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September 3, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CS Docket No. 98-82
Review of the Commission's
Cable Attribution Rules

DOCKET FILE COPY ORIGINAL

Dear Ms. Salas:

Transmitted herewith, on behalf of Time Warner Inc. ("Time Warner"), are an original and nine copies of reply comments in the above-referenced proceeding.

Because Time Warner's reply comments also bear on issues raised in the Commission's Further Notice of Proposed Rulemaking in MM Docket No.92-264, Time Warner is concurrently submitting, under separate cover, an original and nine copies of these reply comments to be included in that docket as well.

Should there be any questions regarding this matter, kindly communicate with the undersigned.

Very truly yours,

Arthur H. Harding

Arthur H. Harding
Counsel for Time Warner Inc.

Enclosure

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

REPLY COMMENTS OF TIME WARNER INC.

TIME WARNER INC.

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Date: September 3, 1998

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SUMMARY

The comments submitted in these proceedings elucidate several principles which should inform the Commission's review of the cable horizontal ownership limit and cable attribution rules.

- The unconstitutional ban on cable operators reaching 70% of their potential audience should cause the Commission to view the 30% cable horizontal ownership limit with extreme skepticism.
- Pursuant to its statutory mandate, the Commission must take account of the volume of evidence submitted by commenters illustrating the substantial consumer benefits of regional clustering of cable systems, including the provision of advanced communications services. At the same time, the Commission's own data evidencing a healthy competitive environment for video programming services and the failure of commenters to illustrate harm from consolidation should convince the Commission that it is time to shift the balance toward allowing for greater efficiencies from clustering and horizontal ownership.
- The array of existing Commission regulations should assuage any fears of potential anticompetitive behavior by cable operators in the event of an eliminated or substantially raised horizontal ownership restrictions.
- The increasing competitive position of DBS, MMDS and other video distribution technologies should cause the Commission to recognize that measuring cable homes passed does not represent an accurate method of assessing cable operators' ability to restrict the "flow" of independent video programming services.

- The hypocrisy of arguments opposing the increased cable concentration by ILECs, who themselves control well over 30% of the nation's access lines and who are eager to stave off competition from cable in local telephony, should give the Commission pause when evaluating their ominous predictions of supposed anticompetitive conduct by cable operators.

With these principles firmly in mind, the Commission should adopt Time Warner's suggested changes to the cable horizontal ownership limits and cable attribution rules, including: eliminating, or, at the very least, raising the horizontal ownership cap to at least 35%; measuring any horizontal ownership limit against total MVPD subscribers and not against unreliable and inaccurate cable homes passed standard; and attributing subscribers to the entity in a joint venture exercising management control. Only through these changes, and other specific changes to the cable attribution rules described herein, can the Commission conform its rules to congressional intent and ensure that its cable ownership regulations reflect competitive realities.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal Ownership Limits	)	
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	)	

To: The Commission

REPLY COMMENTS OF TIME WARNER INC.

Time Warner Inc. ("Time Warner"),[1] by its attorneys, submits these reply comments in response to the Commission's Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking in MM Docket No. 92-264, FCC 98-138, released June 26, 1998 ("FNPRM") as well as to the Commission's Notice of Proposed Rulemaking in

[1]Time Warner is a publicly traded Delaware corporation. Time Warner is the majority owner of Time Warner Entertainment Company, L.P., a partnership conducting business principally through three unincorporated divisions: Time Warner Cable, which operates numerous cable television systems in various areas across the United States; Home Box Office ("HBO"), which operates pay television programming services; and Warner Bros., which produces theatrical motion pictures and television programs. Time Warner also directly and indirectly owns or holds interests in various basic cable programming services other than those operated by HBO. In addition, an affiliate of Time Warner holds an interest in PRIMESTAR, Inc., a direct-to-home satellite programming service provider.

CS Docket No. 98-82, FCC 98-112, released June 26, 1998 ("Cable Attribution NPRM"). The FNPRM seeks comment on, among other issues, whether the 30% horizontal ownership limit remains appropriate in light of changing competitive conditions; whether the rules should take into account the presence of all multichannel video programming distributors ("MVPDs") and not just cable operators; and whether the rules should be changed to count actual subscriber numbers rather than homes passed.[2]

Commenters in favor of liberalizing the horizontal ownership restriction have produced substantial evidence showing the benefits of consolidation, including the economies of scale and capital accessibility necessary to bring advanced communications services to consumers and competition in local telephony, as well as evidence proving the vitality of independent programming services. At the same time, commenters opposing raising the current 30% horizontal ownership cap have failed to produce any specific evidence demonstrating the harms that could occur as a result of adoption of a more lenient ownership restriction. As the Commission is bound to adhere to the congressional directive to adjust its ownership restrictions in response to the dynamic communications competitive environment, and allow for efficiencies associated with horizontal consolidation, it must abolish the current horizontal ownership limit, or, at the very least, raise it and make specific changes in its attribution rules applicable to the horizontal ownership cap to reflect the presence or absence of managerial control.[3]

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[2]FNPRM at ¶¶ 78-79.

[3]The Commission must also relax its cable attribution rules generally in order to encourage further investment in new technologies, programming and entrants into the communications industries. *See* III *infra*.

I. THE HORIZONTAL OWNERSHIP CAP MUST BE RAISED TO COMPORT WITH THE CONSTITUTION AND CONGRESSIONAL OBJECTIVES.

As illustrated in Time Warner's Comments[4] and as found by the Federal District Court for the District of Columbia,[5] the current 30% horizontal ownership restriction is an impermissible abrogation of cable operators' First Amendment rights. The horizontal ownership limits are subject at least to intermediate constitutional scrutiny, and in order for a regulation on cable operators' speech to withstand such scrutiny under the Supreme Court's test in Turner Broadcasting v. FCC, "the government must do more than simply 'posit the existence of the disease to be cured'" but must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[6]

As described in I(B) *infra*, commenters opposing the much-needed relaxation of the horizontal ownership limit mostly avoided discussion of its obvious constitutional deficiencies and have failed to demonstrate any current harms associated with cable consolidation that could justify an absolute ban on the ability to reach 70% of a cable operator's potential audience. Even had commenters made a showing that the governmental interests served by a 30% limit qualified as important or substantial, the 30% limit still fails the narrow tailoring

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[4]*See* Comments of Time Warner Inc. in MM Docket No. 92-264 and CS Docket No. 98-82, at 4-7 ("Time Warner Comments").

[5]Daniels Cablevision, Inc. v. U.S., 835 F.Supp. 1, 10 (D.D.C. 1993), *aff'd in part, rev'd in part,* Time Warner Entertainment Co., L.P. v. FCC, 93 F.3d 957 (D.C. Cir. 1996). Time Warner submits its comments in this proceeding without prejudice to its claims and arguments in its pending constitutional challenge to the horizontal ownership rules.

[6]Turner Broadcasting v. FCC, 512 U.S. 622, 664 (1994) ("Turner I").

component of the intermediate scrutiny test.[7] An assertion that the 30% limit represents a "direct and material way" of achieving the governmental interest in ensuring the "flow" of video programming[8] is made infinitely more difficult given the presence of other, more specific rules[9] designed to address Congress' concerns over potential anticompetitive conduct by cable operators as voiced through its passage of the Cable Television Consumer Protection and Competition Act of 1992.[10] As the commenters in this proceeding have failed to demonstrate that the current 30% horizontal ownership limit satisfies Turner I,[11] and as the empirical evidence shows a thriving competitive environment for independent video programming,[12] the Commission must eliminate, or, at the very least, substantially raise the horizontal ownership restrictions to avoid a violation of cable operators' First Amendment rights.

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[7]*See* U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

[8]47 U.S.C. § 533(2)(A)-(B).

[9]*See* 47 U.S.C. § 532 (leased access); *Id.* § 548, 47 C.F.R. §§ 76.1001, 1002 (program access); 47 U.S.C. 536(a), 47 C.F.R. § 76.1301 (program carriage).

[10]Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[11]The citation by Consumers Union, *et al.* to Turner I and Turner Broadcasting v. FCC, 117 S.Ct. 1174 (1997) ("Turner II") provides absolutely no precedential support for upholding the horizontal ownership rules against constitutional attack. Comments of Consumers Union, *et al.* in MM Docket No. 92-264, at 1-2 ("Consumers Union Horizontal Ownership Comments"). That the Supreme Court found on the factual record before it that analog must-carry survived intermediate scrutiny in no way supports the constitutionality of the horizontal ownership limits at issue here. Rather, these cases firmly establish that cable operators are entitled to the full protections of the First Amendment and that the government bears a heavy burden to justify limits on cable operators' speech. Under the legal standards enunciated by the Court in Turner I and Turner II and other cases, and the factual record here, the horizontal ownership restriction cannot be sustained.

[12]*See* Time Warner Comments at 12-17.

A. The Commission Must Eliminate Or Significantly Raise The Horizontal Ownership Limit To Allow For The Substantial Benefits Of Horizontal Concentration, Including The Provision Of Advanced Communications Services Via Cable.

In addition to the patent need to revise the horizontal ownership restrictions to satisfy the Constitution, the Commission must eliminate or substantially liberalize the horizontal ownership cap to reflect Congress' intent that the FCC's horizontal ownership rules reflect the "dynamic nature of the communications marketplace"[13] and allow for the significant benefits of horizontal concentration so long as the "flow" of video programming is ensured.[14] Commenters in favor of retaining the 30% horizontal ownership cap, or adopting an even more restrictive limit on cable ownership, have failed to show that an elimination of restrictions or a substantially liberalized horizontal ownership percentage poses any of the threats underlying Congress' limited delegation of authority to the Commission to promulgate horizontal ownership limits. Rather, in their zeal to prevent the consolidation necessary for cable operators to compete in the provision of advanced communications services and local telephony, these commenters have only revealed their fear of competition from cable. In contrast, other commenters who support raising or eliminating the horizontal ownership percentage aptly have illustrated the substantial benefits associated with a higher permissible ownership percentage. In light of other Commission rules specifically addressing the conduct of concern to Congress in 1992 when it instructed the Commission to promulgate horizontal

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[13] 47 U.S.C. § 533(f)(2)(E).

[14] *See* Time Warner Comments at 8-12 for statutory analysis and citations to legislative history illustrating the Commission's need to allow for the benefits of horizontal concentration so long as its regulations address conduct that might interrupt the flow of video programming.

ownership limits and the increasingly competitive MVPD environment, the Commission must now eliminate or substantially raise the ownership limits to comply with the 1992 Cable Act.

Commenters, including Time Warner, have illustrated in great detail the significant pro-competitive benefits associated with horizontal consolidation in the cable industry. Chief among those benefits is the development of regional clusters of cable systems. Clustering allows for economies of scale that deliver significant cost savings, improved efficiency and other administrative benefits to consumers.[15] Clustering offers consumers regional programming more targeted to their interests and allows for more efficient advertising over cable.[16] Further, clustering allows for decentralized management that ensures responsiveness to subscribers' requests and concerns.[17]

Perhaps most critically, clustering is an essential precondition to the provision of advanced communications services, including interactive video, high-speed Internet access, data transmission and, of most concern to incumbent local exchange providers ("ILECs") such as Ameritech New Media, Inc. ("Ameritech") and RCN Telecom Services, Inc. ("RCN"), local telephony.[18] With its existing network architecture and substantial bandwidth, cable may be

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[15]Comments of the National Cable Television Association in MM Docket No. 92-264, at 10-11 ("NCTA Horizontal Ownership Comments"); Comments of AT&T Corp. in MM Docket No. 92-264, at 7-9 ("AT&T Comments"); Comments of Bresnan Communications Company, L.P. *et al.* in MM Docket No. 92-264 and CS Docket No. 98-82, at 5-6 ("Bresnan/TCA Comments").

[16]Comments of Cablevision Systems Corporation in MM Docket No. 92-264 and CS Docket No. 98-92, at 12-17 ("Cablevision Comments"); NCTA Horizontal Ownership Comments at 10-11.

[17]Comments of Tele-Communications, Inc., in MM Docket No. 92-264, at 49-50 ("TCI Horizontal Ownership Comments").

[18]TCI Horizontal Ownership Comments at 50-53; AT&T Comments at 3-11; Comments of

(continued...)

the best-positioned participant among the various communications industries to realize the Commission's goals of a wide scale commercial deployment of these services. But in order for cable to achieve its competitive potential, cable operators need the economies of scale and access to capital for the substantial investments needed to upgrade their network architecture.[19] At odds with the Commission's desire to foster advanced communications services is the current 30% horizontal ownership limit, which impedes the ability of cable systems to make the necessary investments and, thus, which delays the rollout of such services.

Clearly, cable's potential to deliver advanced services poses a competitive threat to other providers of communications services, but besides this hostile reaction to competition, little else emerges from the arguments made by competitors who seek to forestall cable's entry by supporting a 30% horizontal ownership limit. For example, Ameritech misleads the Commission about the compatibility and interoperability of cable modems and other technology used to deliver advanced services.[20] In fact, the cable industry is developing universal technical standards through its OpenCable initiative that are designed to allow any supplier to produce compatible devices. If anything, Ameritech will enjoy the benefits of these standards without having had to incur the research and development costs to produce them.

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[18](...continued)
MediaOne Group, Inc. in MM Docket No. 92-264 and CS Docket No. 98-82, at 12-19 ("MediaOne Comments"); Cablevision Comments at 19-22; Bresnan/TCA Comments at 7-12.

[19]MediaOne Comments at 12-15; Cablevision Comments at 12-17; Bresnan/TCA Comments at 14-18; NCTA Horizontal Ownership Comments at 9.

[20]Comments of Ameritech New Media, Inc. in MM Docket No. 92-264 and CS Docket No. 98-82, at 24-27 ("Ameritech Comments").

Local telephony provides an even starker example of the competitive potential of the cable industry, which can only be realized through the economies of scale associated with regional clustering of cable systems. In particular, as pointedly highlighted by the opposition to cable clustering contained in both Ameritech's and RCN's comments, clustering offers the promise of facilities based competition in the provision of local telephony. Interestingly, even a substantial relaxation of the current 30% cable horizontal ownership limit would be consistent with current consolidation levels among the ILECs. The pending combination of SBC (itself having merged with PacTel), SNET and Ameritech will result in 33.8% of the nation's access lines being provided by the combined entity.[21] Similarly, once the pending merger of Bell Atlantic (itself having merged with NYNEX) and GTE is complete, the combined entity will control 35.8% of the nation's total access lines.[22] As pointed out by AT&T, ILECs are subject to no FCC restrictions on their concentration, and thus "it would be completely illogical and counter-productive if AT&T and other carriers providing local exchange services over cable networks were not able to expand their service areas and affiliates to the same extent as the ILECs, or to an even greater extent."[23] The contiguous nature of these companies' service areas underscores the overwhelming importance of regional clustering to the successful offering of local telephony services.

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[21]Federal Communications Commission, Preliminary Statistics of Communications Common Carriers (1997 ed.) at pp. 137-151, Table 2.10 ("Operating Statistics of Reporting Local Exchange Carriers as of December 31, 1997").

[22]*Id.* Time Warner notes that this percentage does not reflect the over 1.2 million customers of the Puerto Rico Telephone Company under GTE's control.

[23]AT&T Comments at 8.

The consolidation necessary for cable to provide advanced communications services and inject competition into local telephone service are the kinds of technological and competitive developments that Congress predicted when it instructed the Commission to ensure that its horizontal ownership limits "reflect the dynamic nature of the communications marketplace."[24] The Commission's horizontal ownership rules must provide the cable industry with the flexibility necessary to respond to the shifting competitive environment and should not substitute arbitrary regulatory limits for business decisions best left to industry participants responding to technological and competitive developments.[25]

B. Commenters Who Oppose Raising The Horizontal Ownership Limits Have Not Shown Any Harms To The Flow Of Video Programming That Are Not Already Addressed By The Commission's Existing Specific Behavioral Restrictions.

As illustrated by the hindering effect of the horizontal ownership limits on cable's ability to offer advanced communications services and local telephony, the Commission must recognize that the horizontal ownership strand of its web of cable regulations has secondary and tertiary effects on its other regulatory goals. Where it can advance certain goals without jeopardizing others, it must do so, as matters of constitutional imperative and statutory directive and in the interests of a comprehensive, coherent approach to regulation. Applying that simple concept to this proceeding, it is clear that the Commission now must eliminate or substantially raise the horizontal ownership cap. Commenters have not provided any evidence

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[24]47 U.S.C. § 533(f)(2)(E). *See also* Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565, ¶ 6 (1993) ("1993 Horizontal and Vertical Ownership Order") (recognizing the need for "periodic review of the ownership limits").

[25]TCI Horizontal Ownership Comments at 51-53; Cablevision Comments at 7-11.

of competitive harms to the "flow" of video programming; indeed, the Commission's own empirical evidence shows just the contrary. Therefore, in light of the thriving competitive environment for independent programming, the existence of other, more focused rules addressing the specific potential anticompetitive conduct of concern to Congress, and the considerable benefits to consumers from such concentration, the Commission must substantially raise the horizontal ownership limits.

The ominous predictions propounded by commenters opposing a liberalization of the horizontal ownership limits are flatly contradicted by the empirical evidence of a thriving competitive environment for independent programming services and an uninterrupted "flow" of video programming. As fully illustrated in Time Warner's Comments, the Commission's own data shows that between 1994 and 1997, programming unaffiliated with cable operators has constituted an increasing percentage of the total video programming and, indeed, has eclipsed the amount of video programming affiliated with MVPDs.[26] Time Warner's own example illustrates the vigor of independent programming; in 1997, an average of only 9 of the 51 regulated programming services carried on Time Warner's cable systems had some affiliation with Time Warner.[27] At the same time, as the economic analysis appended to the Comments of Tele-Communications, Inc. ("TCI") aptly demonstrates, the success of alternative MVPDs such as DBS and MMDS and the alternative programming distribution outlets they provide essentially eliminates the purported ability of MSOs to exert monopsony power and foreclose

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[26]*See* Time Warner Comments at 12-17; TCI Horizontal Ownership Comments at 28-30.

[27]Letter from Catherine M. Reid, Time Warner Inc., to John E. Logan, Acting Chief, Cable Services Bureau, Federal Communications Commission, June 18, 1998.

access to video programming.[28] Further, in sharp contrast to the assertion by Ameritech that a cable network must reach 20 million or more subscribers to be successful,[29] the examples of MSNBC, the Disney Channel, and Turner Classic Movies clearly demonstrate that a programming service can be viable while reaching fewer than 60% of the nation's subscribers. Even assuming, against the evidence, that vertically integrated cable operators would engage in wholesale discrimination against services they do not own, this level of necessary distribution would thus support at least a 40% ownership limit.[30] In short, commenters urging a liberalization of the horizontal ownership rules have provided convincing empirical evidence that video programming is thriving and available to all MVPDs.

Confronted with this empirical evidence, commenters urging a retention or even a tightening of the horizontal ownership cap resort to anecdotes and innuendo about anticompetitive incentives or conduct by cable operators. For instance, Consumers Union offers an anecdote of one alternative MVPD's difficulty in obtaining programming,[31] whose extrapolation as illustrative of an industry wide trend is refuted by the increasing growth of DBS. Similarly, Ameritech offers theoretical speculation about the supposed incentives of cable operators to restrict the distribution of affiliated programming, a practice already specifically addressed by the Commission's program access rules.[32]

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[28]Besen and Woodbury, An Economic Analysis of the FCC's Cable Ownership Resolutions, August 14, 1998, appended to TCI's Horizontal Ownership Comments.

[29]Ameritech Comments at 13-14.

[30]TCI Horizontal Ownership Comments at 75-76.

[31]Consumers Union Horizontal Ownership Comments at 8-9.

[32]Ameritech Comments at 10-11, 20.

RCN's Comments follow this pattern of speculation and innuendo. While failing to offer any evidence of its own, and in spite of the aforementioned empirical evidence gleaned from the Commission's own data, RCN summarily concludes that "no evidence exists to show that cable incumbents' power in the purchase and distribution of video programming has lessened over the last five years."[33] Instead of providing hard data, RCN resorts to bitter complaints about unspecified "anticompetitive tactics" by cable operators in New York and Boston[34] that are telling in their lack of specificity, not to mention striking in their hypocrisy, given RCN's own efforts to restrict access to its OVS systems and become *de facto* cable operators while avoiding cable franchise obligations.[35] In the absence of evidence of concrete harms to the flow of video programming, the Commission must increase the horizontal ownership cap to comply with its statutory mandate to allow for the efficiencies from horizontal concentration.[36]

The FCC's decision to raise the horizontal ownership limit should appear all the more inevitable by the existence of other specific, targeted provisions of the Commission's rules

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[33]Comments of RCN Telecom Services, Inc. in MM Docket No. 92-264, at 16 ("RCN Horizontal Ownership Comments").

[34]*Id.* at 7.

[35]*See* Time Warner Cable v. RCN-BeCoCom, L.L.C., DA 98-798, Memorandum Opinion and Order DA 98-798 (rel. Apr. 28, 1998) (granting in part Time Warner's complaint against RCN for RCN's refusal to provide Time Warner with information pertaining to RCN's open video system in the Boston area and "question[ing] certain of RCN's statements to the Town of Sudbury Selectmen," in which an RCN official admitted that RCN would not build an OVS system if a programming provider not affiliated with RCN requested carriage).

[36]Time Warner reiterates that, in addition to its impact on the Commission's statutory obligation to allow for the benefits from horizontal consolidation, this conspicuous lack of evidence of concrete harms offered by commenters opposing a liberalization of the horizontal ownership cap fails the aforementioned test for the restriction's constitutionality under Turner I.

designed to thwart any potential anticompetitive conduct by cable operators.[37] Specifically, the leased access, program access and program carriage rules, the channel occupancy limits and the must-carry/retransmission consent provisions of the Commission's rules represent more focused regulatory measures that aim at the same purported governmental interests. With these behavioral rules already firmly in place, the Commission must adjust the horizontal ownership limit upwards to adhere to Congress' intent that the horizontal ownership rules undergo periodic revision based on changing competitive conditions and not inhibit the benefits of consolidation.

II. THE COMMISSION SHOULD ADOPT TIME WARNER'S PROPOSED CHANGES TO THE HORIZONTAL OWNERSHIP RULES.

In light of the evidence emerging from the initial comment cycle, the Commission should, at the very least, adopt the specific changes Time Warner advocated in its comments: (1) raise the horizontal ownership cap at least to 35%; (2) base the limit on total MVPD subscribers instead of cable homes passed; and (3) base the attribution standard for horizontal ownership on managerial control.

The majority of commenters support raising the current 30% horizontal ownership cap and changing the basis of calculation to a method that takes account of all MVPD subscribers and not just cable homes passed. Most commenters further argue that the policies underlying the horizontal ownership rules are best served by an attribution standard that is based on managerial control rather than the current overinclusive and ambiguous attribution criteria. By adopting Time Warner's and other commenters' suggested revisions to the horizontal ownership limits, the Commission will better achieve the delicate balance between encouraging

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[37] *See* NCTA Horizontal Ownership Comments at 13-16; TCI Horizontal Ownership Comments at 21-26.

the benefits of horizontal concentration and vertical integration while still affording opportunities for continued growth of independent programming services.

A. The Horizontal Ownership Cap Must Be Raised, At Minimum, To 35%.

Time Warner and a majority of the other commenters provided strong support for raising the current 30% horizontal ownership cap, which was set too low in 1993, to a more realistic level.[38] Commenters urging retention, or even lowering, of the 30% cable horizontal ownership limit have not shown that horizontal consolidation has or will threaten the flow of independent programming services. Accepting arguendo that some cap is needed, and even assuming that an MSO approaching the ownership cap would deny carriage outright to any desirable independent programming service,[39] a horizontal ownership cap of either 35% or 40% would still leave open either 65% or 60% nationwide penetration, respectively. As noted, several commenters illustrated that many established programming services have succeeded with penetration levels well below 60 to 65%.[40] In fact, a horizontal ownership cap of 50%, leaving open at least 50% nationwide penetration, is fully supported by the historical data regarding the reach necessary for a successful programming network launch.[41]

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[38]*See* Time Warner Comments at 22-27; TCI Horizontal Ownership Comments at 65-77; Comments of Adelphia Communications Corporation *et al.* in MM Docket No. 92-264 and CS Docket No. 98-82, at 24-31 ("Adelphia *et al.* Comments"); MediaOne Comments at 19-21, 29-30; Bresnan/TCA Comments at 22-29; NCTA Horizontal Ownership Comments at 22-23.

[39]Of course, the record shows that independent programmers are not facing discrimination. This is to be expected, since cable operators' primary goal is to attract customers by offering the best programming, and a failure to provide such programming would cause them to lose customers to competitors such as DBS and MMDS.

[40]Time Warner Comments at 25-26; TCI Horizontal Ownership Comments at 75-77; Bresnan/TCA Comments at 28-29.

[41]*See id.*

Certainly, nothing in the record supports RCN's unsubstantiated call for a reduction in the current 30% horizontal ownership cap by a full ten percentage points.[42]

To the contrary, as noted, the Commission's own data demonstrate a thriving competitive environment for independent video programming. Further, commenters have illustrated in great detail the many benefits of horizontal concentration -- benefits for which Congress specifically instructed the Commission to account. In addition, a 35% horizontal ownership cap would be well within other standard legal and regulatory measures for assessing concentration. As Time Warner and other commenters noted, numerous courts have determined that market share in excess of 50% is needed to find monopoly power in a market.[43] Certainly the broadcast horizontal ownership limits, which Congress recently raised, suggest that a level of at least 35% is appropriate for cable horizontal ownership.[44] In fact, due to the 50% discount for UHF stations provided for in the Commission's rules,[45] a single broadcaster can now reach up to 70% of the nation's television households. The Commission even has initiated a rulemaking in which it has asked commenters whether the 35% national broadcast ownership rule "is no longer necessary in the public interest as the result of

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[42]RCN Horizontal Ownership Comments at 14-15.

[43]Time Warner Comments at 23; TCI Horizontal Ownership Comments at 67-70; Adelphia *et al.* Comments at 28-29; MediaOne Comments at 29-30; NCTA Horizontal Ownership Comments at 22-23. Time Warner notes that for purposes of antitrust analysis with respect to the cable industry, the relevant market is not limited to MVPDs. Among other things, broadcast television, radio, theatrical motion pictures, videocassettes, the Internet, concerts, sporting events, printed publications and a multitude of other video and non-video sources of news, information and entertainment also compete with cable operators and must be factored into any antitrust analysis.

[44]The Telecommunications Act of 1996 raised the television station horizontal ownership limit from 25% to the current level of 35%. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), § 202(c)(1)(B).

[45]47 C.F.R. § 73.3555(e)(2)(i).

competition."[46] In response, numerous broadcast interests suggested that the Commission completely eliminate the broadcast horizontal ownership limit.[47]

Whatever new cap the Commission eventually adopts, it is imperative that an operator not be penalized for serving additional customers through plant extensions or other internal growth that would cause it to exceed the horizontal ownership cap.[48] Certainly, it makes no sense to punish operators that are responding to consumer desires for attractive programming services. As TCI noted, this type of approach has been used by the Commission before, most recently with respect to the Commission's implementation of the channel occupancy limits.[49] Moreover, as Adelphia *et al.* point out, waivers should be granted liberally for acquisitions designed to better effectuate a regional clustering strategy.[50]

B. The Horizontal Ownership Limit Must Be Based On Total MVPD Subscribers.

In its initial comments, Time Warner supported the adoption of a calculation of any given cable operator's horizontal ownership percentage that uses as the numerator the total

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[46]In the Matter of 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry in MM Docket No. 98-35, FCC 98-37, ¶ 16 (released Mar. 13, 1998).

[47]*See, e.g.*, Comments of National Broadcasting Company, Inc., filed on July 21, 1998 in MM Docket No. 98-35, at 3-4, 14-15.

[48]Time Warner Comments at 27; TCI Horizontal Ownership Comments at 79-80; MediaOne Comments at 31-32; NCTA Horizontal Ownership Comments at 23.

[49]TCI Horizontal Ownership Comments at 79, *citing* 1993 Horizontal and Vertical Ownership Order, *supra*, at ¶¶ 93-94 (1993) (grandfathering cable systems then carrying vertically integrated video programming services in excess of the 40% channel occupancy limit, but requiring that, upon system upgrade, the cable operator could not add another vertically integrated program service until the system came into compliance with the 40% limit).

[50]Adelphia *et al.* Comments at 12.

number of subscribers served by franchised cable systems in which a particular entity holds an attributable interest, with the denominator consisting of all MVPD subscribers nationwide.[51] This calculation is consistent with the statutory mandate that the Commission establish limits on the number of "*cable subscribers* a person is authorized to reach"[52] by including an entity's total cable subscribers in the numerator but not placing limits on the number of non-cable MVPD subscribers that particular entity may serve through distribution technologies other than franchised cable systems.

By including all MVPDs, both cable and non-cable, in the denominator, this approach also recognizes that non-cable MVPDs provide an alternative programming distribution outlet for video programmers. Clearly, as the number of subscribers served by non-cable MVPDs increases, the possibility that any given cable operator could block distribution of a programming service will be even less likely due, in part, to the increasing number of alternative distribution outlets as well as the increased competitive pressure to provide popular programming attractive to potential customers. A shift away from a measure based on homes passed to a measure based on true subscriber count is also necessary because homes passed data is inherently unreliable and difficult to measure. In addition, a cable homes passed measure does not account for the fact that the number of homes passed by a particular cable MSO might remain constant even as that MSO might lose subscribers due to increasing competition from other MVPDs.

Most of the commenters who addressed this issue support Time Warner's suggested horizontal ownership calculation.[53] However, one commenter, RCN, proposes exactly the

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[51]Time Warner Comments at 27-32.

[52]47 U.S.C. § 533(f)(1)(A) (emphasis added).

[53]TCI Horizontal Ownership Comments at 57-65; Adelphia *et al.* Comments at 21-24;

(continued...)

opposite formula advocated by the majority of commenters. RCN would have the Commission retain a homes passed unit of measurement and adopt a horizontal ownership formula that includes in the numerator a reflection of the cable industry's "investments in alternative MVPDs" such as DBS, while *excluding* alternative MVPDs from the denominator.[54] RCN reasons that alternative MVPDs, such as DBS, must be left out of the denominator because "including virtually all television homes in the denominator would grossly distort the size of the MVPD market . . . ."[55]

RCN's tortured analysis highlights the complete unworkability of its suggested calculation. For one thing, RCN never confronts the plain language of the statute, which does not mention homes passed. But in order to bolster its fabricated claim that homes passed, and not actual subscribers, should serve as the accurate measure for a horizontal ownership calculation, RCN states, without support, that "it is the number of homes passed by the operator that is the true measure of the operator's market influence."[56] This is absurd. When calculating market share for purposes of the Herfindahl-Hirschman Index, the relevant inquiry is sales of the product at issue, not how many consumers might buy the product at issue. Thus, Tropicana Orange Juice is not considered to have 95% market share because it is available in 95% of all grocery stores, giving American consumers the option to buy its product. In addition, not only do cable operators typically deal with programmers based on their actual subscribership, and not homes passed, but, as the Commission has noted, "[a]s alternative MVPDs continue to grow in the future, the number of homes passed by a cable

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[53](...continued)
MediaOne Comments at 28-29; NCTA Horizontal Ownership Comments at 19.

[54]RCN Horizontal Ownership Comments at 17-18.

[55]*Id.* at 17.

[56]*Id.* at 18.

operator may become an increasingly inaccurate measure of its actual subscribership and thus of its actual market power."[57]

RCN's insistence on maintaining a homes passed measure is merely a transparent attempt to then claim that all MVPDs, including DBS, cannot be included in the denominator calculation since many DBS providers reach the entire country and the inclusion of all such households in the denominator would "grossly distort the size of the MVPD market."[58] However, RCN conveniently ignores the fact that a cable operator's investment in a DBS operator could never be included in the numerator, as RCN suggests, for exactly the same reason. Under RCN's homes passed formula, the numerator would consist of all cable homes passed by a particular cable operator as well as homes passed by other MVPDs in which the cable operator had an attributable interest, meaning that if the cable operator had an attributable interest in a DBS provider, often virtually all of the television homes in the country could also be included in the numerator because of DBS' typical national footprint. However, RCN's insistence on excluding alternative MVPDs from the denominator would cause the numerator value for a cable operator with an attributable interest in a DBS provider to be always much *larger* than the denominator value, resulting in the absurd outcome that horizontal concentration percentages would exceed 100% for any such cable operator.

The coalition of commenters filing with Consumers Union also opposes Time Warner's suggested horizontal ownership calculation and argues that alternative MVPDs "are not yet fully competitive with cable as a source of programming for viewers" so that "their development does not yet justify the modification of the cable horizontal ownership rules."[59]

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[57]FNPRM at ¶ 84.

[58]RCN Horizontal Ownership Comments at 17.

[59]Consumers Union Horizontal Ownership Comments at 6-7.

However, as Time Warner demonstrated in its initial comments, non-cable MVPDs now account for almost 13% of all MVPD subscribers, with DBS having expanded significantly in recent years.[60] Therefore, in assessing a cable operator's influence on programming services, non cable subscribers must be included within the calculation. Inclusion of all MVPD subscribers in the denominator constitutes a self-adjusting mechanism that will accurately account for the relative number of cable to non-cable MVPD subscribers. As non-cable MVPD subscribership increases, so too will the denominator value, representing an increase in the number of viewers a programmer could potentially reach through alternate distribution mechanisms.

In addition, the Consumers Union's insistence on maintaining a cable homes passed measure in order to avoid discouraging subscriber growth, which could leave some consumers unable to acquire cable programming,[61] is easily addressed by the proposal outlined above that cable operators bumping against the horizontal ownership cap be allowed to continue to add subscribers due to internal growth. Indeed, Congress has expressly directed the Commission to ensure that any horizontal limit adopted does not prevent cable operators from serving unserved households.[62] The only horizontal ownership formula that both complies with the statute and makes sense in the real world is one that uses as its numerator the number of cable subscribers served by any particular entity through its cable systems (but not through other distribution media) and uses as the denominator all MVPD subscribers (both cable and non-cable) nationwide.

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[60]Time Warner Comments at 30.

[61]*Id.* at 11-12.

[62]47 U.S.C. § 533(f)(1)(F).