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September 3, 1998

VIA HAND DELIVERY

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

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 92-264
Horizontal Ownership Limits

Dear Ms. Salas:

Transmitted herewith, on behalf of Adelphia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc. (the "Companies"), are an original and nine copies of reply comments in the above-referenced proceeding.

Because the Companies' reply comments also bear on issues raised in the Commission's Notice of Proposed Rulemaking in CS Docket No. 98-82, the Companies are 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,

Stuart F. Feldstein

Stuart F. Feldstein
Counsel for Adelphia Communications Corporation; Falcon Holding Group, L.P.; Insight Communications Company, L.P.; and Lenfest Communications, Inc.

Enclosure

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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	)	

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

To: The Commission

JOINT REPLY COMMENTS OF ADELPHIA COMMUNICATIONS CORPORATION, FALCON HOLDING GROUP, L.P., INSIGHT COMMUNICATIONS COMPANY, L.P. AND LENFEST COMMUNICATIONS, INC.

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Date: September 3, 1998

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SUMMARY

In their joint comments, Adelphia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc. (the "Companies") demonstrated the procompetitive benefits of their individual transactions with Tele-Communications, Inc. ("TCI"). Three other commenters made the same showing. These transactions offer consumers better cable television services, more responsive, efficient management, and promise widespread deployment of advanced communications services and potential local telephone competition. However, even though TCI cedes management control over the affected systems in these transactions, the current horizontal ownership rules credit TCI with all of the subscribers in the joint ventures. This result is clearly contrary to the congressional mandate that the Commission's cable horizontal ownership rules allow for efficiencies from consolidation and reflect the dynamic nature of the communications marketplace.

Several revisions are clearly warranted to correct the dated and counterproductive cable horizontal ownership and attribution rules. First, the Commission should attribute cable subscribers to an entity only where that entity exercises managerial control over a cable system's day-to-day operational matters. The Lenfest model illustrates that TCI can be relied upon to relinquish managerial authority over the cable systems it contributes to its joint ventures. Therefore, it makes no sense to attribute those systems' subscribers -- or any of the Companies' subscribers -- to TCI. If the Commission is unwilling to entirely ignore the passive investment by an entity, such as TCI, other than the managing partner in a cable partnership or joint venture, then at a very minimum the Commission should apply a *pro rata* approach to counting subscribers held by cable joint ventures or partnerships in order to ameliorate the double counting problem.

Second, the Commission should evaluate any horizontal ownership limit based on total MVPD subscribers and not on cable homes passed. To do otherwise would ignore the dramatic technological and competitive developments in the MVPD marketplace since the rules' adoption and increase cable operators' compliance burdens. At the same time, the statute clearly calls for the numerator of such a limit to include only cable subscribers.

Third, the Commission should adopt the recommendation of the vast majority of commenters and raise the 30% horizontal ownership limit. The empirical evidence shows a thriving market for video programming services that is insulated from potential manipulation by competitive developments and the Commission's specific behavioral rules designed to address anticompetitive conduct. Therefore, in light of the substantial and well-documented efficiencies associated with horizontal consolidation, the Commission must raise the 30% limit to give effect to Congress' intent. Arguments intended to cast aspersions on cable consolidation in an attempt to scare the Commission into rejecting the obvious decision to raise the 30% horizontal ownership limit should be dismissed.

These basic revisions to the Commission's cable horizontal ownership rules will do much to bring them into greater harmony with Congressional intent and current marketplace realities.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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	)	

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

To: The Commission

JOINT REPLY COMMENTS OF ADELPHIA COMMUNICATIONS CORPORATION, FALCON HOLDING GROUP, L.P., INSIGHT COMMUNICATIONS COMPANY, L.P. AND LENFEST COMMUNICATIONS, INC.

Adelphia Communications Corporation ("Adelphia"); Falcon Holding Group, L.P. ("Falcon"); Insight Communications Company, L.P. ("Insight"); and Lenfest Communications, Inc. ("LCI") (collectively, the "Companies"),[1] by their attorneys, jointly submit these reply

[1]The Companies, their subsidiaries and controlled affiliates operate numerous cable television systems in various communities across the United States.

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").[2] The FNPRM seeks comment on a variety of issues relating to the Commission's horizontal ownership rules,[3] the effectiveness of which remain stayed pending judicial resolution of challenges to the validity of those rules.[4] The majority of commenters in this proceeding support a relaxation of the cable horizontal ownership rules in order to better reflect current competitive realities and to encourage the competitive and consumer benefits that result from the efficiencies gained through horizontal concentration. The Commission must liberalize the horizontal ownership limits in order to better achieve the statutorily mandated balance between encouraging such benefits while avoiding any theoretical harms that could result from increased horizontal concentration.[5] The Companies and other commenters supporting a relaxation of the horizontal ownership rules have provided the Commission with suggested concrete changes to these rules in order to better achieve that delicate balance. The Companies reiterate these suggested changes herein.

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[2]The discussion of attribution issues relating to the Commission's horizontal ownership rules also implicates the Commission's Notice of Proposed Rulemaking in CS Docket No. 98-82, FCC 98-112, released June 26, 1998 ("Cable Attribution NPRM"). Accordingly, both rulemaking proceedings are included in the caption to these comments, and copies of these reply comments are being filed in both dockets.

[3]47 C.F.R. § 76.503.

[4]*See* Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (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).

[5]*See* 47 U.S.C. § 533(f) (instructing the Commission to "account for efficiencies and other benefits that might be gained through increased ownership and control" and "ensure that no cable operator . . . can unfairly impede . . . the flow of video programming from the video programmer to the consumer.").

I. ATTRIBUTION SHOULD BE BASED ON MANAGERIAL CONTROL.

As advocated in the Comments filed by the Companies, only the entity exercising managerial control in a partnership or other joint venture should be deemed to hold an "attributable interest" under the Commission's horizontal ownership rules.[6] According to the goal of the attribution rules articulated in the statute to ensure a "flow" of video programming, it makes no sense to attribute subscribers to an entity that holds no overall responsibility for programming or other management decisions affecting those subscribers. Therefore, when an investor contributes cable systems to a joint venture but cedes day-to-day operating authority with respect to the systems it contributes, and continues to have no managerial authority over the systems contributed by the other joint venturer, it seems clear that such investor should not have either of those systems' subscribers attributed to it. And yet, although such joint ventures offer consumers significant benefits, *all* of the subscribers served by the joint venture are typically attributed to *each* joint venturer under the current attribution rules. Consequently, consumers could be denied the substantial benefits of horizontal concentration to the extent that such beneficial combinations are precluded by the horizontal ownership cap.

The Commission must alter the current attribution rules to eliminate this overbroad and counterproductive outcome. The individual joint ventures between the Companies and Tele-Communications, Inc. ("TCI") illustrate the hindering effect of the current horizontal ownership attribution rules. In their Comments, the Companies provided in-depth descriptions of their joint ventures with TCI. While the form of each investment differs, all of the joint ventures are

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[6]Comments of Adelphia *et al.* in MM Docket No. 92-264 and CS Docket No. 98-82, at 3-20 ("Companies' Comments").

structured so that TCI does not have a majority share and, most importantly, can exercise no control over the joint ventures' day-to-day decisions on programming, personnel, technology, marketing, advertising and other basic management functions. For example, the partnership agreement between Falcon and TCI expressly provides that Falcon will exclusively manage the business of the joint venture between the parties.[7] Similarly, TCI's agreements with Insight and Adelphia grant ultimate authority over their joint ventures to Insight and Adelphia, respectively, clearly establishing TCI's role as a passive investor.[8]

Indeed, LCI's longstanding partnership with TCI, in which LCI retains control over cable system management, provides a concrete operational model of how the respective joint ventures between TCI and Adelphia, Falcon and Insight will operate in practice.[9] The LCI model also shows that the option to take advantage of TCI's purchasing power in the programming market by signing an agreement with Satellite Services, Inc. does not in any way curtail the joint venturers' programming freedom or otherwise confer influence on TCI.[10] The detailed

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[7]Companies' Comments at 12.

[8]*Id.* at 14-16.

[9]*Id.* at 17-19.

[10]The proposal by MediaOne Group, Inc. to eliminate double counting of subscribers only where programming is not under common control contains an overly restrictive definition of control if it means that LCI's subscribers should be attributed to TCI where LCI *chooses* to take advantage of TCI's bargaining power in the programming market. Comments of MediaOne Group, Inc. In MM Docket No. 92-264 and CS Docket No. 98-82, at 24-26 ("MediaOne Comments"). As discussed in the Companies' initial comments, LCI retains all decisionmaking authority on programming for its systems in spite of TCI's 50% stock ownership in LCI. It makes no sense to find control simply where LCI exercises its completely voluntary option to obtain programming discounts that benefit its subscribers. Indeed, this is precisely the kind of consumer benefit flowing from horizontal ownership which Congress directed the Commission to

(continued...)

descriptions of their partnerships with TCI jointly submitted by Bresnan Communications Company, L.P. ("Bresnan") and TCA Cable TV, Inc. ("TCA") and the explanation of the joint venture between TCI and Cablevision Systems Corporation ("Cablevision") further demonstrate that TCI has ceded responsibility over day-to-day management to its joint venturers, even where TCI possesses a majority stock share, as in the case of the TCI-Bresnan transaction.[11]

By vesting control in the non-TCI parties to these joint ventures, these transactions offer the benefit of decentralized, local management through existing cable operators with longstanding ties to their subscribers' communities.[12] In addition, as described at great length in the majority of comments submitted in these proceedings, joint ventures of the type pursued by the Companies with TCI provide many more advantages to consumers than merely decentralized and improved management. The simple economies of scale principle behind cable operators' clustering strategies leads to a host of derivative advantages for consumers, including the development of

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[10](...continued)
promote. 47 U.S.C. § 533(f)(2)(D).

[11]*See* Comments of Bresnan Communications Company, L.P. *et al.* in MM Docket No. 92-264 and CS Docket No. 98-82, at 5-14 ("Bresnan/TCA Comments"); Comments of Cablevision Systems Corporation in MM Docket No. 92-264 and CS Docket No. 98-92, at 12-17 ("Cablevision Comments").

[12]*See, e.g.,* Comments of Tele-Communications Inc. in MM Docket No. 92-264, at 49-50 ("TCI Horizonal Ownership Comments"); Bresnan/TCA Comments at 7-12 (citing the support of the mayors in several communities in Minnesota and Michigan for the TCI-Bresnan transaction because of Bresnan's involvement in local activities and responsiveness to consumers.).

regional sports and news programming,[13] better signal quality through integrated system architecture,[14] and enhanced competition in advertising.[15]

Numerous commenters also pointed out that clustering offers an accessible pool of capital with which cable operators can undertake the extraordinary and expensive task of upgrading their systems, which is absolutely critical if cable is to expand to provide advanced communications services such as interactive video, data transmission and high speed Internet services.[16] Clustering is particularly important for smaller MSOs because the substantial network architecture and technology costs of these advanced communications services must be spread out across a significant subscriber base to make the investments cost-effective.[17] RCN Telecom Services, Inc. ("RCN"), which complained about the lack of evidence that large-scale operations are necessary for system upgrades,[18] has ignored the billions of dollars cable operators are investing to upgrade their systems in order to provide advanced communications services.[19]

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[13]Cablevision Comments at 7-11.

[14]Comments of Time Warner Inc. in MM Docket No. 92-264 and CS Docket No. 98-82, at 10 ("Time Warner Comments").

[15]MediaOne Comments at 12-15.

[16]*Id.* at 12-15; Time Warner Comments at 10; Cablevision Comments at 12-17; Bresnan/TCA Comments at 14-18; Comments of the National Cable Television Association in MM Docket No. 92-264, at 9 ("NCTA Horizontal Ownership Comments"); TCI Horizontal Ownership Comments at 49-53.

[17]TCI Horizontal Ownership Comments at 51-52.

[18]Comments of RCN Telecom Services, Inc. in MM Docket No. 92-264, at 11-13 ("RCN Horizontal Ownership Comments").

[19]LCI estimates that it will invest approximately $400 million to upgrade its systems. Time Warner Cable has undertaken a five year, $4 billion system upgrade. *See* Testimony of Joseph J.

(continued...)

Horizontal ownership rules that allow for regional clustering are particularly important if cable is to realize the Commission's long overdue goal of meaningful competition in local telephony. As the vigorous opposition of Ameritech New Media, Inc. ("Ameritech") and RCN demonstrates, cable possesses significant potential to finally bring competition to the local telephone market. But cable operators can compete with incumbent local exchange companies (ILECs), who are not subject to any specific FCC restrictions on their size, only if allowed to serve a consolidated geographically contiguous area.[20] Indeed, the pending GTE/Bell Atlantic and pending Ameritech/SBC/SNET mergers, which will result in each of the two emerging entities controlling 35.8% and 33.8%, respectively, of the nation's telephone access lines,[21] illustrate the importance of geographical continuity to the cost efficient provision of local telephony services. But Ameritech and RCN continue to oppose the same business strategy of regional clustering on the part of cable operators. The hypocrisy and fear of competition evident in Ameritech's and RCN's opposition to clustering should cause the Commission to disregard entirely their arguments on clustering, particularly in the absence of any credible evidence that

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[19](...continued)
Collins, President and CEO, Time Warner Cable, before the Senate Committee on Commerce, Science and Transportation, July 9, 1998. *See also* Testimony of Leo Hindery, Jr., President, Tele-Communications Inc., before the Senate Subcommittee on Antitrust, Business Rights and Competition, October 8, 1997 (estimating that TCI will spend $1.7 billion over three years for system upgrades).

[20]Comments of AT&T Corp. in MM Docket No. 92-264, at 3-11 ("AT&T Comments"); TCI Horizontal Ownership Comments at 47-49; Time Warner Comments at 10; NCTA Horizontal Ownership Comments at 10-11; MediaOne Comments at 12-23; Cablevision Comments at 7-17.

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

horizontal concentration among cable operators has impeded the free flow of video programming.[22]

The current attribution rules treat TCI as expanding even as it pursues a comprehensive and systematic strategy to reduce its control over cable systems nationwide through its various transactions with other cable operators, including the Companies. Given that the purpose of the attribution rules is to identify those interests that confer influence and control,[23] attributing to TCI subscribers served by cable systems in which TCI stands merely as a passive investor makes no sense. Further, the extensive benefits only available to consumers through consolidation among cable operators illustrate that the FCC's regulations instead should encourage exactly these kinds of transactions. But even though these transactions do not confer control on TCI, and in spite of the obvious benefits of clustering, the Commission's rules actually discourage the kinds of beneficial joint ventures described by the Companies and other commenters. The Commission should adopt a managerial control test for attribution to avoid this outcome so obviously contrary to congressional intent. The Companies reiterate that a written certification to the Commission by the party without managerial control satisfying certain criteria evidencing a lack of control beyond fundamental minority protections should be more than sufficient to implement the managerial control test and to identify nonattributable interests under the horizontal ownership rules.[24]

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[22]*See* III *infra.*

[23]The cable attribution rules "are intended to identify those relationships that confer on their holders a degree of influence or control over key business decisions." Cable Attribution NPRM at ¶ 12.

[24]*See* Companies' Comments at 20-21.

Alternatively, if the Commission is unwilling to entirely ignore the passive investment by an entity other than the managing partner in a cable partnership or joint venture, then at a very minimum the Commission should recognize that a minority ownership interest should not count the same as 100% ownership. A *pro rata* approach to counting subscribers held by cable joint ventures or partnerships would recognize this distinction and ameliorate the double counting problem, while still accounting for the possibility that a minority investor may have some ability to influence the operations of a cable system in which it has invested, albeit to a much lesser degree than the managing partner of any such venture.

The use of a *pro rata* approach for counting subscribers served by systems owned by partnerships or other joint ventures for purposes of measuring compliance with any cable horizontal ownership rule is analogous to the use of the UHF discount in measuring compliance with the television station multiple ownership rule. For television multiple ownership purposes, the Commission has recognized that UHF stations typically have a reduced coverage area, smaller audience, and generally lower market value as compared with commercial VHF stations serving the same ADI or DMA.[25] Thus, in recognition of the many disparities between UHF and VHF television stations, UHF stations are only attributed with 50% of the television households in their ADI markets for determining compliance with the television multiple ownership rules, whereas VHF stations are attributed with 100% of such television households.[26]

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[25] In the Matter of Amendment of § 73. 3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 74, ¶¶ 42-44 (1985).

[26] 47 C.F.R. § 73.3555(e)(2)(i).

II. THE HORIZONTAL OWNERSHIP LIMIT SHOULD BE BASED ON TOTAL MVPD SUBSCRIBERS AND NOT ON HOMES PASSED.

The Companies reiterate that the measure of any cable horizontal ownership limit ought to be based on total multichannel video programming distributor ("MVPD") subscribers and not on cable homes passed.[27] In order both to adhere to the statute and most accurately assess a cable operator's extent of influence in the delivery of video programming services, the Commission should examine the number of cable subscribers served by a particular entity (in the numerator) against the total nationwide MVPD subscribers (in the denominator).

According to the plain text of the statute, the Commission must base its horizontal ownership limits "on the number of *cable subscribers* a person is authorized to reach *through cable systems*."[28] Therefore, the statute dictates that an entity with both cable and non-cable subscribers should only have its cable subscribers factored into the numerator for purposes of analyzing its compliance with the cable horizontal ownership limits.

As most commentators addressing the issue urged, the denominator must incorporate all MVPD subscribers if it is to accurately assess the extent of actual horizontal concentration and the potential to restrict the flow of independent programming.[29] In ordering the Commission to promulgate horizontal ownership limits, Congress envisioned that the rules would undergo periodic revision and specifically instructed that any horizontal ownership rules reflect the

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[27]*See* Companies' Comments at 21-24.

[28]47 U.S.C. § 533(f)(1)(A) (emphasis added).

[29]Time Warner Comments at 27-32; NCTA Horizontal Ownership Comments at 17-18; TCI Horizontal Ownership Comments at 57-65; MediaOne Comments at 28-29.

"dynamic nature of the communications marketplace."[30] It is irrefutable that the marketplace for video programming delivery has undergone radical change since 1992. In 1992, DBS systems did not even exist; today, they exert significant and increasing competitive pressure on cable operators, competing for subscribers and providing independent video programmers yet another alternative platform in addition to MMDS, SMATV and other established cable competitors. The existing open video service (OVS) provided by RCN and other telephone companies, as well as the imminent LMDS service, promise that the trend toward increasing competition for delivery of video services will continue.

In spite of these developments, all of which have intensified significantly since the Commission promulgated the horizontal ownership limits in 1993, Consumers Union *et al.* ("Consumers Union") continue to argue for the antiquated cable homes passed measurement.[31] Consumers Union and their joint commenters appear to have simply stuck their collective head in the sand by discounting the impact on the video delivery and programming marketplaces of, for example, the over 7 million current DBS subscribers.[32] To assess the horizontal ownership limits based solely on cable subscribers or cable homes passed is analogous to excluding electronic messages from a measure of the current methods of written correspondence. A denominator

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[30]47 U.S.C. § 533(f)(2)(E).

[31]Comments of Consumers Union, *et al.* in MM Docket No. 92-264, at 6-7 ("Consumers Union Horizontal Ownership Comments").

[32]Monica Hogan, "DBS Sales Heat Up In June," Multichannel News, July 20, 1998, at 3. The Commission estimates that DBS will serve approximately 15,000,000 DBS subscribers by sometime between 2001-2002. 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, ¶ 55 (rel. Jan. 13, 1998).

consisting solely of cable subscribers or cable homes passed simply does not adjust a cable operator's horizontal ownership percentage in the face of increasing competition from non-cable MVPDs. As a result, a denominator based solely on total nationwide cable subscribers, for example, would lead to the anomalous result that, as competing MVPDs garner a growing share of total MVPD subscribers, a cable operator serving fewer and fewer of the nation's total MVPD subscribers could still fall into violation of the horizontal ownership rules if total U.S. cable subscribers decrease. Accordingly, in order to establish an essentially self-adjusting mechanism, the denominator in any horizontal ownership cap calculation should include all MVPD subscribers. The Commission simply cannot ignore the dramatic impact of DBS, MMDS and the other technologies on the video delivery and programming marketplaces by including only cable homes passed or cable subscribers in the denominator.

RCN offers a similarly unpersuasive argument for maintaining cable homes passed as the proper measure for the horizontal ownership limits that is contradicted by marketplace reality, Commission precedent and its own internal inconsistency. While RCN claims that "it is the number of homes passed by the operator that is the true measure of the operator's market influence,"[33] in fact, as discussed, and as recognized by the Commission,[34] cable faces increasing competition from alternative MVPDs, thus reducing the accuracy of cable homes passed as any sort of indicator of cable's market power or penetration. The fact that negotiations between cable operators and video programmers center on the number of cable subscribers and not on cable homes passed also shows that RCN's statement is not grounded in reality. Further, RCN

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[33]RCN Horizontal Ownership Comments at 18.

[34]FNPRM at ¶ 84.

illustrates its blatantly self-serving inconsistency by *excluding* MVPD homes passed from the denominator on the grounds that it "would grossly distort the size of the MVPD market"[35] but proposing that all MVPD homes passed by an entity be *included* in the numerator for a cable operator who holds an interest in another non-cable MVPD. Under RCN's proposal, a cable operator with an attributable interest in a DBS service with a national footprint would have virtually *all* of the nation's households included in its numerator but only the number of cable homes passed in the denominator. Such a measure for purposes of any horizontal ownership limit would indeed be a "gross distortion" of the MVPD marketplace as well as a facial absurdity, resulting in cable operators with supposed horizontal concentration shares in excess of 100%.

In addition to statutory directive and sound policy, the Commission should reject a homes passed standard for calculating horizontal ownership because statistics regarding homes passed are not readily available, thus increasing cable operators' compliance burdens. By contrast, the Commission publishes MVPD subscriber data in its annual competition reports, providing a single, readily accessible number that can be used for the horizontal concentration denominator value. Then, all a cable operator need do to calculate the numerator value is to check its own internal billing records to determine the number of cable subscribers it serves nationwide.

III. THE COMMISSION SHOULD RAISE THE CURRENT 30% HORIZONTAL OWNERSHIP LIMIT.

Most commenters agreed with the Companies that the current 30% cap on horizontal ownership is too low.[36] The empirical evidence shows a vital market for independent

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[35]RCN Horizontal Ownership Comments at 17.

[36]Time Warner Comments; TCI Horizontal Ownership Comments; NCTA Horizontal

(continued...)

programming and, therefore, given the presence of other specific rules that address any potential anticompetitive incentives, the Commission should now raise the 30% horizontal ownership cap.

In opposing a liberalization of the 30% horizontal ownership limit, Consumers Union cites as one of the purposes of the Cable Television Consumer Protection and Competition Act of 1992 "ensur[ing] that cable operators do not have undue market power vis-a-vis video programmers."[37] As discussed in their comments, the Companies agree that reducing the risk of foreclosure of independent programming services is the key goal of the horizontal ownership limits.[38] However, in light of the Commission's own empirical evidence demonstrating the increasing strength of independent video programming services and the emergence of alternative video delivery mechanisms ensuring additional outlets for unaffiliated programming, Consumers Union exhibits a fundamental misunderstanding of the Commission's task in the instant proceeding. As thoroughly and irrefutably demonstrated by several commenters, there simply is no case to be made that horizontal concentration has threatened to foreclose independent programming services, even as TCI has approached the 30% horizontal ownership limit.[39]

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[36](...continued)
Ownership Comments; MediaOne Comments; Bresnan/TCA Comments; Cablevision Comments; AT&T Comments.

[37]Consumers Union Comments at 3, *citing* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) at § 2(b) ("1992 Cable Act").

[38]*See* Companies' Comments at 4 (*citing* text and legislative history to the 1992 Cable Act).

[39]*Id.* at 25-29; Time Warner Comments at 12-17; TCI Horizontal Ownership Comments at 28-30; NCTA Horizontal Ownership Comments at 3-9; Bresnan/TCA Comments at 27-29; MediaOne Comments at 6-10. Significantly, no independent programmer has filed comments in this proceeding to oppose relaxation of the horizontal ownership limit.

Thus, Consumers Union's citation to Congress' evaluations of the effects of concentration on the cable industry *in 1992* are utterly unhelpful to the Commission *in 1998* in its effort to adhere to the statutory mandate that it periodically modify its ownership limits to reflect "the dynamic nature of the communications marketplace"[40] and to take account of "efficiencies and other benefits" from horizontal concentration.[41] Certainly Consumers Union would not contest that the video programming and video delivery marketplaces have undergone dramatic transformation since 1992, when DBS did not even occupy a critical competitive foothold. In addition, to the extent any residual anticompetitive incentives remain for cable operators to manipulate the market for independent programming, the Commission's specific behavioral provisions, including the rules regarding carriage agreements,[42] program access,[43] and the leased access regulations,[44] address them.[45] And yet, as it implores the Commission to strengthen the existing limits, Consumers Union would have the Commission turn a blind eye to these competitive developments and violate the plain text of its statutory directive.

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[40]47 U.S.C. § 533(f)(2)(E).

[41]*Id.* § 533(f)(2)(D).

[42]47 C.F.R. § 76.1301.

[43]47 C.F.R. §§ 76.1001, 76.1002.

[44]47 U.S.C. § 532.

[45]As for affiliated programming, the program access rules, 47 C.F.R. §§ 76.1001, 76.1002, which, as pointed out by RCN, were recently strengthened, serve to police any incentives for cable operators to prevent access to affiliated programming. RCN Horizontal Ownership Comments at 16.

Not only does the evidence demonstrate that current horizontal concentration levels have not threatened the flow of video programming, but, as noted earlier, the substantial benefits from such consolidation are well documented. Indeed, it is apparent that if prevented from pursuing regional clustering strategies by the 30% horizontal ownership cap, cable operators will be foreclosed from promoting competition in the local telephony market. To account for these efficiencies, the Commission should increase the horizontal ownership cap well above 30%.

As the Commission must disregard Consumers Union's ignorance of the empirical evidence demonstrating a vital video programming services market, the Commission should also dismiss the chimerical allegation by Ameritech that horizontal concentration has led to monopsony problems in the market for programming services. In attacking volume discounts from video programmers achieved by large MSOs such as TCI, Ameritech asserts that these discounts are anticompetitive and impede entry into the market for the delivery of video services.[46]

The Commission could choose from either statutory provisions or empirical evidence to dismiss Ameritech's attempt to sully consolidation among cable operators with the "anticompetitive" label in spite of such consolidation's procompetitive benefits to consumers. First, by alleging a monopsony in the market for video programming services, Ameritech implies that programmers who are not carried by TCI cannot succeed. However, as illustrated in TCI's Comments, the success of Turner Classic Movies, MSNBC and Disney Channel show that a

[46]Ameritech Comments at 9.

programming service can reach far fewer than 60% of the nation's cable subscribers and still be viable, thus supporting a horizontal ownership cap of up to 40%.[47]

Second, volume discounts for video programming are just one of the many consumer benefits from consolidation and in fact are specifically contemplated by existing law. Section 628 of the Communications Act provides, in pertinent part, that "a satellite cable programming vendor shall not be prohibited from . . . establishing different prices, terms and conditions which take into account economies of scale or cost savings reasonably attributable to the number of subscribers served by the distributor . . . ."[48] Far from being anticompetitive, volume discounts achieved through economies of scale benefit subscribers, who reap the savings from such discounts.[49] Surely, Ameritech's allegation is intended only to deflect attention away from its own attempt to prevent cable operators from entering the highly concentrated market -- to the extent there is any current "market" at all -- for local telephony services.

Finally, Ameritech's monopsony allegation fails to explain the success of existing non-cable MVPDs. After all, DBS providers could not have acquired over 7 million subscribers nationwide had they been unable to acquire programming attractive to viewers. As the study appended to TCI's Comments demonstrates, the empirical evidence simply does not support an assertion of a monopsony problem posed by cable concentration in the market for video

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

[48]47 U.S.C. § 548(c)(2)(B)(iii).

[49]Indeed, FCC Form 1240 requires a dollar-for-dollar rate decrease for any reduction in a cable operator's annual programming costs as a result of volume discounts.

programming.[50] Indeed, the TCI study indicates that increased consolidation may actually *reduce* any incentive for cable operators to extract discounts in programming costs because any reduction in programming quality as a result of the lower prices will reduce the profits of newly acquired cable systems.[51]

CONCLUSION

Competitive conditions demand changes to the current horizontal ownership rules.[52] First, managerial control should determine attribution for purposes of the horizontal ownership rules because it is the entity responsible for actually making the programming decisions with respect to any given cable system that will have an impact on the degree of distribution of independent programming services. The various transactions with TCI described by commenters should be encouraged because they will result in an overall reduction in subscribers subject to TCI's managerial control and bring significant benefits to consumers.

Further, the increasing competition from non-cable MVPDs means that any horizontal ownership limit must account for the increasing market power of such non-cable MVPDs and the alternative programming distribution outlets they provide. Accordingly, the Commission should measure any horizontal ownership limit based on all MVPD subscribers and not on cable homes passed data, which is unreliable and inaccurate. Rather, all of the operator's cable subscribers

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[50]*See* Stanley M. Besen and John R. Woodbury, An Economic Analysis of the FCC's Cable Ownership Restrictions, August 14, 1998, at 4-6, appended to TCI Horizontal Ownership Comments.

[51]*Id.* at 6.

[52]If, for some reason, the Commission disregards the suggestion of a majority of commenters to relax its current horizontal ownership rules, it may have to address grandfathering issues. *See* Companies' Comments at 31-32.

should be included in the numerator and all MVPD subscribers nationwide should be factored into the denominator.

Finally, the current 30% horizontal ownership cap should be raised because there is no evidence of a threat to independent programming services, even as TCI has bumped up against the 30% limit. The Companies believe that all of these suggested revisions to the horizontal ownership rules will better reflect today's competitive environment and encourage the competitive and consumer benefits to be realized through horizontal concentration and the associated economies of scale.

Respectfully submitted,

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