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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Review of the Commission's Cable Attribution Rules	)	

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To: The Commission

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SUMMARY

As demonstrated by the evidence presented in this proceeding, a relaxation of the Commission's cable attribution rules is warranted because the existing rules needlessly inhibit investment in programming and services and do not account for fundamental differences between the cable and broadcast industries. The Commission's attribution rules can and should be tailored to the realities of the cable business so as to encourage investment while ensuring that the goals of competition and diversity of programming are achieved.

The Commission should reject suggestions that would have it adopt limitations on the ability of cable operators to "cluster" their systems — to do so would deny consumers the acknowledged procompetitive and cost reducing benefits provided by clustering and would result in less diversity in video programming. The Commission should also avoid adoption of an attributable interest standard which is unauthorized by the Communications Act. Section 628 of the Communications Act cannot be read to apply to entities in which a cable operator has no attributable interest, and the Commission's rules should not be amended to encompass other business relationships because the attribution rules already include non-ownership interests which confer actual working control over cable operators. Such actual control should be the touchstone of the cable attribution standard.

Comcast therefore supports the comments of institutional investors and the cable industry, which recommend: (i) increasing the limit for cognizable ownership interests from five percent of voting equity to at least ten percent; (ii) expanding the investment company rule to include non-passive institutional investors; (iii) including insulated LLC interest holders in the insulated limited partner exception; and (iv) adopting a rule which allows companies to certify

that they have no direct or indirect material involvement in the media activities of a cable operator, thereby freeing them from an otherwise attributable interest.

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Act of 1992	)	
	)	
	)	
Review of the Commission's Cable	)	
Attribution Rules	)	

To: The Commission

REPLY COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

Comcast Cable Communications, Inc. ("Comcast" or the "Company"), by its attorneys and pursuant to Section 1.415(c) of the Commission's rules, 47 C.F.R. § 1.415(c), hereby submits these Reply Comments in the above-captioned proceeding.

INTRODUCTION

The comments that have been filed in this proceeding demonstrate that the adoption of more stringent cable television attribution rules is unnecessary. There is abundant evidence in the record which makes it amply clear that more restrictive attribution rules would inhibit new investment in programming and services, and that the Commission should relax, rather than implement new restrictions on cable ownership. Those parties' comments that would have the Commission adopt more stringent ownership provisions — such as a limitation on clustering of cable systems and an application of the program access rules to entities and business relationships not contemplated under the Communications Act — should be rejected because they would result in less, rather than more, diversity in video programming and would create an uneven playing field. The concerns raised by those arguing for more stringent attribution rules have already been addressed by current regulations which prescribe the conditions under which the programming of vertically integrated companies may be offered to non-cable multichannel video programming distributors ("MVPDs").

The Commission should craft attribution rules which are tailored to the cable television industry and are not merely grafted from rules designed to regulate the business practices of television stations. Significant differences between the cable and broadcast industries militate toward the adoption of less stringent cable attribution rules. Such rules should encourage rather than inhibit investment in new programming and services by focusing on the degree to which an investor obtains actual working control over a cable operator and its programming choices. Comcast therefore supports the comments filed in this proceeding by Chase Capital Partners ("Chase"), the National Cable Television Association ("NCTA"), Time Warner Inc., and others, and urges the Commission to adopt its proposal to increase the ownership benchmark. The Commission should also relax the passive ownership standard and retain the single majority shareholder provision of the current rules.

DISCUSSION

1. The Cable Attribution Rules Should Be Relaxed To Reflect The Cable Market And To Encourage Investment.

As several commenters have demonstrated, the Commission's cable television attribution rules can and should be tailored to the realities of the cable business so as to encourage investment while ensuring that the Commission's goals of competition and diversity in the MVPD market are achieved. Commenters have identified significant differences between the single-channel programming provided by broadcast stations and the multitude of programming choices provided by cable systems. These distinctions, coupled with existing cable-specific regulations that guarantee a diversity of non-affiliated cable programming, justify a relaxation of the cable attribution rules.

Comcast supports the comments of institutional investors such as Chase — as well as cable industry commenters NCTA, Time Warner Inc., Tele-Communications, Inc. ("TCI"), and others — which recommend that the Commission amend the attribution rules by: (i) increasing the limit for cognizable ownership interests from five percent of voting equity to at least ten percent; (ii) expanding the investment company rule[1] to include non-passive institutional investors; (iii) including insulated LLC interest holders in the insulated limited partner exception;[2] and (iv) adopting a rule which allows companies to certify that they have no direct or indirect material involvement in the media activities of a cable operator, thereby freeing them from an otherwise attributable interest. Self-certification, coupled with an operational control standard, is an efficient administrative tool to ensure conformance with the Commission's attribution policies and regulations while providing the industry with a maximum degree of flexibility.

The commenters have demonstrated that the Commission's existing cable attribution rules needlessly reduce available capital to both cable operators and their wireless competitors. Chase observed in its comments that the current attribution rules limit the ownership interests of institutional investors to extremely small percentages regardless of whether those investors exert actual control over the companies in which they invest; the rules therefore inhibit the flow of

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1/ *See* 47 C.F.R. § 76.501, Note 2(c).

2/ *See* 47 C.F.R. § 76.501, Note 2(g).

capital needed by cable operators to introduce new products, services, and technologies.[3] The Commission itself has acknowledged that higher levels of nonattributable investment "may well attract new sources of capital . . . and would inevitably create greater flexibility for existing investors to increase their participation."[4] Because investors typically are not involved in the daily management or programming choices of cable operators, allowing increased investor participation will not diminish competition or diversity in the MVPD market. On the other hand, failing to allow it will limit the availability of capital, ultimately to the public's detriment. Successful capital formation is crucial to capital intensive undertakings such as system upgrades, Internet access, telephony, and introduction of digital technology and services. NCTA and others noted in their comments that additional financing made possible by relaxation of the cable attribution rules will allow operators to extend the use of their facilities into telephony and other services and will provide much needed competition in the local exchange market without threatening competition and diversity in the MVPD arena.[5]

Although the underlying goals of both the broadcast and cable attribution rules are to maximize competition and programming diversity. the structural differences between these industries require the adoption of separate cable attribution rules if the goals of competition and program diversity in the multichannel arena are to be achieved. Comcast therefore agrees with the comments submitted by TCI and NCTA, which demonstrate that significant differences between the broadcast and cable television industries warrant the relaxation of rules which were

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3/ Chase Comments at 1, 3.

4/ Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, *Notice of Proposed Rulemaking and Notice of Inquiry*, 7 FCC Rcd 2654, 2655 (1992).

5/ *See, e.g.*, NCTA Comments at 14; Mediacom, LLC comments at 8.

designed specifically for business arrangements arising in the broadcast market and which have little relevance to the distribution of cable services.[6] Unlike broadcasters, cable operators act as an outlet for a multitude of television stations and cable programmers, rather than a single network's offerings. Consequently, in contrast to the broadcast model, little or no risk exists that a minority, non-controlling investor in a cable system will have any significant influence over the diverse programming choices available over the system. A relaxation of the cable attribution standard is warranted because the purpose of the rule — to ensure that the flow of programming to consumers is unimpeded — will be achieved under a less restrictive regime.

Moreover, the Commission's existing cable-specific regulations — including mandatory carriage, leased access, and public, educational, and governmental ("PEG") channel set-asides — already assure that the concerns regarding diversity and competition in programming are satisfied. Under these circumstances, relaxed attribution rules designed specifically for the cable television industry are warranted, and Comcast therefore urges that the Commission adopt its proposal in the *Notice* to increase the ownership benchmark while relaxing the passive ownership standard and retaining the single majority shareholder provision of the current rule.

2. The Commission's Review Of The Cable Attribution Rules Should Not Result In Depriving Consumers Of The Benefits Of "Clustering."

Against the tide of evidence submitted in the comments demonstrating the benefits provided by the "clustering" of cable television systems, RCN's suggestion that the Commission should adopt rules "prohibiting ownership or control of cable systems passing more than 20% of

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6/ *See* NCTA comments at 3-4; TCI comments at 11-17.

the total homes passed in any of the top 50 television markets"[7] should be rejected. This proposal runs counter to the conclusions of both Congress and the Commission, and would most certainly deprive consumers of the procompetitive and cost reducing benefits which are achieved by "clustering."

It has been recognized that clustering can have significant procompetitive effects.[8] Comcast has first-hand experience that clustering provides means by which costs can be reduced, operating and management efficiencies can be improved, and system redundancies eliminated. Clustering provides a broader and more attractive base for advertisers and enhances the ability of cable operators to compete successfully with local exchange carriers ("LECs") and electric utilities in providing data transmission and local telephone services. Clustering also enhances the ability of a cable operator to be more competitive across a range of markets and technologies, including video, telecommunications, and the Internet. All of the cost reductions and efficiencies which clustering makes available redound to the benefit of cable subscribers. Contrary to RCN's

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7/ RCN Comments at 16.

8/ *See, e.g.*, 47 U.S.C. § 523(f)(2); Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fourth Annual Report*, CS Docket No. 97-141, 11 Communications Reg. 147, __ FCC Rcd __ at para. 140 (released January 13, 1998); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Third Annual Report*, 12 FCC Rcd 4358 at para. 138 (1997); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report*, 11 FCC Rcd 2060 at para. 146 (1995); Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *First Report*, 9 FCC Rcd 7442 at paras. 151, 153 (1994). The Commission has also acknowledged the benefits of clustering in waiving the former three-year holding requirement and in approving various cable system transactions. *See, e.g., HC Crown Corp.*, 10 FCC Rcd 1611 (1994) (waiver of holding requirement); *Cox Cable Communications, Inc. and Times Mirror Company*, 10 FCC Rcd 1559 (1994) (system acquisition).

argument, therefore, clustering actually enhances rather than impedes competition in both the telecommunications and MVPD markets.

In conjunction with its proposal to deny consumers the acknowledged benefits of clustering, RCN argues that to limit clustering, "[o]wnership or control should be defined to include attributable interests as currently applied by the Commission to its conduct-oriented cable attribution rules."[9] The Commission, however, has already rejected RCN's contention that attribution in the structural context of the Commission's ownership rules should be subject to the more stringent requirements of rules designed to deter specific improper conduct, and RCN has offered no valid reason to conclude otherwise. In the Horizontal Ownership proceeding, the Commission rejected any reduction in the thirty percent horizontal ownership limit and any other reduction of existing levels of cable ownership.[10] In doing so, the Commission noted that the thirty percent limit is a *structural*, rather than a *conduct-oriented*, complement to the program access provisions, which would therefore be subject to less restrictive attribution standards, and found that an expansion in cable programming sources and networks had occurred in conjunction with the cable operators' formation of regional clusters.[11] Thus, no reason exists to apply the more restrictive conduct-oriented attribution standards to the structural context of ownership limits. In essence, RCN's proposals amount to little more than an effort to achieve a competitive

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9/ RCN Comments at 16.

10/ Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket No. 92-264, FCC 98-138, 1998 FCC LEXIS 3108 at para. 45 (released June 26, 1998) (Horizontal Ownership Reconsideration).

11/ *Id.* at paras. 42-43.

advantage for itself by ensuring that cable operators' costs of doing business will remain as high as possible, and should therefore be rejected.

3. The Commission Should Not Adopt An Attributable Interest Standard Which Is Unauthorized By The Communications Act.

The Commission should also reject the WCA's request that the attributable interest definition found in the program access rules, and which the Commission implemented pursuant to Section 628(b) of the Act,[12/] be rewritten to apply to entities in which a cable operator has no attributable interest[13/] because to do so would be contrary to the plain language of the Act. WCA's request that Section 76.1000(b) of the Commission's rules[14/] be amended to include business relationships other than those specified by the Act[15/] also should be rejected because the Commission's attribution rules already encompass non-ownership interests which confer actual working control over cable operators.

WCA contends that Microsoft's passive investment in Comcast combined with Microsoft's fifty percent ownership of MSNBC should result in the attribution to Comcast of an interest in MSNBC, an entity in which Comcast holds no interest whatsoever. WCA bases its contention on the Commission's rule adopted pursuant to Section 628(b), which provides in pertinent part that:

> It shall be unlawful for . . . *a satellite cable programming vendor in which a cable operator has an attributable interest* . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming

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12/ 47 U.S.C. § 548(b).

13/ WCA Comments at 7-15.

14/ 47 C.F.R. § 76.1000(b).

15/ WCA Comments at 15-19.

> distributor from providing satellite cable programming . . . to subscribers or consumers.[16/]

The statute unambiguously specifies the entities and the relationships which are subject to the program access provisions. It also unambiguously directed the Commission to adopt regulations in conformity with Section 628(b).[17/] Nothing in Section 628 even remotely suggests that the program access provisions are applicable in the attribution context to entities other than satellite-delivered cable programming networks which are directly owned in whole or in part by cable operators; indeed, the plain language of the statute confirms that only such entities and relationships are subject to it.

The law is well-settled that where Congress has spoken directly to the precise question at issue, the Commission must give effect to its unambiguously expressed intent.[18/] The Commission properly applied the attribution provisions of its program access rules[19/] only to "satellite cable programming vendor[s] in which a cable operator has an attributable interest."[20/] Section 628 cannot be read "to include a situation where a noncable entity holds simultaneous ownership interest [*sic*] in a cable operator and a satellite-delivered cable network."[21/] This

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16/ 47 U.S.C. § 548(b) (emphasis added).

17/ "[T]he Commission shall . . . prescribe regulations to specify particular conduct that is prohibited by subsection (b)." 47 U.S.C. § 548(c)(1).

18/ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

19/ 47 C.F.R. §§ 76.1000 – 76.1004.

20/ 47 U.S.C. § 548(b); *see* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order* 8 FCC Rcd 3359 (1993) ("With respect to the entities covered by Section 628 we will follow the plain language of the statute . . ." *Id.* at para 10; "To provide certainty to the cable industry and the public, it is imperative that we develop a clear directive with respect to which entities will be deemed subject to the statute and our implementing rules." *Id.* at para. 33).

21/ WCA Comments at 7 (footnote omitted).

interpretation exceeds what Congress unambiguously specified in the Act, and the Commission is without authority to alter the statutory scheme.[22]

WCA's argument that the incorporation of Note 2 from the Section 76.501 (cross-ownership) attribution standards into Section 76.1000(b)[23] means that the program access rules apply to entities other than satellite-delivered cable networks or programmers is simply wrong. The preamble of Note 2, to which WCA refers and upon which its argument hinges, governs a procedural application of the attribution standards to the Commission's broadcast/cable television cross-ownership rules set out in Section 76.501. Note 2 provides a road map in the interpretation of this section, but it is not a substantive rule which permits or proscribes the common ownership of a broadcast station and cable system. The proscription against such a combination is found in the text of the rule itself. Similarly, Note 2 cannot serve as a substantive rule which attributes an interest that is not proscribed by Section 76.1000(b) or Section 628(b) of the Act. WCA has offered no valid rationale for the Commission to alter the plain meaning of the Act or its existing rule, and its attempt to apply the program access rules to entities other than those in which a cable operator has an attributable interest should be rejected.

The Commission should also decline WCA's request that Section 76.1000(b) be amended to include non-attributable interests. As the Commission has noted, "the ownership attribution rules are intended to identify those relationships that confer on their holders a degree of influence or control over key business decisions, including budget, personnel, programming, and technology practices of cable entities, such that the holders should be subject to the

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22/ *MCI Telecommunications Corp. v. American Tel. & Tel.*, 512 U.S. 218, ___, 114 S.Ct. 2223, 2233 (1994).

23/ WCA Comments at 11.

Commission's regulations."[24] Because the Commission's program access rules already encompass non-ownership relationships that confer "actual working control" over cable operators,[25] implementation of this new standard is unnecessary. Moreover, WCA has presented no evidence that it actually has been denied any video programming due to a business relationship, such as a joint venture, which is not explicitly contemplated in Section 76.1000(b). As proposed by several commenters, the Commission's attribution rules should only be triggered by operational control rather than by a standard which attempts to qualify and define business relationships.

WCA strenuously argues for more stringent application of the attribution rules to cable operators, but it predicably urges the Commission to relax any ownership attribution standards applicable to wireless operators.[26] Although this contradiction is not surprising, WCA's proposals should be rejected because they will lead to an unlevel playing field.

24/ Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Review of the Commission's Cable Attribution Rules, *Notice of Proposed Rulemaking*, FCC 98-112, CS Docket No. 98-82 at para. 12 (released June 26, 1998) (the "*Notice*").

25/ *See* 47 C.F.R. § 76.501, Note 1.

26/ WCA Comments at 19-22.

CONCLUSION

For the foregoing reasons, Comcast urges the Commission to reject proposals which would limit the "clustering" of cable television systems and which would incorporate entities and business relationships not contemplated by the Communications Act into the program access rules. Rather, the Commission should relax its cable attribution standards in order to encourage competition and investment in new programming and services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ruby Brown a secretary with the law firm of Dow, Lohnes & Albertson, hereby certify that a true and correct copy of the foregoing Reply Comments of Comcast Cable Communications, Inc. was served this 3rd day of September, 1998 via United States first-class mail, postage prepaid, upon the following:

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