

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter Of	)	
	)	
Implementation of Section 11(c) of the Cable Television	)	FCC 99-289
Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal Ownership Limits	)	

To: The Commission

**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION  
OF CONSUMER FEDERATION OF AMERICA, *et al.***

Consumer Federation of America, Center for Media Education, Association of Independent Video and Filmmakers, and Office of Communication, Inc. United Church of Christ ("*CFA, et al.*" or "*Petitioners*") respectfully reply to the National Cable Television Association's ("*NCTA*") February 17, 1999 *Opposition to the Petition for Reconsideration of CFA, et al.* ("*Opp.*"). As *NCTA* proffers nothing that could justify the Commission's actions under review, the Commission should grant the *Petition for Reconsideration*.

**ARGUMENT**

**I. NCTA FAILS TO REFUTE THAT THE COMMISSION'S USE OF CABLE SUBSCRIBERS RATHER THAN HOMES PASSED VIOLATES THE STATUTE.**

As the *Petition* made clear, the plain language of Section 613(f)(1)(A) prohibits the Commission from switching from "homes passed" to subscribers when calculating the horizontal ownership limit. Specifically, the use of the phrase "authorized to reach through cable systems" in which the system operator has an attributable interest requires that the Commission use the number of homes passed rather than the number of subscribers.

In response, *NCTA* proposed a strained, two-step analysis. First, *NCTA* proposes that rather than reading the phrase "authorized to reach" as written, it should instead be read to mean "permitted

to serve." Second, having accepted this substitution, NCTA further suggests that this definition now reflexively means that the Commission should set limits on the number of subscribers a cable operator "is permitted to serve."

NCTA offers no explanation as to why Congress did not simply *say* "permitted to serve" rather than "authorized to reach." By contrast, the phrase "authorized to reach," makes perfect sense as written to mean a homes passed measure. Nor does NCTA's analysis comport with the specific Congressional finding that system operators generally face no local competition within their franchise area. In Section 2(a)(2) of the 1992 Cable Act, Congress found that:

Without the presence of another multichannel video programming distributor, a cable system faces no local competition. ***The result is undue market power for the cable operator as compared to that of consumers and video programmers.***

*Id.* (Emphasis added.)

In other words, Congress recognized that the absence of competition within a franchise area, not merely the total number of subscribers, provides cable system operators with their market power over both consumers and video programmers. Congress therefore chose a method to limit the number of such local franchise monopolies an MSO may hold, by ordering the Commission to limit the number of homes an MSO "is authorized to reach," rather than the number of subscribers.

NCTA cites the Commission's unsupported finding that "an operator's actual number of subscribers more uniformly and accurately reflects power in the programming marketplace than does homes passed." *Opp.* at 6. While the Commission may hold this opinion, it is irrelevant to the question of what Congress intended when it enacted Section 613(f). Congress found the absence of competition for the homes a cable system is authorized to reach in its local franchise area gives cable MSOs undue market power over consumers and video programmers. Section 2(a)(2). Congress therefore directed the Commission to create horizontal ownership limits, "in order to enhance ef-

fective competition" in the MVPD market. Section 613(f)(1). The Commission's conclusion about the relationship between national subscriber limits and power in the video programming market, while relevant to the Commission's responsibility to ensure that MSOs cannot impede the flow of video programming, *see* Section 613(f)(2)(A), is utterly *irrelevant* to interpreting Congress' plain language directive to limit the number of homes an MSO is authorized to reach.

## **II. THE COMMISSION LACKS AUTHORITY TO INCLUDE NON-CABLE MVPD SUBSCRIBERS.**

NCTA fails to refute the plain language of the statute, which imposes limits on the number of *cable subscribers* an MSO is authorized to reach. Instead, it simply repeats the same fallacy found in the Commission's *Horizontal Ownership Order* and companion *Attribution Order*: that the Commission may properly adjust the horizontal ownership rules based solely upon a single factor -- Section 613(f)(2)(E)'s instruction to take into account "the dynamic nature of the communications marketplace" in promulgating its horizontal ownership limits. Petitioners have thoroughly addressed this argument in their *Petition for Reconsideration*. *See Pet.* at 6-8.

NCTA also attempts to bolster the Commission's reasoning by arguing that the Commission's choice was a wise one, since as non-cable MVPDs grow, they provide a "comparable outlet for programmers." *Opp.* at 8-9. However, this policy argument is of no significance, as the issue here is governed by the statute, which does not *authorize* the Commission to include non-cable MVPDs. To the contrary, the statute directs the Commission to apply its limitations to *cable* subscribers an MSO may reach. While NCTA is free to argue that the 1992 Act should have considered DBS providers "comparable outlets" for programming and drafted accordingly, Congress did not do so. If NCTA desires a more flexible policy that treats DBS providers as comparable to cable, it must

petition Congress, not the Commission, to change the law.<sup>1</sup>

Congress directed the Commission to set horizontal limits on cable system ownership for the purpose of enhancing "effective competition" among MVPDs. §613(f). Congress understood that

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<sup>1</sup>Even if the Commission had the authority to include non-cable MVPD subscribers, NCTA's specious comparison attempts to obscure the basic truth that even the largest DBS provider is *not* comparable to the largest cable MSOs at which the horizontal limits are directed and whose anti-competitive behavior the limits are intended to constrain. As the Commission found in the *Horizontal Order*, the cable industry continues to use its monopsony power over the programming market to the detriment of alternate MVPD providers:

WCA and Ameritech proffer credible evidence that indicates that *MSOs have used their market power to cause unaffiliated programmers to refuse to sell their programming to other MVPDs*. This evidence demonstrates another way MSOs can use their size and market power to impede the flow of programming to consumers in contravention of Section 613(f)(2)(A). *It is reasonable to assume that an unaffiliated programmer carried on a large MSO, with all the advantages that such carriage confers, would be disinclined to alienate the MSO by seeking carriage.*

*Order* at ¶59. (Emphasis added.)

This simply reality demonstrates the fallacy of NCTA's argument. The Commission's findings demonstrate that DirectTV's subscribers are not "comparable" to Comcast's, and are certainly not comparable to AT&T's. Furthermore, the history of the cable industry demonstrates the ability of the cable industry as a whole to work to block DBS programming. *See, e.g.*, complaint filed in *US v. Primestar, Inc.*, Civ. No. 1:98CV01193(JLG) (May 12, 1998).

cable MSOs derive their market power not only from their subscriber base, but from their monopoly control within their franchise areas, Section 2(a)(2), from the lack of competition within the cable industry nationally, Section 2(a)(4), and from the ability of MSOs to control programming, §2(a)(5). The legislative history reflects a clear understanding of how cable MSOs used their market power to the detriment of alternate MVPDs. *See, e.g.*, H.R. Rep. No. 102-628 at 41-43; 138 Cong. Rec. S409, S417 (daily ed. January 27, 1992).

As a result, Congress directed the Commission to set limits on the cable industry. Only by limiting the monopsony power of cable MSOs could Congress hope to foster "effective competition." Section 613(f) represents one aspect of the 1992 Cable Act's integrated scheme to foster effective competition and limit cable monopsony power. As the *Petition* made clear, the use of cable subscribers rather than homes passed in the numerator and the inclusion of non-cable MVPD subscribers in the denominator frustrates this scheme, ignores Congress' explicit findings, and violates the clear language of the statute. NCTA's fanciful suppositions regarding DBS' "comparability" as a programming outlet -- suppositions rejected by the very Commission Order the NCTA here defends -- cannot refute the findings and language that Congress incorporated into the 1992 Cable Act.

NCTA also mischaracterizes the legislative history cited in the *Petition*. *Opp.* at 9-10. Petitioners ***did not*** claim that the rejected House version of Section 613 "direct[ed] the Commission to adopt a horizontal ownership rule for cable operators based on cable's share of the entire MVPD market." As Petitioners clearly explained, the rejected provision would have required the Commission to establish rules setting ownership limits on all MVPDs.

NCTA apparently hopes that this mischaracterization will blur the lesson of this legislative history- *i.e.*, that Congress considered and rejected the idea advanced by NCTA that cable and non-cable MVPDs are "comparable outlet[s] for programmers." *Opp.* at 9. Rather, as explained in the *Petition*,

the legislative history confirms that Congress intended Section 613 to enhance effective competition among MVPDs by limiting the market power of Cable MSOs.

To conclude, the plain language of Section 613, the Congressional findings regarding cable market power, and the legislative history cited in the *Petition* demonstrate that Congress did not give the Commission authority to include all MVPD subscribers when calculating the limits on cable horizontal ownership. Congress directed the Commission to set rules limiting the number of "*cable subscribers* a person is *authorized to reach through cable systems*" in which such person has an attributable interest. The Commission should therefore reconsider its changes to the horizontal ownership limits and restore the original formula adopted by the Commission.

### **III. NOTHING JUSTIFIES THE COMMISSION'S DECISION TO ALLOW MSOs TO USE ANY "WIDELY CITED INDUSTRY ESTIMATE" WHEN CALCULATING THE NUMBER OF SUBSCRIBERS.**

NCTA does not address Petitioners' key objections to the Commission's decision to place exclusive reliance on private reporting services to determine subscribership data used to enforce its cable ownership rules, including Petitioners' demonstration that proprietary data is inaccessible to public scrutiny as to methodology and accuracy. In particular, NCTA does not address the fact that existing industry reporters vary considerably in the numbers they report for cable and non-cable MVPD subscribers. The invitation to forum shop is exacerbated by the impermissibly vague scope of data the Commission will accept. NCTA speaks to the practices of "leading private data services," *Opp.* at 16, but the Commission's new rule comprehends using *any* "widely cited industry estimate," which allows for "non-leading," *i.e.*, not respected, sources as well.

In fact, nothing precludes applicants from obtaining strategic benefit from the FCC by relying upon sources they know to be incomplete or inaccurate. NCTA says nothing about the inherent conflicts created by a system in which the reporting services' customers (the MSO's) may benefit from

data which, when published, suits their regulatory needs.

**A. The Fact That Cable MSOs Must Report Their Subscriber Numbers When They Acquire New Cable Systems Does Not Provide Adequate Safeguards.**

NCTA argues that the requirement, established in 47 CFR §76.503(c), that the very largest cable MSOs must report their subscriber numbers to the Commission provides adequate protection against any possible manipulation by cable MSOs. *Opp.* at 14. It says that this protects against underreporting.

The sad fact is that the Commission has failed to enforce this requirement, and it provides no reassurance at all. As is detailed in an October 7, 1999 complaint against AT&T, the Commission staff has completely ignored reports submitted under 47 CFR §76.503(c) and acquiesced to AT&T's *prima facie* violations of the filing requirements set forth therein. The failure to enforce Section 503(c) vitiates any possible deterrent effect this requirement might have had.

Moreover, even if the reporting rule were to be properly enforced, the self-reported data required thereunder would have the same flaw about which Petitioners have complained. The accuracy NCTA ascribes to the Section 503(g) reports extends only to the numerator of the necessary report (*i.e.*, the operators' own subscribership data) and not to the denominator (total MVPD homes), which would still come from private data services.

**B. NCTA's Description of Cable Incentives To Report Their Real Subscriber Figures to Industry Reporters Does Not Eliminate The Reality That Cable MSOs Can Manipulate The System To Their Advantage**

NCTA argues that self-reported data is likely to be accurate because cable MSOs have a strong incentive to report their subscriber numbers truthfully in light of the fact that license fees are based on the number of subscribers. *Opp.* at 14. NCTA also maintains that private reporting services have every incentive to report numbers accurately for the sake of their reputation. *Opp.* at 16.

This argument fails on two counts. Even if NCTA were correct that there are certain incentives to report accurately, this does not negate the existence of other incentives to manipulate data or the ability to act thereupon.

First, 18 USC §1001 does not apply to the data reported to private publishers. The Commission may not rationally speculate on the complex motivations of parties under no obligation to report honestly. Even were NCTA correct about the claimed incentives to report subscriber numbers honestly, a cable MSO may well decide that its interest in avoiding the cap by underreporting its subscriber base for a brief period of months exceeds the cost of additional licensing fees it might pay.

Second, nothing in the record indicates that cable MSOs and programmers rely on any particular reporter. Indeed, because commercial arrangements between reporting services and their customers take place in secret, there is no reason to believe that the private data is accurate and beyond manipulation. Given the close affiliations the largest MSOs have with their program suppliers, and their ability to exercise monopsony power over unaffiliated suppliers, there is little doubt that the largest MSOs -- those with the greatest incentive to manipulate data provided to reporting services -- can require programmers to use whatever set of numbers the MSO finds best suits its needs.

**C. The Commission's Use of Commercial Reporters For Other Limited Purposes Does Not Justify The Use of Any "Widely Cited Industry Estimate."**

Petitioners have also argued that defining compliance in terms of data published by private reporting services chosen by MSO's improperly delegates agency obligations. NCTA responds with the assertion that the Commission has on other occasions employed private reporting services in its policymaking without objection. *Opp.* at 15.

While the FCC does cite or employ private data to *guide* its policymaking, it is not the case that the Commission has ever permitted such publications to *control* the outcome of its enforcement proceedings.

Many instances to which the NCTA refers involve FCC use of industry reporters to inform itself on the state of the industry for purposes of assessing overall industry trends. *See, e.g., Video Competition Report*, CS Docket 99-230, FCC 99-418 (released January 14, 2000). In other circumstances, the Commission accepts privately generated data to determine the number of voices, or the size of a market for purposes of considering a waiver request or to make a determination as to whether a market is subject to effective competition. *See, e.g., Mountain Cable Company*, 14 FCCRcd 13994 (1999). But the data generated in those cases is not determinative, and the petitions are subject to objection from competitors, often with deep pockets. Citizens seeking to challenge cable horizontal ownership data lack the resources to assess and litigate such issues.

NCTA's reliance on Section 614(h)(1)(C) of the Communications Act, 47 USC §534(h)(1)(C), and FCC regulations promulgated thereunder, 47 CFR §76.55(e)(2), is similarly misplaced. While Congress did, indeed, authorize the FCC to employ "commercial publications" to delineate markets for purposes of its "must-carry" rules, what is relevant here is that the statute anticipates that this data will be inadequate in at least some circumstances, and provides specific procedures for petitions for special relief to modify the market definitions. Thus, unlike the situation here, Congress specifically contemplated that the private data would be used merely as a starting point. Moreover, as in other instances in which the Commission has employed information from private sources, it requested public comment on a particular company to be chosen for this purpose, and invited public comment on that publisher's competence and methodology. *Report & Order*, 8

FCCRcd 2965, 2975-77 (1993).<sup>2</sup>

It is also relevant that where the Commission has employed information from private sources, it has requested public comment on the company to be chosen for this purpose, and has designated *one* private reporting service on which all parties may rely. Here, the Commission has delegated its responsibility in an impermissibly broad and vague fashion to *multiple* private parties whose numbers *already* vary. This encourages abuses and creates numerous opportunities for private parties to manipulate the data.

**D. NCTA's Argument That Using Private Reporting Services Serves The Public Interest Is Wrong.**

NCTA offers an affirmative defense of the Commission's rules, suggesting that use of private reporting services serves the public interest by saving the Commission time and resources. Even leaving aside the plain language of the statute, the argument falls of its own weight. It surely *is* cheaper to use private sources, but the argument begs the question of accuracy. This is a case of getting what one pays for.

**IV. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO EXCLUDE "NONINCUMBENT" SYSTEMS.**

While stating that the Commission has the statutory authority to create an exception for "nonincumbent" systems, NCTA yet again fails to address the key point raised in the *Petition*. The Commission found in its *1998 Order* that it lacked authority to create an exception absent express Congressional authority. *1998 Order*, 13 FCCRcd 14462, 14488 (1998). The Commission cannot

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<sup>2</sup>More recently, the Commission conducted a similar inquiry before adopting Nielson as opposed to Arbitron data as a starting point for broadcast duopoly proceedings. *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCCRcd 12903, 12424-29 (1999), *recon. pending*. A *Petition for Reconsideration* challenging the use of private data in that docket is pending.

depart from this understanding without explanation. NCTA's naked assertion of authority cannot substitute for what the Commission has failed to do.

NCTA's comparison with the repealed minority exception is inapposite. Congress delegated authority to the Commission to set "reasonable" limits. It did not give the Commission unfettered discretion to ignore particular cable assets explicitly included in the statutory language. Thus, the Commission has discretion to determine if 30% or 20% or 40% is the correct limit, provided the limit set is "reasonable" and supported by the evidence. Nothing prevents the Commission from setting one limit as "reasonable" for one class of participants and another limit as reasonable for a different class of participants, provided it justifies this distinction.

It is quite another thing, however, for the Commission to exclude systems from its calculations that Congress specifically included. Congress mandated that the Commission set rules limiting the number of cable subscribers an MSO may reach through systems in which it holds an attributable interest. Congress did not provide any basis for excluding systems. The Commission's determination to exclude otherwise attributable systems therefore violates the statute.

## **CONCLUSION**

For the above stated reasons, the Commission should grant CFA, *et al.*'s *Petition for Reconsideration* and deny the *Opposition* filed by NCTA on February 17, 2000.

Respectfully submitted,

Harold Feld

Andrew Jay Schwartzman

Cheryl A. Leanza  
MEDIA ACCESS PROJECT  
Counsel for CFA, *et al.*

Suite 220  
950 18<sup>th</sup> St., NW  
Washington, D.C. 20036

Date: February 28, 2000

## CERTIFICATE OF SERVICE

I Harold Feld, do hereby certify that I caused one copy of the attached Reply to Opposition of NCTA to be served by first-class United States mail, postage pre-paid, upon the parties listed below.

2/28/00

Harold Feld

Date

Daniel L. Brenner  
David L. Nicoll  
National Cable Television Association  
1724 Massachusetts Avenue, NW  
Washington, DC 20036

Counsel for National Cable Television Association