ORIGINAL

EX PARTE OR LATE FILED

Wiley, Rein & Fielding

1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Fax: (202) 719-7049
www.wrf.com

Peter D. Ross
(202) 719-4232
pross@wrf.com

RECEIVED
SEP 29 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 29, 1999

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notification of Permitted *Ex Parte* Presentation in
MM Docket No. 92-264, CS Docket No. 98-82, and CS Docket No. 99-251

Dear Ms. Salas:

On behalf of GTE Services Corporation ("GTE") and pursuant to Section 1.1206(b) of the Commission's rules, I hereby submit an original and two copies of this memorandum and the attached permitted written *ex parte* presentation to Commission officials regarding the above-cited proceedings.

On September 28, 1999, at 3:00 p.m., the undersigned, on behalf of GTE, met with FCC General Counsel Chris Wright and Jim Carr of his office. The discussion focused on the law and policy of the Commission's cable horizontal ownership and applicable attribution rules as compiled in the attached summary.

Kindly direct any questions regarding this matter to the undersigned.

Sincerely,

Peter D. Ross

PDR/lra
cc: Chris Wright
Jim Carr

#767102

Permitted Written ex parte Presentation
MM Docket No. 92-264
and CS Docket No. 98-82

CABLE HORIZONTAL OWNERSHIP CAP

Excerpts from Congressional and FCC Articulations
of the
Law and Policy of the Cable Cap

I. THE STATUTORY MANDATE

The 1992 Cable Act

- In order to enhance effective competition, the Commission shall . . . conduct a proceeding - (A) to prescribe rules and regulations establishing **reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest**." 47 U.S.C. Section 533(f)(1)(A).

- "In prescribing [such] rules and regulations . . . the Commission shall, among other public interest objectives -

  (A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of **joint actions by a group of operators of sufficient size**, the flow of video programming from the video programmer to the consumer;

  (C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, **and the various types of non-equity controlling interests;**

  (E) **make such rules and regulations reflect the dynamic nature of the communications marketplace**. 47 U.S.C. Section 533(f)(2) (emphasis added).

The Congressional Purpose

- Increasing cable horizontal concentration gave rise to "special concerns about concentration of the media in the hands of a few who may control the dissemination of information." S. Rep. No. 102-92 (1991) ("Senate Report") at 32.

- "The second concern about horizontal concentration is that it can become the basis of anticompetitive acts." Senate Report at 33.

- "[T]raditional antitrust analysis has not been, and should not be; the sole measure of concentration in media industries. Both Congress and the Commission have historically recognized that **diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are substantially below those that a traditional antitrust analysis would support.**" House Report at 42.

- Cable industry concentration poses a potential for "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act"), at Section 2(a)(4).

- Subscriber limits were designed to further the "First Amendment goal of promoting a diversity of ideas and speech throughout the country." Senate Report at 32.

- Senator Gore: **Where do you think the [horizontal] limit ought to be?**
  Mr. Malone: I'm not sure. You know, it depends on how you count, I think, to some degree. But, you know, broadcasters right now I think can own 25 percent of the market with VHF stations and up to 50 with UHF stations. **Our technology is different. Clearly, some lower limits are in order for our industry**. Senate Report at 34 (testimony of John Malone, TCI Chairman).

- "In determining what is an attributable interest, **it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 CFR Section 73.3555 (notes) or other criteria the FCC may deem appropriate.**" Senate Report at 80.

II. THE FCC'S CABLE SUBSCRIBER LIMITS

1993: The Second Report and Order

- "The House Report suggests that diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are substantially below those that traditional antitrust analysis would support." Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, 8 FCC Rcd 8565 (1993) ("Second Report") at 8570-71.

- "**A 30% horizontal ownership limit is generally appropriate to prevent the nation's largest [MSOs] from gaining enhanced leverage** from increased horizontal concentration" and "ensures that the majority of [MSOs] continue to expand and benefit from the economies of scale necessary to encourage investment in new video programming

services and the deployment of advanced cable technologies." Second Report, 8 FCC Rcd at 8577.

1998: The Subscriber Limit Reconsideration Order

- "The 30% limit **diminishes the likelihood that either a large cable MSO acting unilaterally or a group of cable MSOs acting in concert could exercise market power in the purchase of programming.**" Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, 12 CR 597 (1998) ("Horizontal Ownership Limit Reconsideration Order") at paragraph 39.

- **"The rule limits the extent to which large cable MSOs can merge and result in one or two MSOs controlling local cable markets nationwide.**" Horizontal Ownership Limit Reconsideration Order at paragraph 40.

- "Limiting this merger potential may preserve opportunities for entry by overbuilders or other MVPD providers and reduce the likelihood that large MSOs can coordinate their behavior by mutually forbearing from overbuilding each other's service territories. **Coordinated activity between cable MSOs, whether tacit or overt, is more likely with few firms than many** (due to greater ease in reaching a consensus, monitoring compliance, and punishing cheaters), **and such behavior will have a greater impact the larger combined share of the market these collusive firms control.** The 30% limit also reduces the likelihood of coordinated activity between large cable MSOs in areas such as program purchasing and equipment purchasing (e.g., set top boxes and converters)." Horizontal Ownership Limit Reconsideration Order at paragraph 40.

- "[T]he cable horizontal ownership **rules remain necessary** to prevent MSOs from exercising market power against new, independent, and less prominent programmers." Horizontal Ownership Limit Reconsideration Order at paragraph 3.

III. THE CABLE CAP ATTRIBUTION RULES

1993: First Report and Order and Further Notice of Proposed Rulemaking

- ""**[A]pplication of [broadcast] attribution criteria** in the context of subscriber limits **is appropriate since the same issues regarding influence and control over management and programming decisions are at issue here.**" Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions, 8 FCC Rcd 6828 (1993) ("First Report") at 6852.

- "**[T]he objectives of the broadcast attribution model are consistent with our goals** in establishing ownership standards for subscriber limits. In this regard, the broadcast attribution rules focus on **ownership thresholds that enable a broadcast licensee to influence** or control management or programming decisions. We believe this same approach is relevant to addressing the concerns at issue in this proceeding, which relate to the **ability of cable operators to unduly influence the programming marketplace.**" First Report, 8 FCC Rcd at 6852.

- "[T]he legislative history of the 1992 Cable Act supports the use of the broadcast attribution criteria." First Report, 8 FCC Rcd at 6852.

- "**[S]everal cable operators advocate that our attribution standard should focus exclusively on control, since in the absence of control, an operator does not have the ability to direct a system's programming choices**. Specifically, cable commenters would apply an ownership standard based on stockholder or managerial control of a cable system. **Our attribution rules have long recognized that parties that have less than a majority equity interest in a media property can influence management and programming decisions**. We see no reason at this time to diverge from this longstanding principal." First Report, 8 FCC Rcd at 6852.

1993: Second Report and Order

- "In the Further Notice we proposed to adopt the broadcast attribution standard to implement horizontal ownership limits . . . ." Second Report, 8 FCC Rcd at 8579.

- "[T]he objectives of the broadcast attribution model are consistent with our goals in establishing ownership standards for subscriber limits.' In this regard, the broadcast attribution rules focus on ownership thresholds that enable a broadcast licensee to **influence** or control management or programming decisions." Second Report, 8 FCC Rcd at 8581.

- "[T]he **legislative history** of the 1992 Cable Act supports the use of the broadcast attribution criteria." Second Report, 8 FCC Rcd at 8581.

1998: The Subscriber Limits Reconsideration Order

- "In the Second Report and Order, the Commission adopted the broadcast attribution rules . . . in the cable horizontal ownership context because 'the objectives of the broadcast attribution model are consistent with our goals in establishing ownership standards for subscriber limits.'" Horizontal Ownership Limit Reconsideration Order at paragraph 69.

- "The Commission explicitly stated that the broadcast rules 'focus on ownership thresholds that enable a broadcast licensee to **influence** or control management or programming decisions' and that 'these same issues are also relevant to addressing the concerns at issue in this proceeding relating to **the ability of cable operators to unduly influence the programming marketplace.**'" Horizontal Ownership Limit Reconsideration Order at paragraph 69.

August 6, 1999: The Broadcast Attribution Order

- "The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders **a degree of influence** or control such that the holders have a **realistic potential to affect the programming decisions** of licensees or other core operating functions." Review of the Commission Regulations Governing Attribution of Broadcast and Cable/MDS Interest, MM Dockets Nos. 94-15-, 92-51, 87-154, FCC 99-207 (rel. Aug. 6, 1996) ("Broadcast Attribution Order") at paragraph 1.

- "We remain convinced that shareholders with ownership interests of 5 percent or greater may well be **able to exert significant influence** on the management and operations of the firms in which they invest." Broadcast Attribution Order at paragraph 10.

- **"[R]elaxation of ownership limits, if warranted, should be accomplished directly through revision of the multiple ownership rules, not indirectly through manipulation of what is considered 'ownership.'"** Broadcast Attribution Order at paragraph 46.

- "Capital Cities/ABC asked the Commission to confirm that an insulated limited partner's interest in a licensee does not preclude the interest holder from also holding an affiliation agreement with the licensee. However, **a contractual arrangement to provide programming would be inconsistent with the insulation criterion** that "the limited partner may not perform any services for the partnership materially relating to its media activities," and therefore would not allow insulation of the limited partner's interest." Broadcast Attribution Order at paragraph 133.

IV. FCC DEFENSE OF THE SUBSCRIBER LIMITS

August 13, 1999: FCC DC Circuit Brief Supporting Subscriber Limits

- "The FCC's limit . . . puts a reasonable ceiling on horizontal concentration in the cable industry and **forecloses the possibility that the national cable market might ultimately be dominated by one (or two) larger operators.**" FCC Brief at 17.

- "Cable operators were singled out for regulation, not because of their views, but because of the special and dominant nature of cable television as a video programming distribution

medium; cable operators, and only cable operators, have bottleneck monopoly power over the access of competing video programming speakers to the overwhelming majority of American homes." FCC Brief at 16.

- "[L]ike every other business organization, a cable company is subject to reasonable legislative measures designed to curb anticompetitive practices and restrain monopoly powers, particularly when doing so hopes to promote the public interest in media diversity." FCC Brief at 31.

- "[E]xcessive concentration in the cable industry is antithetical to the long-held federal policy of promoting the 'widest possible dissemination of information from diverse and antagonistic sources.'" FCC Brief at 32, citing Turner II, 520 U.S. at 192.

- "Time Warner provides **no ground for concluding that the potential for shareholder influence of management and programming in the cable industry is materially different from the potential for such influence in the broadcast industry**." FCC Brief at 49.