ORIGINAL

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

RECEIVED
SEP - 3 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Review of the Commission's Cable Attribution Rules	)	
	)	
Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal Ownership Limits	)	

REPLY COMMENTS

THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN, LLP
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 783-4141

Its Attorneys

September 3, 1998

No. of Copies rec'd 0+8
List ABCDE

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

I. THE COMMISSION MUST CONSIDER THE ANTICOMPETITIVE EFFECTS OF HORIZONTAL OWNERSHIP ON PROGRAM ACCESS WHEN EVALUATING ANY PROPOSAL TO LIBERALIZE THE HORIZONTAL OWNERSHIP ATTRIBUTION RULES 1

II. THE RECORD IN THIS PROCEEDING REFLECTS THAT THE COMMISSION SHOULD RELAX THE OWNERSHIP ATTRIBUTION RULES THAT APPLY TO CABLE-MDS CROSS-OWNERSHIP 10

III. AT&T'S PROPOSED ACQUISITION OF TCI FURTHER DEMONSTRATES WHY THE COMMISSION MUST AMEND SECTION 76.1000(b) AS PROPOSED BY WCA 12

IV. THE COMMISSION MUST NOT RELAX THE STRICT OWNERSHIP ATTRIBUTION STANDARDS THAT APPLY TO PROGRAM ACCESS ... 14

V. CONCLUSION 16

EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") has asked the Commission to clarify the ownership attribution standards in Section 76.1000(b) to eliminate any doubt that *all* vertically-integrated satellite-delivered cable networks are covered by the Commission's program access rules. By contrast, the cable MSOs and AT&T have directed their comments almost entirely toward the Commission's horizontal ownership cap and the ownership attribution standards applicable thereto. Though the cable/AT&T comments differ from each other in their details, by and large they share the same fundamental theme: local competition in telephony and advanced telecommunications services cannot develop unless cable MSOs are permitted to form larger system "clusters" in local markets, and such "clustering" cannot occur unless the Commission liberalizes the horizontal ownership attribution standards.

WCA is an ardent supporter of competition in local markets, and thus is not unconditionally opposed to "clustering" of cable systems insofar it promotes consumer choice for local loop services. That, however, is not the only public interest consideration at issue here. *The Commission itself has acknowledged that cable's stranglehold over distribution of programming in local markets is the source of the program access problem.* It is beyond dispute (indeed, even acknowledged by some of the cable MSOs themselves) that the larger cable operators use their control over local distribution to pressure independent programmers into signing exclusive contracts that deny programming to cable's competitors. Were the Commission to amend the horizontal ownership rules to permit more extensive clustering of cable systems, it would only strengthen the hand of the cable MSOs at the expense of alternative multichannel video programming distributors who need full and fair access to programming to survive. Accordingly, the Commission's public interest analysis of the horizontal ownership issue must weigh the alleged pro-competitive benefits of system clustering against the already substantial and well-documented *anti*-competitive effects of horizontal concentration on program access.

Further, the comments filed in this proceeding by Chase Capital Partners and Mediacom LLC reaffirm that less restrictive ownership attribution standards are both appropriate and necessary in the cable-MDS cross-ownership context. However, WCA submits that the purpose of relaxing those standards could be defeated by counting non-cable subscribers toward the horizontal ownership cap, and thus the Commission must take care to avoid that result.

WCA also notes that the comments of AT&T, when read in conjunction with recent trade press reports, demonstrate why it is imperative that the Commission amend Section 76.1000(b) to confirm that the program access rule's definition of "attributable interest" applies to ownership interests in cable operators, and confirm that AT&T's proposed common ownership of TCI's cable systems and the Liberty cable networks renders the latter "vertically integrated" and therefore subject to program access obligations. AT&T states that it intends to hold TCI's

cable systems and the Liberty cable networks in separate subsidiaries. Since, however, Section 76.1000(b)'s current definition of "attributable interest" would not explicitly apply to AT&T's ownership of its cable subsidiary, the rule could be stretched by the AT&T/TCI/Liberty combine to argue that AT&T's 100% ownership interest in the TCI cable systems is not attributable and that Liberty therefore is subject to the program access rules. Though WCA believes that this interpretation of the rule would be incorrect, the mere possibility of this scenario reflects that the flaws in the drafting of the program access rule's attribution standard has far-reaching and potentially calamitous consequences for cable's competitors. Accordingly, the Commission should address the problem immediately by amending Section 76.1000(b) as proposed by WCA.

Finally, to WCA's knowledge none of the commenting parties in these proceedings have explicitly suggested that the Commission should liberalize the strict ownership attribution standards that apply to the Commission's program access rules, and indeed there is no reason for the Commission to do so. Both the legislative history of the 1992 Cable Act and the Commission's own decisions reflect that "influence," as opposed to "control," is the foundation of the ownership attribution standards for program access, and the Commission is well aware that the cable MSOs exert substantial influence over even those programmers in which they do *not* hold a stock or partnership interest. Given that cable MSO influence invariably is used as a means of pressuring programmers not to sell to cable's competitors, it would be inimical to competition and therefore the public interest for the Commission to *narrow* the reach of the program access rules and thereby empower cable operators to *expand* their already pervasive influence over cable programmers.

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	)	CS Docket No. 98-82
	)	
Review of the Commission's Cable Attribution Rules	)	
	)	
Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal Ownership Limits	)	

REPLY COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply comments with respect to the above-captioned proceedings.

I. THE COMMISSION MUST CONSIDER THE ANTICOMPETITIVE EFFECTS OF HORIZONTAL OWNERSHIP ON PROGRAM ACCESS WHEN EVALUATING ANY PROPOSAL TO LIBERALIZE THE HORIZONTAL OWNERSHIP ATTRIBUTION RULES

The comments of the cable MSOs leave little doubt as to their primary agenda in these proceedings. Almost unanimously, the cable MSOs support a dramatic relaxation of the Commission's horizontal ownership attribution standards and/or an increase in the Commission's horizontal ownership "cap." Indeed, some of the cable MSOs even go so far as

to recommend that the Commission adopt a "managerial control" test that would place otherwise attributable minority ownership interests outside the scope of the Commission's horizontal ownership restrictions.[1] In the same vein, others recommend that the Commission eschew attribution of any minority interest in a cable system where the owner of the interest self-certifies that the system is not covered by the owner's carriage negotiations or agreements, or that the owner of the interest otherwise cannot dictate the system's programming choices.[2]

There is no dispute that the cable proposals, if adopted, would afford cable MSOs (and eventually AT&T) greater opportunities to create regional system "clusters," which in turn would expand their already extensive control over distribution of multichannel video programming in local markets.[3] The cable MSOs nonetheless argue that expanded system

---

[1] *See, e.g.*, Comments of Cablevision Systems Corporation, CS Docket No. 98-82 and MM Docket No. 92-264, at 5-6 (filed Aug. 14, 1998) [the "Cablevision Comments"]; Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 19-24 (filed Aug. 14, 1998) [the "TCI Comments"]; Comments of Adelphia Communications Corporation, *et al.*, CS Docket No. 98-82 and MM Docket No. 92-264, at 4-7 (filed Aug. 14, 1998) [the "Adelphia Comments"]; Comments of Time Warner Inc., CS Docket No. 98-82 and MM Docket No. 92-264, at 32-38 (filed August 14, 1998) [the "Time Warner Comments"].

[2] *See, e.g.*, Comments of MediaOne Group, Inc., CS Docket No. 98-82 and MM Docket No. 92-264, at 24-26 (filed August 14, 1998) [the "MediaOne Comments"]; Comments of the National Cable Television Association CS Docket 98-82, at 10-11 (filed Aug. 14, 1998).

[3] *See, e.g.*, Cablevision Comments at 19-21; Adelphia Comments at 10-12; TCI Comments at 41-49. As noted in the Commission's most recent report to Congress on the status of competition in the multichannel video marketplace, nearly 53% of all cable subscribers already are served by "clusters" of commonly owned, contiguous cable systems. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Red 1034, ¶ 143 (rel. Jan. 13, 1998) [the "*Fourth Annual Report*"]. Between 1995 and 1996, the number of clusters with 300,000 to 399,000 subscribers increased by 38%, and the number of clusters with at least 500,000 subscribers increased by 20%. *Id.* at ¶144. The four largest cable MSOs (TCI, Time Warner, MediaOne and Comcast) controlled 84 of the 139 system clusters serving at least 100,000 subscribers at the end of 1996. *Id.* at ¶ 143. Moreover, these figures do not even

clustering serves the public interest by enabling cable operators to achieve economies of scale and offer telecommunications services in direct competition with incumbent local exchange carriers.[4] Not surprisingly, however, the cable MSOs devote little attention to how liberalization of the horizontal ownership attribution standards will adversely affect the ability of alternative MVPDs to obtain programming from independent sources (*i.e.*, those not affiliated with a cable operator) that are exempt from the program access provisions of the 1992 Cable Act. Instead, they contend that the anticompetitive effects of horizontal concentration should be measured solely in terms of whether the number of independent programmers has increased since passage of the 1992 Cable Act, and that by this measure horizontal concentration in local markets has had no material adverse effect on competition.[5]

As a general matter, WCA recognizes that consumers will benefit from vigorous competition in the provision of local loop services, and thus WCA does not unconditionally oppose modifications of the Commission's rules that facilitate competitive entry by new providers of local telecommunications services. The cable MSOs are plainly wrong, however, in suggesting that the Commission need only consider the number of independent programmers

---

include the substantial number of MSO consolidations and joint ventures initiated during 1997. *See, e.g.*, TCI Comments at 41-50.

[4] *See, e.g.*, Comments of AT&T Corp., MM Docket No. 92-264, at 3-4; Time Warner Comments at 45-46; TCI Comments at 41 n.99; Cablevision Comments at 12-14; Comments of Bresnan Communications Company, L.P. and TCA Cable TV, Inc., CS Docket No. 98-82 and MM Docket No. 92-264, at 5-7 (filed August 14, 1998) [the "Bresnan/TCA Comments].

[5] *See, e.g.*, MediaOne Comments at 5-10; Time Warner Comments at 13-17; TCI Comments at 15-17.

in the marketplace when evaluating the anticompetitive effects of horizontal concentration. Whatever the putative benefits of system clustering may be, the fact remains that cable's control over local distribution of multichannel video programming has had a substantial and irreparable chilling effect on the willingness of independent programmers to sell their product to cable's competitors. Indeed, the Commission itself has acknowledged to Congress that "[the program access] analysis should focus on the source of any market power involved *(the absence of competition at the local distribution level)* rather than on vertical integration itself."[6] As demonstrated below, there is ample marketplace evidence which suggests that the Commission's concerns about this problem continue to be more than justified, and that the program access factor must be given significant weight in any evaluation of whether the Commission should

---

[6] Letter from William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 3 (Jan. 23, 1998) [emphasis added]. *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, at ¶ 128 (1997) ["In all but a few local markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators."]; *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996) [noting that concentration of ownership among cable operators is significant in the program access context because it demonstrates an increase in the buying power of the major MSOs, and because it facilitates the ability of MSOs to coordinate their conduct]; Comments of DirecTV, Inc., CS Docket No. 98-82, at 9-10 (filed Aug. 14, 1998) ["Concentration of ownership and consolidation of cable systems into regional clusters only strengthen the cable industry's industry's influence over program suppliers. In the perceptions of program suppliers, no alternative MVPD has yet achieved a distribution level that promises a substitute distribution channel for cable. For these reasons, programmers remain principally dependent on cable MSOs and may be easily influenced to restrict the supply of programming to non-cable MVPDs."].

liberalize the horizontal ownership attribution standards and/or raise the horizontal ownership cap at this time.

The saga of Fox's recent attempt to invest in the cable-controlled Primestar DBS service is perhaps the most telling example of how heavily the large cable MSOs influence the behavior of supposedly independent programmers, to the decided disadvantage of cable's competitors. Initially, Fox attempted to enter the domestic DBS business by partnering with EchoStar, an entity that is completely independent of the cable industry and whose high-power DBS service competes directly both with cable and Primestar. In subsequent testimony before Congress, Fox chairman Rupert Murdoch touted the pro-consumer benefits of increased competition to cable from the Fox/EchoStar joint venture and, in that same pro-competitive spirit, assured Congress that "*we will sell our programming to any customers.*"[7]

Unfortunately, Mr. Murdoch lost his enthusiasm for his joint venture with EchoStar after cable operators responded by refusing to discuss carriage of Fox's various cable networks:

> Murdoch was initially enthusiastic about the News Corp./EchoStar merger, but his ardor cooled once cable operators began refusing to talk to Fox programming people.[8]

Indeed, the cable industry's position was put rather succinctly by Jeff Marcus, chairman of Marcus Cable (at that time the nation's ninth-largest MSO):

---

[7] Hearing of the Senate Commerce, Science and Transportation Committee (April 10, 1997) [tesimony of Rupert Murdoch].

[8] Colman, "Murdoch Goes From Big to Bit DBS Player," *Broadcasting & Cable*, at 50 (June 16, 1997).

> If someone is threatening to burn your house down, you don't invite them in for lunch first. We are not going to give them money so they can build a competing satellite business.[9]

Unwilling to put the financial viability of Fox's cable networks at risk, Mr. Murdoch ultimately took the path of least resistance, left EchoStar at the altar and switched his DBS affections to the cable-controlled Primestar:

> Time Warner, Inc. and [Fox] appear to have entered a symbiotic truce following [Fox's] new proposed affiliation with cable TV industry-owned Primestar Partners L.P. [Fox] originally proposed a merger with EchoStar Communications Corp. to compete with cable TV operators. But according to industry sources, [Fox] received not-so-subtle signals from cable TV operators that its cable TV programming would have trouble finding carriage on their systems if the EchoStar deal went through.[10]

The above reflects the simple fact that neither Fox's nor any other independent programmer's cable networks can succeed without access to a critical mass of subscribers, and that all independent programmers will be even more beholden to the larger MSOs as TCI and

---

[9] Hofmeister, "Murdoch Outfoxing Himself With New Satellite Venture?" *Los Angeles Times*, Part D at 1 (March 12, 1997) [reporting that after the announcement of the Fox/EchoStar transaction, Marcus Cable "slammed the door shut, refusing to meet with FX or News Corp.'s fledgling Fox News Channel."].

[10] "Time Warner, News Corp. Enter Necessary Truce," *The Cable-Telco Report*, at 8 (Aug. 11, 1997). *See also* Colman, "Murdoch Goes From Big to Bit DBS Player," *Broadcasting & Cable*, at 50 (June 16, 1997) ["[A] deal with Primestar represents detente between Murdoch and cable operators - an essential outlet for [Fox] programming."]; "News Corp. to Join Primestar; Time Warner With EchoStar?" *Media World* (May 27, 1997). It has also been reported that Mr. Murdoch's abandonment of the Fox/EchoStar joint venture was a prerequisite for TCI's blessing of Fox's $2 billion acquisition of The Family Channel. Ross, "Murdoch, Malone Weigh $1 Bil Deal: News Corp. Would Acquire Sports Assets From TCI's Liberty Media," *Advertising Age* (March 24, 1997) ["Initially, [TCI] was said to be so upset about the EchoStar deal that [it] wanted to kill a pact under discussion that would see [Fox] making a major investment in International Family Entertainment."].

others tighten their control over distribution on a national and regional scale. As noted with respect to Time Warner's acquisition of Turner Broadcasting:

> The launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40%-60% of subscribers . . . TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 26.7% and 17%, respectively. Carriage on one or both systems is critical for new programming to achieve competitive viability.[11]

Furthermore, it is well known that the large MSOs will not hesitate to use their stranglehold over local distribution as a means of forcing independent programmers into exclusive contracts:

> Operators warn that if existing programmers don't play ball on exclusivity, a new and similar network probably will. "There's more than one news service and more than one sports service now and more competition is inevitable," says an executive at one of the U.S.'s five largest MSOs. "We have choices and if one service doesn't want to work with us, we have other places we can go."[12]

Fox News Channel ("FNC") is an excellent example of this phenomenon. It is well known that FNC owes its very existence to TCI, whose agreement to carry the channel on

---

[11] Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, *In the Matter of Time Warner Inc.*, FTC File No. 961-0004, at 7-8 (Sept. 12, 1996). Here it should be noted that the principal beneficiary of any liberalization of the Commission's horizontal ownership rules would be TCI, which is seeking nonattribution of numerous minority ownership interests it holds in joint ventures with other cable MSOs throughout the United States. *See* TCI Comments at 41-50; Cablevision Comments at 12-19; Adelphia Comments at 9-17; Bresnan/TCA Comments at 2-4.

[12] "Raising the Exclusivity Ante," *Cable World*, at 1, 103 (July 15, 1996).

systems serving 90% of TCI's subscribers was critical to the successful launch of the network.[13] Not coincidentally, Fox has refused to sell FNC to alternative multichannel video programming distributors ("MVPDs").[14] The launch and subsequent cable-exclusive growth of FNC is a case study in how the large MSOs control the destiny of "independent" programmers, and demonstrates why Fox and others are unwilling to alienate the large MSOs by selling to cable's competitors.[15]

Finally, if some of the cable MSOs' earlier representations before the Commission are to be believed, the larger cable operators are even able to pressure *vertically-integrated* cable networks into cable-exclusive carriage arrangements. In a recent unsuccessful Petition for Exclusivity filed by the MSO-controlled Outdoor Life and Speedvision cable networks (the "Networks"), it was acknowledged that:

---

[13] "TCI Strikes Unique Deal With Fox News," *Media Daily* (June 24, 1996); *see also Communications Daily*, at 7 (June 25, 1996).

[14] "ESPNEWS, Fox Sports Kicking Off Nov. 1," *Media Daily* (Oct. 28, 1996). Fox also has refused to sell the FX cable network to alternative MVPDs. *See Echostar Communications Corporation v. Fox/Liberty Networks, L.L.C.*, DA 98-730 (rel. April 17, 1998). Other cable-exclusive services currently include Game Show Network, Eye on People, Home & Garden Television, and TV Land. Kennard Letter, Responses to Questions at 1.

[15] *See also Ameritech New Media, Inc. v. MediaOne Inc. and Time Warner Cable*, CSR-5273-P, at 5-7 (filed July 1, 1998).

> The Networks' inability to gain sufficient subscriber penetration is due primarily to their inability to obtain carriage on the nation's cable systems, a condition that has caused many other networks either to delay launch, or once launched, to fail. Cable systems are still the primary distributor of multichannel video programming and, thus, carriage by the nation's cable systems is central to the Networks' ability to increase subscriber penetration to adequate levels.[16]

In sum, the recent experience of Fox (perhaps the most powerful independent programmer in the marketplace today) and other cable programmers (vertically-integrated or otherwise) reaffirms that cable's *existing* control over distribution in local markets is having a demonstrable and substantial chilling effect on program access, and that this problem will only become worse to the extent that the cable MSOs are permitted to expand that control via liberalized horizontal ownership rules.[17] Clearly, the purported growth of supposedly independent programmers in the wake of the 1992 Cable Act is of little benefit to consumers

---

[16] Petition for Exclusivity re: Outdoor Life Network and Speedvision Network, CSR 5044-P, at 14 (July 15, 1998). Outdoor Life and Speedvision are owned in part by cable MSOs MediaOne, Comcast, and Cox Communications. *See Fourth Annual Report*, Appendix F at 3.

[17] *See* Comments of Ameritech New Media, Inc., CS Docket No. 98-82 and MM Docket No. 92-264, at 12-17 (filed Aug. 14, 1998). By contrast, as discussed at Section II *infra*, no such issues are raised by WCA's request that the Commission liberalize the ownership attribution standards applicable to the cable-MDS and cable-ITFS cross ownership and cross-leasing rules. As noted in WCA's initial comments, those rules may be liberalized to spur additional investment in the wireless cable industry without materially increasing the risk of spectrum warehousing or otherwise having any cognizable adverse effect on competition between MVPDs in local markets. *See* Comments of The Wireless Communications Association International, Inc., CS Docket No. 98-82, at 19-22 (filed Aug. 14, 1998) [the "WCA Comments"]; Comments of Chase Capital Partners, CS Docket No. 98-82, at 3-8 (filed Aug. 14, 1998) [supporting relaxation of cable-MDS ownership attribution standards to give institutional investors greater latitude to hold simultaneous investments in the wired and wireless cable industries] [the "Chase Comments"].

where cable MSOs effectively can dictate whether those same programmers sell their product to cable's competitors. Moreover, given the high priority that the Commission has accorded to program access over the past year, it certainly would be anomalous for the Commission to now abandon that agenda solely to give the cable MSOs easier entry into the local telephone business. WCA thus urges the Commission to remember that competition among MVPDs, and not just the growth of independent programmers, must be the touchstone of any analysis of the horizontal ownership problem, and that the very real and damaging effects of horizontal concentration on program access must be considered thoroughly when evaluating any relaxation of the Commission's horizontal ownership attribution rules and/or the horizontal ownership cap.

II. THE RECORD IN THIS PROCEEDING REFLECTS THAT THE COMMISSION SHOULD RELAX THE OWNERSHIP ATTRIBUTION RULES THAT APPLY TO CABLE-MDS CROSS-OWNERSHIP

As noted in WCA's initial comments, the Commission's strict ownership attribution rules for cable-MDS cross-ownership chills potential investment in the wireless cable industry by institutional investors or venture capital firms who have already invested in or would like to invest in the cable industry.[18/] Further proof of the problem is set forth in the comments of Chase Capital Partners ("Chase") and Mediacom LLC ("Mediacom"), which describe the difficulties Chase has encountered in attempting to maintain relatively small, non-controlling interests in cable MSO Mediacom and wireless cable operator Wireless One, Inc. As noted therein, in order

---

[18/] WCA Comments at 19-22. Under the rule's current ownership attribution benchmarks, a prohibited cross-ownership is created by as little as a 5% or greater voting or non-voting stock interest in a wireless cable operator. 47 C.F.R. § 21.912, Note 1.

for Chase to provide capital to Mediacom (representing less than 10 percent of the company's total equity), Mediacom was required to obtain a twelve-month forbearance of the Commission's cable/MDS cross-ownership rule.[19] Chase points out that unless the current cable-MDS ownership attribution standards are relaxed, Chase or Mediacom will be forced to either restructure Chase's investment or divest certain of Mediacom's cable systems to come into compliance with the rule.[20] The Chase comments thus reaffirm what has been clear for some time, *i.e.*, that the current cable-MDS cross-ownership attribution standards are having a material and immediate adverse impact on the ability of wireless cable operators to raise capital, and that WCA's proposed relaxation of those standards would not increase the risk that incumbent cable operators will obtain control over wireless cable channels in their own markets.[21]

WCA submits, however, that if the Commission intends to count a cable MSO's non-cable subscribers toward the horizontal ownership cap,[22] the Commission must take care not to construct rules that might result in attribution of subscribers that are nonattributable under the

---

[19] Chase Comments at 4; *See also* Comments of Mediacom LLC, CS Docket No. 98-82, at 1-2 (filed Aug 14, 1998).

[20] *Id.* WCA has already noted that Blackstone Management Associates faced a similar fate when it attempted to acquire a limited partnership interest in a joint cable venture with Time Warner and retain its 15% interest in wireless cable operator People's Choice TV Corp. WCA Comments at 19-20.

[21] *See also* Comments of Ohio Valley Wireless, Ltd., CS Docket No. 98-82, at 2 (filed July 15, 1998).

[22] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 - Horizontal Ownership Limits*, MM Docket No. 92-264, FCC 98-138, at ¶¶ 78-81 (rel. June 26, 1998).

relaxed cable-MDS attribution standards. This could occur if the Commission were to adopt a horizontal ownership attribution standard that is more stringent than the standard applicable to cable-MDS cross ownership. For example, assume that the Commission retains a 5% voting benchmark for the purposes of the horizontal ownership cap but a 10% voting benchmark for cable-MDS cross-ownership. In that case, where an institutional investor already holds an attributable interest in a cable MSO, it would be at risk of exceeding the horizontal ownership cap if it acquired a 7% voting interest in a wireless cable operator, even though the latter interest is nonattributable under the cable-MDS cross-ownership rule. This obviously defeats the purpose of encouraging greater cross-investment between the wired and wireless cable industries, and thus the Commission should design its rules to avoid this type of situation.

III. AT&T'S PROPOSED ACQUISITION OF TCI FURTHER DEMONSTRATES WHY THE COMMISSION MUST AMEND SECTION 76.1000(b) AS PROPOSED BY WCA

As pointed out in WCA's initial comments, the Commission must correct a serious flaw in Section 76.1000(b) to make it absolutely clear that a cable programming network is subject to the program access rules if an entity has an "attributable interest" in both a cable operator and the cable network.[23] Because Section 76.1000(b) does not explicitly apply the term "attributable interest" to an entity's level of ownership in a *cable operator*, the rule is being read (or misread, in WCA's view) to apply the term "attributable interest" only to a cable operator's level of ownership in a programmer. As a result, some have alleged that the program access rules do not

---

[23] *See generally* WCA Comments at 3-5, 7-15.

apply to a satellite-delivered cable network owned by an entity that is not itself a "cable operator" but holds a significant ownership interest in a cable MSO. MSNBC, for example, is using this interpretation of the rule as justification for its refusal to sell to wireless cable operators, notwithstanding Microsoft's $1 billion, 11.5% ownership interest in Comcast. Accordingly, WCA has asked that the Commission put the issue to rest by clarifying that the rule's definition of "attributable interest" applies to an entity's level of ownership in a "cable operator," and that an entity holding common attributable ownership interests in a cable operator and a satellite-delivered cable network is subject to the Commission's program access rules.

As reflected in AT&T's comments and recent trade press reports, the proposed restructuring of AT&T in the wake of its pending acquisition of TCI demonstrates why the current flaw in Section 76.1000(b) has serious consequences even beyond those relating to MSNBC. AT&T states that it will hold the TCI cable systems and the Liberty cable networks in "separate business groups," and that Liberty will be operated independently by its current management.[24] In fact, TCI's cable operations and Liberty apparently will be held as "tracking stock" subsidiaries of AT&T.[25] Thus, it might be argued that the restructured AT&T places Liberty outside the scope of the program access rules, since (1) AT&T's 100% ownership interest in its TCI cable subsidiary is not explicitly "attributable" under Section 76.1000(b), and

---

[24] Comments of AT&T at 3, n.5; *see also* "Murdoch/Malone May Be Primestar's Prime Stars," *Broadcasting/Cable*, at 7 (Aug. 10, 1998) [quoting industry executive as saying that "[u]nder the AT&T deal Liberty is not going to be managed by anybody who's managing the cable company].

[25] *Id.*

(2) in the absence of attribution, AT&T is not a "cable operator" under the rule and thus is not "vertically integrated," notwithstanding its 100% ownership of Liberty.

Though WCA certainly hopes that the AT&T/TCI/Liberty combine would not attempt to advance such a position before the Commission, the mere possibility that it might do so demonstrates the flaw in the rule as it is currently written. Moreover, to contend that AT&T can own cable systems in one subsidiary and cable programming networks in another without being subject to program access obligations clearly flies in the face of Congressional intent: both the text and legislative history of the 1992 Cable Act reflect that Congress sought to apply the Act's program access provisions to satellite-delivered cable networks that are commonly owned with cable operators, regardless of how those ownership interests are structured.[26] Accordingly, to give full effect to Congress's mandate and "ensure that all entities with potential incentives to engage in anticompetitive conduct are covered by [the program access] rules,"[27] WCA urges that the Commission amend Section 76.1000(b) of its Rules as proposed in WCA's initial comments.

IV. THE COMMISSION MUST NOT RELAX THE STRICT OWNERSHIP ATTRIBUTION STANDARDS THAT APPLY TO PROGRAM ACCESS

To WCA's knowledge, no party in these proceedings has specifically recommended that the Commission relax the strict ownership attribution standards that apply to program access, and indeed there is no reason for the Commission to do so. As noted in WCA's initial

---

[26] *See* WCA Comments at 7-8.

[27] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3363 (1993).

comments, Congress expressly adopted a regulatory framework for program access that is based on "affiliation" rather than "control," and thus the Commission quite correctly has rejected calls from the cable industry to include a "control-based" attribution standard in Section 76.1000(b).[28] Moreover, the Commission has already explained why the more liberal ownership attribution standards for horizontal ownership are not appropriate for program access:

> [A]n entity's "control" is the focus of the vertical and horizontal ownership rules. By comparison, the attribution standard in the program access rules is focused on the potential "influence" on programming vendor behavior through ownership by cable interests, *irrespective of the amount of ownership that may be involved.*[29]

Furthermore, contrary to what is the case with respect to cable-MDS cross-ownership, nothing in the record before the Commission in these or any other proceedings even remotely suggests that the ownership attribution standards for program access should be relaxed at this time.[30] If anything, all available evidence indicates that programmers are unwilling to sell to cable's competitors even where vertical integration is absent (even as currently defined under the strict standards in Section 76.1000(b)), and that the program access attribution standards

---

[28] WCA Comments at 13-14.

[29] DirecTV Comments at 7, *quoting Program Access Reconsideration Order* at ¶ 44.

[30] *See* DirecTV Comments at 10 ("The existing five percent restrictive standard provides a clear and concise threshold that adequately accounts for the program access law's behavioral component, yet is not over-inclusive. In addition, the strict program access attribution standard has not caused a backlash in capital investment in program creation or distribution. Nor is there any evidence that cable operators have refrained from investing in new program services primarily to avoid the strict attribution standard.").

therefore should be *tightened* to address the sprawling web of non-ownership relationships between cable operators and programmers that have the same anticompetitive effect as *de jure* ownership interests.[31] At a minimum, however, regardless of whether the Commission chooses to liberalize its horizontal ownership attribution standards at this time, the ownership attribution standards for program access must be left as is.

V. CONCLUSION

WCA reiterates that these proceedings represent an excellent opportunity for the Commission to bring its rules into line with changing marketplace conditions that Congress clearly did not anticipate in adopting the 1992 Cable Act. If that legislation is to continue to have its intended effect, it is essential that the Commission consistently "fine tune" its regulatory framework to ensure that loopholes in the current law do not have the very same anticompetitive consequences Congress clearly was trying to prevent. WCA thus once again urges the

---

[31] *See* WCA Comments at 15-19 (recommending amendment to Section 76.1000(b) that would permit case-by-case review of unique and substantial non-ownership relationships between cable operators and programmers, and to permit those relationships to be classified as *de facto* "attributable interests").

Commission to fulfill its pro-competitive agenda and amend its program access and cable-MDS cross-ownership rules in accordance with WCA's initial comments.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: _____
Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN, LLP
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 783-4141

Its Attorneys

September 3, 1998