI an immensely important voice in the determination of Cablevision's business plans."[15] Similarly, Ameritech mischaracterizes the transaction as a "joint venture," and as an attempt by TCI to extend its subscriber reach.[16] RCN goes even further, however, and explicitly calls upon the Commission to "limit[] cable clusters" and tighten the existing horizontal ownership restrictions, even if (or perhaps because) such steps would require cable system divestitures and/or block recent strategic alliances forged by cable operators.[17]

In attacking the Cablevision/TCI transaction, RCN and others have ignored the facts. First, as detailed extensively in Cablevision's initial comments, the transaction with TCI was neither a merger nor a combination of the two companies, nor is it a joint venture.[18] In exchange for an equity stake in Cablevision, TCI transferred to Cablevision several cable systems in the New York/New Jersey region. The transaction was structured to ensure that the equity interest granted to TCI in exchange for the cable systems did not effectuate a transfer of control over

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[14] Comments of RCN Telecom Services, Inc., CS Docket No. 98-82, filed August 14, 1998, at 13 ("RCN Attribution Comments").

[15] Id.

[16] Ameritech Comments at 8.

[17] RCN Attribution Comments at 15-16; RCN Horizontal Comments at 19-20.

[18] Cablevision Comments at 14-17.

Cablevision to TCI. Indeed, there are specific structural safeguards already in place to ensure that TCI exerts no control over Cablevision operations.[19]

RCN's focus on TCI's equity stake in Cablevision ignores the fact that the transaction involving the New York/New Jersey systems converged to TCI only 8.9% of Cablevision's voting stock and restricted it from amassing further voting strength.[20] Similarly, RCN's claim that TCI will control Cablevision's operations is wholly incorrect, since it fails to account for the safeguards that prevent TCI from exercising control. These safeguards, as described in Cablevision's comments, include: (1) transferring to TCI only a limited 8.9% voting interest in Cablevision; (2) restricting TCI's ability to independently vote the limited voting interest which it holds; (3) maintaining Dolan family control of approximately 80% of the company's voting power; and (4) limiting TCI's ability to nominate board members -- so that the Dolans will always appoint a majority of the board.[21]

Second, RCN erroneously states that the transaction will impede competition.[22] In fact, the opposite is true.[23] The transaction actually stimulates new competition by enabling

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[19] Id. at 15-16.

[20] Id.

[21] Id.

[22] RCN Attribution Comments at 9.

[23] RCN attempts to distort the Federal Trade Commission's review of the TCI transaction by asserting that "the FTC concluded that the proposed acquisition would be anticompetitive without the parties' agreement to minor cable divestitures." Id. at 10. In fact, as Cablevision pointed out in its initial comments, in a transaction involving over 800,000 subscribers, the FTC required divestitures in just two communities composed of roughly 5,000 subscribers due to the existence of overlapping cable systems operated in those communities by TCI and Cablevision. Cablevision Comments at 17. Even RCN appears hesitant to persist in characterizing the FTC's action as amounting to a condemnation of the transaction as "anticompetitive," since it goes on to note later that "the Federal Trade Commission did not find that the TCI/Cablevision

Cablevision to enter the local telephony and Internet services markets in the New York area against Bell Atlantic/NYNEX/GTE. At the same time, Cablevision will continue to face mounting competition in its cable business from General Motors' DirecTV, RCN, and, in all probability, Bell Atlantic/NYNEX/GTE. Indeed, RCN states that it already provides services to 40,000 customers in the New York area, and has begun to deploy facilities in other boroughs.[24/] Other MVPDs, such as DBS and SMATV providers, already serve New York area residents, and the collective resources and economies of scale of Bell Atlantic/NYNEX/GTE will allow it to become a major competitor to Cablevision in the provision of networked service offerings as well.[25/]

Third, RCN's argument that cable system clustering, and its attendant economies of scale and scope, enhances the potential for anti-competitive conduct flies in the face of reason.[26/] Essentially, RCN urges the Commission to promulgate rules that promote inefficiency -- at least among RCN's competitors. The fact that a business strategy results in enhanced efficiency does not mean that it harms consumer welfare or creates an incentive or ability to engage in anti-competitive conduct. To the contrary, consumers have been the first to benefit from

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combination in New York posed a significant risk of an antitrust violation, apart from a minor overlap of cable systems in suburban New Jersey." RCN Attribution Comments at 14.

[24/] RCN Attribution Comments at 7.

[25/] Id. at 12. RCN observes that the FTC's review of the transaction did not take into account the market shares of DBS and other alternative multichannel providers. Id. at 10-11. The important point, however, is that, despite FTC's sole focus on the cable submarket of the larger MVPD market, it approved the transaction with only minor conditions. See supra n. 23.

[26/] RCN would have the Commission believe that clustering causes incumbent cable operators to intimidate new entrants -- without examining precisely why that is so. RCN Attribution Comments at 13.

Cablevision's clustering strategy through the availability of more programming channels, new video services with two-way capabilities, high-speed data offerings and local telephony.

The Commission should give no weight to RCN's disingenuous suggestion that its "modest" size somehow demonstrates that cable system clustering and increased economies of scale are unimportant for deploying new network technologies or entering new markets.[27/] RCN's resources are hardly "modest,"[28/] and it is clearly taking full advantage of the pre-existing network economies of scale and scope possessed by its electric utility partners, Boston Edison and Pepco.[29/] Through its own alliances, RCN itself benefits from expansive economies of scale

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[27/] Id. at 12.

[28/] RCN projects its capital budget for telecommunications activities in 1998 and 1999 at a hefty $850 million. See RCN Attribution Comments at 5. RCN's relationships with other providers in the telecommunications business provide it with added leverage. RCN is controlled by a wholly-owned subsidiary of Peter Kiewit Sons', Inc. See Peter Kiewit Sons', Inc. Form 10-K, filed March 31, 1998. See also Daniel Roth, "RCN's high-wire act," Forbes, December 29, 1997 (visited September 2, 1998) <http://www.forbes.com> (noting that RCN has a "powerful ally: Omaha, Nebraska-based Peter Kiewit Sons, the giant construction and investment outfit."). Moreover, RCN's chairman, David McCourt, owns WorldCom shares worth approximately $30 million and, until recently, held a seat on WorldCom's board of directors. See Price Colman, "RCN takes on the big guys," Broadcasting & Cable, March 9, 1998 at 58. In addition, Boston Edison, Pepco, and WorldCom "provide or are expected to provide RCN with extensive fiberoptic networks or other assets." RCN Corporation Form 10-K, filed March 31, 1998, at 4 ("RCN 10-K"). See also infra nn.29-30. And, RCN shares network construction costs with WorldCom. See RCN 10-K at 6-7. See also Joseph R. Perone, "House-to-house in telecom war," Newark Star Ledger, August 5, 1998, at 49. RCN has also acquired UltraNet Communications, Inc. and Erols Internet, Inc., two Internet service providers located in Boston and Washington, D.C. See RCN Press Release, January 21, 1998 (visited September 2, 1998) <http://www.rcn.com>.

[29/] Pepco is the country's largest utility, serving almost two million customers in the nation's capital. Ted Hearn, "RCN to invade D.C. with power ally," Multichannel News, August 11, 1997 at 10. Boston Edison provides electricity to more than half a million customers in Boston and thirty-nine surrounding towns. Boston Edison Form 10-K, filed March 30, 1998 ("Boston Edison 10-K"). In 1997, Pepco generated revenues of almost $2 billion and controlled assets of almost $7 billion. See Potomac Electric Power Company Form 10-K, filed March 27, 1998. Boston Edison and Pepco each have reportedly contributed three hundred million dollars to RCN to finance their separate ventures, promising to "flex some muscle" on behalf of RCN and

and scope.[30] Moreover, RCN's professed skepticism regarding the importance of system clusters also is undermined by the fact that, unlike Cablevision, it can structure its entry into video programming markets without necessarily assuming an obligation to serve all residences in a particular community.[31] Obviously, clustering is less important in instances where a provider has the freedom to serve only the most lucrative, and/or lowest per-unit cost, areas of a particular market.

Fourth, RCN's complaints regarding challenges to the legality of the manner in which it provides video programming services, as well as its objections to the responses to its competitive challenge initiated by Cablevision and others, are both unavailing and irrelevant to these proceedings. The record demonstrates that RCN has repeatedly skirted legal requirements that serve as prerequisites to its entry into the video programming marketplace. Over the past three

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leverage their substantial resources in its behalf. "Xpanding any which way it can," Jupiter Communications Newsletter, May 1, 1998. With the combined assets and ratepayer bases of these entrenched monopolies at their disposal,

[30] According to RCN's Chairman, besides "access to capital," relationships with local utilities offer "access to customers. Pepco and Boston Edison have 1.5 million customers between the two of them, which we have access to in a variety of ways. They offer us 550 miles of brand-new fiber. And they give us access to 20,000 route miles." Interview of David McCourt by Carl Weinshenk (visited September 2, 1998) <http://teledotcom.com/0398/features/tdc0398mccourt.html>.

[31] See Linda Haugsted, "OVS company may overbuild," Multichannel News, May 18, 1998 at 18 (quoting Gaithersburg, MD, economic development director Tony Tomasello as saying that "StarPower," RCN's joint venture with Pepco, "could 'cherry-pick' the most profitable areas," since it is "not required to build out the entire city"). See also "Stand and deliver," The Economist, April 18, 1998 at 65 (noting that RCN "is free to cherry-pick"). In fact, RCN has "pioneer[ed]" the strategy of targeting lucrative multiple-dwelling units ("MDUs") for its bundled service offerings. "Apartment Dwellers Will be First to Benefit," PR Newswire, February 6, 1998. And RCN itself has admitted that focusing on MDUs is the "backbone" of its strategy. Monica Hogan, "MDU market attracts notice as competition enters field," Multichannel News, December 15, 1997, at 6 (quoting Jim Maiella, RCN spokesperson). See also 1997 Video Competition Report, 13 FCC Rcd at 1110 ¶ 131 (citing RCN as a firm "primarily serving" MDUs).

years, RCN has been ordered to show cause why it was not providing unfranchised cable service in the Massachusetts marketplace;[32] unsuccessfully attempted to characterize itself as a video dialtone operator before the FCC;[33] and violated the FCC's rules regarding the distribution of information to prospective OVS video providers.[34] Likewise, RCN's complaint about rate discounts and marketing initiatives offered in markets where RCN offers video programming services ignores the fundamental fact that all such discounts and initiatives undertaken by Cablevision are fully permissible under the Commission's rules.

The specific policy suggestions advanced by RCN in its comments would harm both consumers and competition. RCN ignores the dramatic trend towards more competition in every affected market. RCN argues that the Commission should limit cable operators from offering service to no more than twenty percent of the total number of homes passed in the top fifty television markets, or to no more than ten percent of the homes passed in more than one of the top ten markets or three of the top twenty-five markets.[35] This hodge-podge of proposals has only one unifying element: restricting the ability of cable operators to compete, grow, and offer new services. While the Commission has already stressed that limits on horizontal concentration

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[32] See Order to Show Cause, Docket No. NA-4, Massachusetts Cable Television Commission, Feb. 20, 1996.

[33] See Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York, Election of Open Video System Option and Motion for Extension of Time to Complete Open Video System Transition and Metropolitan Fiber Systems/McCourt, Inc., Election of Open Video System Option and Motion for Extension of Time to Complete Open Video System Transition, Consolidated Order, 12 FCC Rcd 3536, 3555 ¶ 35 (1997); Order on Reconsideration, 12 FCC Rcd 6901 (1997).

[34] See Time Warner Cable v. RCN-BeCoCom, Open Video System Complaint, Memorandum Opinion and Order, DA 98-798 (Cable Services Bureau rel. April 28, 1998).

[35] RCN Attribution Comments at 16; RCN Horizontal Ownership Comments at 14.

must be balanced against the benefits that can result from clustering,[36] RCN is advocating one-sided proposals designed to undo most, if not all, of the recent strategic alliances in the cable industry that have promoted clustering and the provision of new services by cable operators.[37]

RCN's arguments are particularly misplaced in light of other changes taking place in telecommunications markets. Preventing Cablevision from pursuing strategic alliances and acquisitions that promote growth and system clusters will hamper severely its ability to compete with such massive rivals as Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET.[38] Indeed, limiting Cablevision in this manner while permitting the seemingly boundless growth of these rivals would stifle competition, not promote it.

Ameritech boldly argues in its comments that recent transactions in the cable industry, such as the Cablevision/TCI transaction in the New York metropolitan area, somehow place Ameritech "at a distinct, competitive disadvantage."[39] Having combined its already-formidable resources with SBC/Pacific/SNET to form a company with sizeable annual revenues, Ameritech's claim of competitive inequity strains credulity. Indeed, the Commission would create a competitive inequity if it continues to impose regulatory limits on a cable company's potential subscriber base even as no such similar restrictions are applicable to companies such as SBC/Pacific/Ameritech/SNET.

The comments submitted by RCN and Ameritech highlight the lack of any meaningful empirical evidence supporting retention of the current cable attribution rules and horizontal

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36/ Horizontal MO&O and NPRM at ¶ 41.

37/ See Cablevision Comments at 8 n. 10-11.

38/ Id. at 14, 20-21.

39/ Ameritech Comments at 8-9.

ownership limits. Reduced to its essence, these comments are simply a plea for the imposition of regulatory constraints on cable operators in order to hamper their ability to engage in strategies and transactions that yield growth, competition and new services. The real issue before the Commission, however, is whether the current rules are still justified in light of ongoing market developments. RCN and Ameritech would have the Commission downsize the competition in order to gain a narrow market advantage.[40] Their gain would be consumers' loss. Cablevision and other cable operators have undertaken strategies and forged alliances that are beginning to offer tremendous new benefits to consumers. The Commission should stay focused on the potential benefits that flow from more realistic attribution and ownership rules and reject proposals that would impede pro-competition strategies and transactions in the cable industry.

II. THE RECORD IN THIS PROCEEDING SUPPORTS RELAXATION OF THE CABLE ATTRIBUTION AND HORIZONTAL OWNERSHIP RULES IN ORDER TO PROMOTE CONSUMER CHOICE AND ENCOURAGE PRO-COMPETITIVE TRANSACTIONS

The record in this proceeding strongly supports revisions to the Commission's cable attribution and horizontal ownership rules. Several cable commenters have described recent transactions and alliances that have permitted them to deliver the benefits of clustering to their subscribers.[41] These benefits are both real and burgeoning, as evidenced by the growing number

[40] See RCN Horizontal Comments at 15 (arguing that the Commission should intervene in order to bring RCN's competition to a more "modest[]" level).

[41] See, e.g., Joint Comments of Adelphia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc., CS Docket No. 98-82, MM Docket No. 92-265, filed August 14, 1998, at 10-13, 15 ("Adelphia, et al. Comments"); Comments of Bresnan Communications Company, L.P. and TCA Cable TV, Inc., CS Docket No. 98-82, MM Docket No. 92-264, filed August 14, 1998, at 5-14, 22-26 ("Bresnan and TCA Comments"); Consolidated Comments of MediaOne Group, Inc., CS Docket No. 98-82, MM Docket No. 92-264, filed August 14, 1998, at 13-14 ("MediaOne Comments"); TCI Ownership comments at 44-56.

of cable operators that are upgrading their networks and delivering new services such as local telephony and Internet access.[42] At the same time, MediaOne and others also have highlighted the deep flaws inherent in the Commission's current cable attribution rules.[43] As these commenters demonstrate, the mechanistic, quantitative inquiry dictated by the Commission's current attribution rules – when combined with the ceiling imposed by the horizontal limits -- disserves both competition and consumers by hindering cable operator growth and discouraging beneficial transactions.

The Commission's current cable attribution regime should be reformed in at least two key respects. First, the present quantitative benchmarks for measuring an attributable interest should be relaxed. For example, the voting stock benchmark should be increased to at least ten percent.[44] Second, and more importantly, the Commission's cable attribution rules should move away from a purely quantitative assessment of the size of a particular investor's interest, and move toward a qualitative inquiry into whether the interest held by that investor conveys a

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[42] See, e.g., Adelphia, et al. Comments at 12 (Internet); Bresnan and TCA Comments at 7 (Internet), 8 (telephony), 11 (high-speed voice and data), 23-24 (telephony); MediaOne Comments at 17-19 (high-speed data and telecommunications services).

[43] See, e.g., MediaOne Comments at 3-5 (noting how current rules require double-counting subscribers), 12-15 (noting how artificial, mechanistic rules stifle the benefits envisioned by Congress and the FCC); Adelphia, et al. Comments at 7-20 (noting how mechanical rules stifle innovation); Bresnan and TCA Comments at 19 (noting how mechanical rules harm the public interest).

[44] Comments of Chase Capital Partners, CS Docket No. 98-82, filed August 14, 1998, at 2; Comments of MediaCom LLC, CS Docket No. 98-82, filed August 14, 1998, at 11; Comments of the National Cable Television Association, CS Docket No. 98-82, filed August 14, 1998, at 15 ("NCTA Attribution Comments").

meaningful opportunity to wield control over the company's business and operational decisions.[45]

The policy rationale for a qualitative inquiry into control is simple: the attribution rules that are applied in the context of the horizontal ownership limits are designed to preserve programming diversity.[46] The concern articulated by Congress in the 1992 Cable Act was that consolidation among vertically-integrated cable operators could reduce programming diversity and strengthen incentives among the consolidating entities to favor affiliated programming.[47] Accordingly, the focus of the Commission's rules should be on whether a particular interest obtained by an investor in a cable company provides that investor with the opportunity to control that company's programming choices. Thus, the TCI/Cablevision transaction should not be deemed to have conveyed an attributable interest to TCI, because the safeguards built into the transaction preclude TCI from exercising control over any of Cablevision's business and operational decisions, including its program carriage decisions.[48]

When the present attribution rules are assessed in light of the policy purposes they are designed to serve and the current competitive and regulatory landscape, the need for reform is clearly apparent. As several commenters have pointed out, the number of new independent cable

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[45] Adelphia, et al. Comments at 3 et seq. (managerial control test); Bresnan and TCA Comments at 21-22 ("pro-rata" attribution); NCTA Attribution Comments at 10 ("certification" test); Time Warner Comments at 30 et seq. ("managerial control" test).

[46] See In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competitors Act of 1992, Horizontal and Vertical Ownership Limits, MM Docket No. 92-264, Second Report and Order, 8 FCC Rcd 8565, 8581 ¶ 35 (1993) (referring to "management or programming decisions.") ("Horizontal Ownership Limits"); NCTA Attribution Comments at 5-9.

[47] Horizontal Ownership Limits at 8568 ¶ 6.

[48] See Cablevision Comments at 14-19, 21-22.

programming networks launched in recent years has substantially outpaced the number of new vertically-integrated programming services,[49] and several new unaffiliated national programming services are scheduled for launch in the near future.[50] At the same time, channel capacity on cable systems has increased substantially since passage of the 1992 Cable Act, thereby increasing the number of outlets available to cable programmers.[51] Moreover, competitors to cable now account for approximately 9.5 million of the nation's multichannel video programming subscribers.[52] The Commission itself has estimated that a new programming services be available to at least 15 to 20 million households in order to be viable.[53] Thus, competitors to cable, by themselves, can satisfy a substantial portion of the threshold subscriber level necessary to support a new programming service, rendering carriage by the top cable MSOs less important to viability than it may have been in the past. In addition, the Commission also has in place program carriage rules and limits on carriage of affiliated channels that also are designed to assist independent programmers and promote diversity.[54]

49/ See 1997 Video Competition Report, 13 FCC Rcd at 1124 ¶ 163; TCI Ownership Comments at 29.

50/ 1997 Video Competition Report at 1223-25 (Table F-4).

51/ Compare In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 94-48, 9 FCC Rcd 7442, 7567 (Table 3) (1994) (showing 38.4% of subscribers served by cable systems with over 54 channels) and 1997 Video Competition Report at 1176 (Table B-4) (showing 58.4% of subscribers served by cable systems with over 54 channels).

52/ 1997 Video Competition Report at 1121 ¶ 155.

53/ Id.

54/ See, 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c) (regulation of carriage agreements). See also 47 C.F.R. §§ 76.504(a),(b) (channel occupancy rules). Cf. NCTA Attribution Comments at 7.

Not only has the competitive and regulatory landscape changed substantially since adoption of the Commission's cable attribution and horizontal ownership regime, but the recent cable industry transactions cited by some commenters as evidencing the need for continuing that regime actually have helped to promote the policies underlying those rules. For example, Ameritech repeatedly refers to the "monopsony" power of the top cable MSOs as justifying the need for retention of the current attribution rules. The Cablevision/TCI transaction does not implicate program diversity and program carriage concerns, however, because Cablevision continues to fully control decisions regarding the selection of programming on its systems. Moreover, to the extent that the transaction fosters faster and broader systems rebuilds on the part of both companies, it actually will promote programming diversity by increasing the number of outlets available to programmers.

Even if Ameritech could demonstrate the presence of such monopsony power – which it has not -- the fact is that Cablevision's transaction with TCI reduces the potential for such power by transferring 800,000 subscribers to Cablevision. Since TCI's transaction with Cablevision and other cable operators do not provide it with control over the companies acquiring its systems, the transactions actually diminish "monopsony" power by dispersing control over program carriage decisions to a broader number of companies.

Cablevision disagrees with the comments of Consumer's Union ("CU"), RCN, and others urging the Commission to adopt lower horizontal ownership limits and retain strict attribution rules.[55] These rules must be revised to ensure a regulatory landscape that allows cable companies to more effectively compete against the entrenched telephone monopolies. Even CU

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[55] Comments of Consumers Union, et al., Horizontal Ownership Limits, MM Docket No. 92-264 ("CU Ownership Comments") at 3-6.

concedes that the recent wave of cable industry transactions has "allowed the cable industry to benefit from economies of scale."[56] But, in declaring that the benefits have not reached the public, CU has ignored plain evidence to the contrary. The public has already benefited from the enhanced channel capacity, advanced network infrastructure, new two-way programming services, high-speed cable modem service, and competitive local telephony offerings being offered by Cablevision in the New York area and Connecticut. These benefits will spread to other markets so long as the Commission's regulatory landscape encourages the transactions and strategies that makes their delivery possible. By contrast, adoption of the approached urged by CU and others will preclude cable companies from achieving the size and scale necessary to viably compete against Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET in telephony, high-speed data, and other markets.

Likewise, there is no merit to the suggestion by Ameritech and DirecTV that the current attribution and horizontal ownership limits are necessary to ensure the availability of cable programming to competing MVPDs.[57] Neither Ameritech nor DirecTV are able to offer any tangible evidence that its ability to compete has been hampered by lack of access to cable programming;[58] indeed, the fact is that cable's competitors have access to all of the popular cable

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[56] Id. at 4.

[57] See Ameritech Comments at 20-24, 28-29; DirecTV Comments at 3-10.

[58] While Ameritech cites instances in which unaffiliated cable programmers opt to take advantage of the market flexibility granted to them by virtue of their exemption from the program access rules, see Ameritech Comments at 15, these examples do not in any way evidence anti-competitive conduct on the part of those programmers or any MSOs. It is far more likely that such instances simply evidence the basic economic precept that a profit-maximizing vendor with full marketplace flexibility to sell to any distributor which it chooses, may opt to limit its number of product distributors in order to optimize its mode of distribution and maximize the promotion and marketing of its service. Indeed, such decisions are commonplace in virtually every other business that is not subject to the mandatory access and price regulation

programming services necessary to offer subscribers a viable competitive alternative to the incumbent cable operator.[59] Ameritech's argument that large MSOs enjoy sinister price advantages compared to competitors with vastly smaller subscriber bases[60] ignores the impact that a particular distributor's subscriber levels have on a programmer's overall marketing costs, advertising revenues and promotional activities. Nor is there any merit to Ameritech's suggestion that clustering helps vertically integrated programmers "avoid" the program access rules by facilitating terrestrial delivery of programming.[61] The Commission itself has

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requirements of the cable industry's program access rules. See, e.g., Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358 (3d Cir. 1996) (upholding film distributor's exclusive license for first-run films); Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1226 (10th Cir. 1986) ("Sound economic theory supports the cases that have allowed suppliers wide latitude in selecting their distributors.").

[59] See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 11 FCC Rcd 2060, 2136 ¶ 160 (1995) ("The Commission's enforcement of the program access provisions appears to be meeting one of the goals of the 1992 Cable Act - ensuring access by competing MVPDs to satellite cable programming from vertically integrated programming services."). See also 1997 Video Competition Report, 13 FCC Rcd at 1071 ¶ 56 (citing "the large number of channels and programming variety, especially sports and movies "available on DBS) (emphasis supplied), 1088 ¶ 86 (citing "expanded channel offerings, multiplexed premium and numerous pay-per-view channels, special sports and special events packages "available on SMATV), 1134 ¶ 191 (citing Ameritech's "80 channels on ... basic" plus channels such as the History Channel, ESPN2, PASS, the Golf Channel and the Disney Channel as well as several premium channels). See also RCN 10-K at 6 (trumpeting RCN's "diverse line-up of high quality basic, premium and pay-per-view video programming... [with] 61 to 110 channels [including] all major cable and broadcast networks.") (emphasis supplied).

[60] See Ameritech Comments, Attachment 2 (James N. Dertouzos and Steven S. Wildman, "Programming Access and Effective Competition in Cable Television"). Ameritech further argues that any form of program exclusivity (even that which is permitted under the program access rules) is per se anticompetitive, citing Dertouzos and Wildman's conclusion that incumbent MSOs are more likely to pay for exclusivity than their competitors are. Ameritech Comments at 14-15. But it fails entirely to explain why the practice is harmful. Indeed, to the extent that exclusivity arrangements fosters the launch, and wider distribution, of new programming services that would not otherwise be deployed, exclusivity benefits consumers by enhancing diversity and choice.

[61] Ameritech Comments at 27 n.66.

determined that the evidence established to date "fails to indicate a significant competitive problem" with respect to terrestrial delivery of programming.[62]

Any decision by the Commission to relax its cable attribution rules, particularly in the context of the horizontal ownership limits, would not effect the program access rules.[63] Notably, while both Ameritech and DirecTV claim that any relaxation in the cable attribution standard will generate greater circumvention of the program access rules,[64] neither can cite a single instance in which more flexible attribution rules would have made a difference. A satellite cable programming service either is or is not subject to the program access rules: a vertically-integrated satellite cable network does not somehow become less susceptible to challenge under the program access rules simply because it is affiliated with only one cable operator, rather than with two or three.[65] The viability of the Commission's program access rules does not in any way depend upon the preservation of the current cable attribution rules and horizontal ownership limits.

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[62] Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order, CS Docket No. 97-248, RM No. 9097, FCC 98-189 (rel. August 10, 1998) at ¶ 71.

[63] The attribution standard for program access cases is even more restrictive than the attribution standard utilized for the horizontal ownership rules. To the extent that the Commission opts to develop attribution rules that entail a qualitative analysis of an investor's ability to control an entity's operational and business decisions, there is no reason why such a revised standard could not be applied in the program access context without contravening the purposes of Section 628 of the 1992 Cable Act. Even if the Commission retains the current attribution restrictive attribution regime for the purposes of program access, that decision does not in any way preclude it from effectuating the necessary reforms to the attribution rules for purposes of system ownership.

[64] Ameritech Comments at 28; DirecTV Comments at 7-10.

[65] Cf. 47 C.F.R. § 76.1003(c)(ix) (permitting program access complainant to challenge price differential between rate charged complainant and rate charged "a competing multichannel video programming distributor").

Finally, both RCN and DirecTV attempt to make an issue out of Cablevision's ownership interests in Madison Square Garden, the New York Knicks and Rangers, Radio City Productions and the MSG Network and other regional sports programming services.[66/] Beyond some inchoate concern with vertical integration, it is difficult to gauge the policy concerns relevant to the instant proceedings which RCN and DirecTV seek to raise through the recitation of these ownership interests. Cablevision's interests in Madison Square Garden, the Knicks and the Rangers, and Radio City have no bearing on any of the issues at stake in these proceedings. As set forth in its initial comments, Cablevision's interest in Regional Programming Partners, a sports programming alliance between Rainbow Media and Fox/Liberty Networks, was forged through a transaction separate from the Cablevision/TCI transaction involving the New York/New Jersey cable systems.[67/] The sports programming partnership between Fox/Liberty and Rainbow actually enhances competition in the sports programming market, since it strengthens the prospects for a viable rival to ESPN.[68/] In addition, DirecTV's efforts to cast aspersions on this alliance is particularly disingenuous given the fact that it both utilizes exclusivity for sports programming and promotes its service by emphasizing the breadth of its sports program offerings.[69/]

The Commission should not allow unfounded concerns raised by cable's competitors divert it from the focus of the instant proceedings: whether current market and regulatory

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66/ RCN Attribution Comments at 10; DirecTV Comments at 9.

67/ See Cablevision Comments at 21-22.

68/ See e.g. "National net keys regional deal," Broadcasting & Cable, June 30, 1997 at 68.

69/ See DirecTV Web Site (visited September 3, 1998) <http://www.directv.com/sports/index.html> (trumpeting DirecTV's sports offerings). See also Testimony of Ed Hartenstein conditions warrant relaxation of its cable attribution rules and horizontal ownership limits in order to preserve and promote strategies and transactions that are providing consumers with more choice, more competition and new services.[70] A "qualitative" control test, as suggested by Cablevision and others, would preserve the Commission's ability to safeguard competition while allowing new investments and strategies designed to enhance offerings in the market. Likewise, relaxed horizontal ownership limits will allow cable operators to vigorously pursue opportunities for growth that can position them to compete more effectively with large ILECs such as Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET. Strict mechanical rules are inappropriate in the current market environment, particularly where the pro-competitive effects of transactions implicating the attribution rules and ownership limits significantly outweigh any competitive concerns.

In the antitrust context, courts have limited application of "per se" rules to arrangements whose anticompetitive consequences are clear over time.[71] Likewise, the Commission should abandon mechanical attribution tests that are unnecessary to protect competition and will in fact stifle a host of new and emerging relationships with tremendous potential to benefit consumers.

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before the United States Senate Subcommittee on Antitrust, Business Rights and Competition, 105th Cong. (October 8, 1997) at 2.

[70] Cablevision agrees with those commenters who state that if the Commission adopts more restrictive attribution rules or re-imposes ownership limits that have the effect of restricting investment opportunities, any existing investments or transactions that are in place or have been announced prior to the adoption of such revised rules should be grandfathered. See NCTA Attribution Comments at 17-18; Adelphia Comments at 31-32.

[71] See State Oil Co. v. Khan, 118 S.Ct. 275 (1997) (concluding that "per se" treatment is only appropriate once experience conclusively demonstrates a practice will repeatedly be condemned under more searching analysis).

CONCLUSION

For the foregoing reasons, the Commission should revise its cable attribution rules in accordance with the analysis and proposals previously set forth by Cablevision. Specifically, the Commission should increase the voting stock benchmark in its cable attribution rules, create a passive investor exception, and revise its rules to ensure that pro-competitive transactions, such as the Cablevision/TCI deal, which are structured to preclude control by the investing entity, do not trigger application of the cable attribution rules.

Respectfully submitted,

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