### C. Attribution for Purposes of the Horizontal Ownership Rules Should Be Based on Managerial Control.

Throughout the Commission's rulemaking process regarding the horizontal ownership rules, Time Warner has consistently demonstrated that attribution for purposes of those rules should focus on management control, *i.e.*, the ability of a given cable operator to control the day-to-day operations of a particular cable system. A managerial control test best achieves the goals underlying the horizontal ownership rules without thwarting pro-consumer business transactions by recognizing that it is the managing entity of any given cable system that could theoretically operate the system contrary to the goals of the horizontal ownership restriction, not an entity that has taken a non-managerial role with respect to that cable system's operations.[63]

Several commenters suggested the same common sense approach to attribution under the horizontal ownership rules.[64] Four operators (Adelphia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc.) filed joint comments in which they outlined their current or proposed business relationships with TCI and demonstrated that each transaction was structured so as to prevent TCI from having any control over the day-to-day operations of the affected cable systems.[65] Three of the operators filing jointly are in various stages of forming joint ventures with TCI similar to the upcoming Time Warner/TCI joint ventures, and all of these TCI joint

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[63]However, as Time Warner noted in its initial comments, the Commission has routinely recognized that a party taking a non-managerial role must be allowed to retain certain generally accepted minority investor protections in order to safeguard its investment without those protections constituting attributable interests. *See* Time Warner Comments at 35-37.

[64]MediaOne Comments at 3-5, 21-28; Adelphia *et al.* Comments at 4-21; Cablevision Comments at 12-22; Bresnan/TCA Comments at 12-22.

[65]Adelphia *et al.* Comments at 9-20.

venture transactions will ultimately reduce the number and percentage of subscribers within TCI's operational control. However, for purposes of the horizontal ownership limits, the current attribution standards discourage such beneficial transactions that reduce TCI's control over cable systems nationwide because all of the subscribers to the cable systems served by such joint ventures might be double-counted, once to TCI and once to the joint venture partner. This double counting produces the perverse result that the number of subscribers counted toward TCI's national total would *increase* (both the TCI subscribers contributed to the joint venture and the subscribers contributed by the joint venture partner) just as TCI is in fact *reducing* the total number of subscribers to cable systems it controls.

The double counting issue can only be remedied if the Commission either adopts Time Warner's proposed managerial control test[66] or else adopts an attribution standard whereby an entity is only attributed with its *pro rata* share of subscribers equivalent to that entity's equity or partnership interest in the affected cable operator. While Time Warner believes that a managerial control test is the most appropriate means of determining attribution for purposes of the horizontal ownership limits, if the Commission is unwilling to attribute all of the subscribers to any given cable system to the managerial entity in charge of the day-to-day operations of that cable system, the Commission must adopt a *pro rata* attribution approach in order to avoid double counting a particular cable system's subscribers. Such an approach is

[66]The comments filed by Adelphia Communications Corporation *et al.* propose that a managerial control attribution test could be implemented by requiring the entity without managerial control to provide a written certification to the Commission that certain enumerated control criteria were satisfied and that the entity did not retain any authority beyond fundamental minority protections found acceptable by the Commission. Adelphia *et al.* Comments at 20-21. This approach to implementing a managerial control test seems reasonable and unburdensome both to the Commission and the parties making such a certification.

not only favored in the alternative by several of the commenters in this proceeding,[67] but it also reflects standard industry practice and understanding. For example, industry analysts such as Paul Kagan Associates, Inc. routinely attribute only an entity's *pro rata* share of a cable operator's total subscribers based on the percentage of that entity's equity or partnership interest in the cable operator for purposes of releasing estimates of any given entity's nationwide cable penetration.[68] Significantly, the Commission often relies on Paul Kagan statistics for regulatory purposes.[69]

## III. THE TIME HAS COME TO RELAX THE OVERLY BROAD CABLE ATTRIBUTION STANDARDS.

As noted in Time Warner's Comments and herein, continued investment in the cable industry is essential to ensure the capital necessary to upgrade systems and to provide advanced services and local telephony to consumers. Liberalization of the cable attribution standards will lead to the infusion of further capital, while overly restrictive attribution standards can only hinder the introduction of additional consumer benefits. A number of commenters have confirmed the benefits of and need for such capital investment.

For example, in its comments filed jointly with other parties, Falcon Holding Group, L.P. ("Falcon") reports that the geographic distribution of its systems nationally and the rural nature of many communities it serves created significant challenges in raising the capital

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[67] Time Warner Comments at 38; Adelphia *et al.* Comments at 21; MediaOne Comments at 26-28; Bresnan/TCA Comments at 21-22.

[68] *See* Cable TV Investor, Sept. 10, 1997, at 11 (noting that subscriber totals for TCI were calculated by attributing to TCI only its *pro rata* ownership interest in other cable operators).

[69] *See, e.g.*, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034, n.29 (rel. Jan. 13, 1998).

necessary for system upgrades and to meet consumer and municipal demands.[70] Its new partnership with TCI, in which Falcon will hold a 53% equity interest and be managing partner, will give Falcon the critical mass and economic base necessary to offer state-of-the-art technology to consumers. Falcon also expects to benefit from its minority partner's experience in offering new services such as Internet access.[71] Insight Communications Company, L.P. ("Insight"), which will hold a 50% equity interest in and be managing partner of another joint venture with TCI, has reached the same conclusion regarding its Indiana systems.[72] Adelphia Communications Corporation ("Adelphia") reports that its partnership with TCI in the Buffalo ADI will make possible a two-way interactive system offering voice, data and Internet services.[73]

Similarly, two smaller cable operators, Bresnan Communications Company, L.P. ("Bresnan") and TCA Cable TV, Inc. ("TCA"), report that their own partnerships with TCI have enabled these operators to undertake extensive rebuilds to offer new services in video programming, telephony and Internet access. Indeed, Bresnan further reports that its new cable architecture allows it to provide high speed Internet access to schools and to provide the capability for distance learning at 100 educational sites.[74]

Chase Capital Partners ("Chase"), an institutional investor in both cable operators and wireless cable competitors, echoes the need for capital accessibility:

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[70] Adelphia *et al.* Comments at 9.

[71] *Id.* at 12.

[72] *Id.* at 14.

[73] *Id.* at 15.

[74] Bresnan/TCA Comments at 7-12.

> Funds also are needed for improvement of physical plants and expansion of services available to subscribers of established services, such as cable. The pace of technological advance is gaining momentum, and the need for capital to bring new technologies to market is more pressing than ever before . . . .[75]

Chase concludes that the "increasing pressure" for new capital to support technology upgrades "far outweighs the very low risk that a minority shareholder such as Chase would, or could, force actions by any company that are in conflict with the objectives of increasing competition and diversity."[76] For these reasons, Chase believes that the Commission should permit any non-controlling interest by an institutional investor, without attribution.[77]

In spite of this "consolidation" and the access to capital they afford, these transactions have actually resulted in decentralized control of cable management, as demonstrated by TCI's passive roles in its joint ventures even as the cable attribution rules perversely treat TCI as enlarging.[78] Indeed, the record indicates that minority investments have actually prevented further consolidation of the industry. Falcon reports that, absent the infusion of new investment capital provided by TCI, it would likely have been forced to sell out partially or entirely to a larger MSO, thus eliminating Falcon as an independent operator.[79] This result clearly would have disserved the goals of the horizontal ownership rules.

RCN, a vigorous competitor to cable in a number of geographic areas, actually seeks to extend the more restrictive program access attribution standards to the cable horizontal

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[75]Comments of Chase Capital Partners in CS Docket No. 98-82, at 3 (footnote omitted).

[76]*Id.* at 6. Chase's observations in this regard, made in the context of the more restrictive cable/MDS and cable/SMATV cross-ownership restrictions, are equally applicable here.

[77]Chase also points out that the current attribution rules for cable/MDS and cable/SMATV encompass even minority investors that provide financing to businesses in which they do not themselves compete.

[78]*See* II(C) *supra*.

[79]Adelphia *et al.* Comments at 10.

ownership rules.[80] First, RCN's proposal is contradicted by the common sense observation of Chase, a wireless cable investor, that the need for technological advances far outweighs the merely theoretical risk that minority investor might exert some sort of anticompetitive influence. Further, RCN's suggestion runs counter to the deregulatory intent of the Telecommunications Act of 1996. Indeed, RCN's proposals appear to be specifically calculated to hinder the competitors it faces in the New York area, as RCN asserts that its proposals would have prohibited TCI's investment in Cablevision (which, RCN admits, the FTC approved), as well as TCI's non-voting interest in Time Warner (which was also approved by the FTC).[81] Obviously, the cable attribution standard should not be further broadened by applying the program access attribution standards to benefit one company at the expense of enhanced competition overall.

Several companies have taken this occasion to argue for changes in the attribution rules that would effectively tighten the program access requirements.[82] For example, Ameritech argues that no attribution standard should be relaxed until the Commission extends the program access rules to non-vertically integrated cable networks.[83] Clearly, it is inappropriate for these parties to suggest what are essentially extensions of the program access rules in a proceeding to reassess the cable attribution standards generally (or even in the context of reviewing the horizontal ownership rules). Indeed, the existing attribution standards underlying the program

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[80]Comments of RCN Telecom Services, Inc. in CS Docket No. 98-82, at 2 ("RCN Cable Attribution Comments").

[81]*Id.* at 16-17.

[82]*See, e.g.,* Ameritech Comments; Comments of Wireless Communications Association International, Inc. in CS Docket No. 98-82 ("Wireless Association Comments") and RCN Cable Attribution Comments.

[83]Ameritech Comments at 5.

access rules already are the most strict of the standards applied to cable, and sweep far beyond the traditional broadcast attribution standards.

Finally, Ameritech asserts that the Commission must examine closely the effects of cable operators' investment in providers of broadband digital technologies. According to Ameritech, anticompetitive conduct it claims to see by the programming providers "may soon be replicated" in the market for technologies; vertically-integrated MSOs "may seek" to disadvantage competing MVPDs; and it is concerned that CableLabs may establish incompatible standards.[84] Ameritech does not even purport to show any such abuse or anticompetitive conduct by any technology provider. Nor has it shown why any technology provider would have an economic incentive not to distribute its technology or products as widely as possible. As discussed above, CableLabs' goal is to produce uniform specifications for digital cable boxes and other devices for widespread commercial use -- a procompetitive objective.

Further, the record in this proceeding demonstrates that investments by TCI that will facilitate advanced services pose no competitive risks. Falcon reports that its partnership with TCI will allow it to more easily finance capital needs, such as digital boxes, "without losing the right to select what kind of digital boxes to purchase . . . ."[85] LCI reports that Mr. Lenfest, not TCI, makes all equipment purchase decisions. LCI has had the opportunity to benefit from certain research and experience that TCI can afford, but has no obligation to select the ISP modem chosen by TCI or to participate in TCI's contract with General Instruments for set top boxes (although it has *chosen* to do so).[86] Moreover, as Time Warner

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[84]Ameritech Comments at 26.

[85]Adelphia *et al.* Comments at 10.

[86]*Id.* at 18-19.

pointed out in its Comments, the general regulation of such technology development is simply not within the Commission's jurisdiction.[87] Absent any record of anticompetitive conduct, speculation by competitors should not be the basis for extensive new regulation with such a questionable jurisdictional basis.

Accordingly, based on the record in this proceeding, Time Warner urges the Commission to adopt the following modifications to its cable attribution rules governing ownership issues other than horizontal ownership, which have been addressed extensively above:

- The Commission should raise the general voting stock benchmark from 5% to *at least* 10%, and the voting stock benchmark for passive investors from 10% to at least 20%.
- Nonvoting stock should remain nonattributable.
- The Commission should relieve from attribution any limited partnership interest of less than 33% in any partnership with at least 20 limited partners, if the partnership certifies to the Commission that such limited partner will not be actively involved in the partnership's media affairs. The Commission should also modify the insulation criteria with respect to publicly traded limited partnership interests to allow limited partners to vote on the election and removal of general partners and hold other protective rights, to align its rules with state and federal securities laws.
- The Commission should not adopt the unnecessary and burdensome equity/debt plus proposal.
- The Commission should eliminate, not expand, its cross-interest policy.

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[87]Ameritech seems to recognize this fact by suggesting that the Commission seek Congressional authority to regulate competitive practices involving equipment manufacturers and intellectual property owners. Ameritech Comments at 27.

- The Commission should expressly confirm that attribution is not triggered because an entity merely holds the power to appoint less than a majority of the board of directors of a corporation in which that entity does not otherwise hold an attributable interest.
- The Commission should clarify that, under its director recusal policy, a director is not required to recuse himself from any vote involving the company as a whole, or the entire budget of the company, in order to assure nonattributable status.

## CONCLUSION

WHEREFORE, Time Warner respectfully urges the Commission to modify its horizontal concentration and cable attribution rules in accordance with the proposals described above.

Respectfully submitted,

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