Federal Communications Commission
Washington, D.C.

March 6, 2000

DOCKET FILE COPY ORIGINAL

National Cable Television Association
c/o Francis M. Buono
1724 Massachusetts Avenue, NW
Washington, DC 20036

Re: Acceptance of Comments As Timely Filed in (CS Docket No. 98-82)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceeding as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(I), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas WRC
Secretary

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

February 18, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB-204
Washington, DC 20554

Re: Opposition of the National Cable Television Association ("NCTA") to Petition for Reconsideration in CS Docket No. 98-82; Motion to Accept Opposition as Timely Filed

Dear Ms. Salas:

Attached is the Opposition of NCTA to the joint Petition for Reconsideration filed by the Consumer Federation of America, Center for Media Education, Association of Independent Video and Filmmakers, and Office of Communications, Inc., United Church of Christ ("CFA *et al.*") in the above-captioned proceeding.

NCTA's undersigned counsel made numerous attempts to electronically file this Opposition in a timely manner on the deadline -- yesterday, February 17, 2000 -- between the hours of 7 p.m. and midnight and in three different formats, including WordPerfect, Microsoft Word, and Adobe Acrobat. The Commission's ECFS server, however, repeatedly delivered an error message indicating that the document had not been received. I have attached printouts of the completed ECFS forms which NCTA attempted to submit last night and the corresponding error messages that were received from the ECFS system. In addition, I left voice mail messages on February 17, 2000 with the Office of the Secretary and the ECFS Office indicating that the ECFS system was not accepting this document. I subsequently spoke with Ms. Rosemarie Muller of the ECFS Office earlier this morning,

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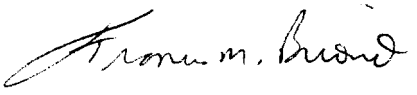
who indicated to me that the ECFS Web server was in fact down last night and unable to accept electronically-filed documents.

For the forgoing reasons, NCTA respectfully requests that the attached Opposition be accepted as timely filed in the above-captioned proceeding. Earlier this morning, I delivered via e-mail and messenger a copy of the attached Opposition to counsel for CFA *et al.* along with a copy of this letter. Thus, petitioner has received NCTA's Opposition in a timely manner and no prejudice will be caused to any party as a result of the malfunctioning of the ECFS system.

Please direct any questions regarding this matter to my attention. Thank you.

Sincerely,



Francis M. Buono
Counsel for NCTA

cc: Andy Schwartzman, Media Access Project

Attachment

Federal Communications Commission

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98-92

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National Cable Television Association

4. **Law Firm Name** (optional)

5. **Attorney Name** (optional)
Daniel L. Brenner

6. **Email-id** (optional)
dbrenner@ncta.com

7. **Mailing Address For Correspondence** (required)
1724 Massachusetts Avenue, NW

8. **City** (required)
Washington

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DC: DISTRICT OF COLUMBIA

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98-184 [redacted]
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98-83

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National Cable Television Association

4. Law Firm Name (optional)

5. Attorney Name (optional)
Daniel L. Brenner

6. Email-id (optional)
dbrenner@ncta.com

7. Mailing Address For Correspondence (required)
1724 Massachusetts Avenue, NW

8. City (required)
Washington

9. State (required)
DC DISTRICT OF COLUMBIA

10. Zip Code (required)
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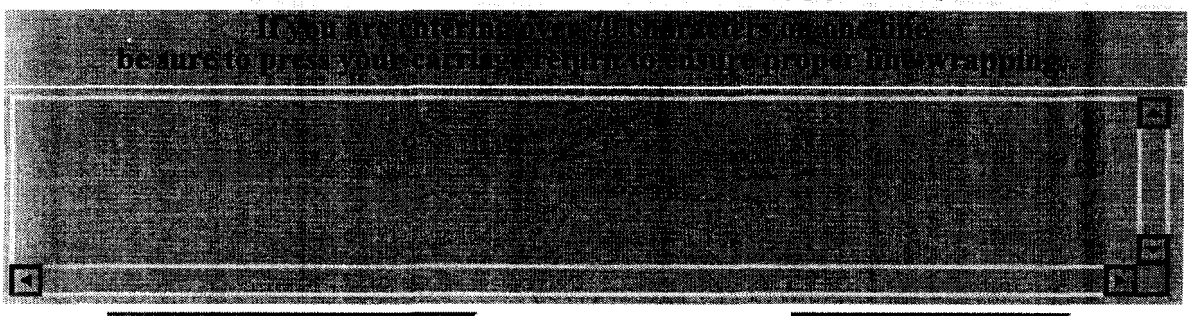

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98-82

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3. **Name of Applicant/Petitioner** (required)
National Cable Television Association

4. **Law Firm Name** (optional)

5. **Attorney Name** (optional)
Daniel L. Brenner

6. **Email-id** (optional)
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DC: DISTRICT OF COLUMBIA

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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
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
Review of the Commission's Cable Attribution Rules	)	

OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION TO PETITION FOR RECONSIDERATION

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February 17, 2000

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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
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
Review of the Commission's Cable Attribution Rules	)	

OPPOSITION OF NCTA TO PETITION FOR RECONSIDERATION

The National Cable Television Association ("NCTA"), by its attorneys, hereby files its opposition to the petition for reconsideration of 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.*") in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

In their petition for reconsideration, CFA *et al.* assert that: (1) the Commission's revised cable attribution rules for limited partners, officers, and directors violate Section 613 of the

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[1] *See In Re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, Report and Order, FCC 99-288 (rel. Oct. 20, 1999) ("*Cable Attribution Order*").

Communications Act; (2) the Commission failed to justify adequately those changes to its cable attribution rules; and (3) the Commission's revised rules are unenforceable.[2]

For the reasons discussed below, the aforementioned claims of CFA *et al.* are without merit and should be rejected by the Commission.[3] In particular, the Commission's change in its insulation rules from a focus on "media-related activities" to "video programming-related activities" is consistent with the plain language of the statute, its legislative history, and changes in the MVPD marketplace that have occurred since the insulation rules were first adopted in the mid-1980's, particularly the convergence of communications media.

Moreover, contrary to CFA *et al.*'s claims, the Commission will be able to enforce its revised insulation rules. The Commission has substantial experience reviewing certifications and waiver requests involving corporations with numerous, varied, and complex media interests, and CFA *et al.* suggest no reason why convergence will make it any more difficult for the Commission

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[2] Petition of CFA *et al.*, filed in CS Docket Nos. 98-82, 96-85 (Jan. 3, 2000) ("*CFA Petition*"). While the Commission's changes to the insulation rules apply to both the cable horizontal ownership and channel occupancy rules, NCTA focuses this opposition on the former consistent with CU *et al.*'s focus in their petition. However, NCTA's arguments in this opposition apply equally to justify the Commission's changes with respect to the channel occupancy rules.

[3] NCTA's opposition to the *CFA Petition* should in no way be construed as an endorsement of the Commission's revised cable attribution rules. NCTA supports the Commission's decision to change its insulation rules for limited partners, officers, and directors to focus on "video programming," but, as reflected in its comments filed in the rulemaking, it continues to object to other aspects of the revised cable attribution rules, and therefore expressly reserves its right to challenge these other aspects of the revised rules. For example, NCTA believes that the Commission improperly applied the broadcast attribution rules to cable. The legislative history, NCTA believes, makes clear that the Commission is free to adopt "other criteria the FCC may deem appropriate." *See Senate Report* at 80. Moreover, as AT&T demonstrated in its comments, the differences between the broadcast and cable industries justified different sets of attribution rules. *See* TCI Comments, filed on Aug. 14, 1998, in CS Docket No. 98-82, at 4-17.

to police such efforts, or why the rule revisions will invite a new regime of case-by-case adjudications.

II. THE CHANGE IN THE INSULATION RULES FROM A FOCUS ON "MEDIA-RELATED ACTIVITIES" TO "VIDEO PROGRAMMING-RELATED ACTIVITIES" IS CONSISTENT WITH SECTION 613.

A. The Changes To The Insulation Rules Are Consistent With The Plain Meaning Of Section 613.

CFA *et al.* argue that the Commission's decision to change its limited partner insulation rules and its recusal rules for officers and directors (hereinafter collectively referred to as "insulation rules") to bar material involvement in "video programming activities," rather than "media-related activities," violates the plain meaning of Section 613.

CFA *et al.*'s analysis is without merit. In fact, the plain language of Section 613 makes clear that Congress was concerned with video programming when it enacted the provision. In particular, Section 613(f)(2) directs the Commission to consider seven factors in developing its rules, six of which either specifically focus on competition in the video programming market or instruct the Commission not to overregulate in this area.[4] For example, the Commission must ensure that: (1) cable operators do not "unfairly impede . . . the flow of *video programming* from the video programmer to the consumer;"[5] (2) cable operators do not discriminate in favor of affiliated video programmers or "unreasonably restrict the flow of the *video programming* of such programmers to other video distributors;"[6] and (3) the Commission's rules do not "impair the

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4 47 U.S.C. § 533(f)(2).

5 *Id.* § 533(f)(2)(A) (emphasis added).

6 *Id.* § 533(f)(2)(B) (emphasis added).

development of diverse and high quality *video programming*."[7] Three of the other factors relate to possible efficiencies and other public interest benefits associated with cable ownership of video programming assets.[8]

CFA *et al.* base their interpretation largely on prefatory language in Section 613(f)(1) stating that the Commission should prescribe cable horizontal ownership rules in order to enhance "effective competition," a term defined elsewhere in the Communications Act to refer to MVPD competition in the local franchise area.[9] However, at most, the reference to "effective competition" in Section 613 merely reflects Congress's concern that a cable operator's size in the national video programming market not cause harmful downstream effects to competition among MVPDs in the delivery of video programming to end users, *i.e.*, that cable operators do not "unreasonably restrict the flow [of affiliated video programming] to other video distributors."[10] Congress' interest in these ancillary effects only underscores the fact, however, that the central focus of Section 613 is to promote competition and diversity in the national *video programming* market.[11]

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7 *Id.* § 533(f)(2)(G) (emphasis added).

8 *Id.* §§ 533(f)(2)(D) (efficiencies from cable ownership); (f)(2)(E) (dynamic nature of communications marketplace); (f)(2)(F) (service in rural communities).

9 *CFA Petition* at 4-5.

10 *Id.* § 533(f)(2)(B).

11 Additionally, the fact that the effective competition definition in Section 623(l)(1) *itself* focuses on video programming further demonstrates that a change in the insulation rules to a focus on video programming is consistent with the plain language of Section 613.

B. The Changes To The Insulation Rules Are Also Consistent With The Legislative History Of Section 613.

Even assuming the plain language of Section 613(f)(1) were ambiguous -- and it is not -- the Commission's change from "media-related" to "video programming-related" would be entitled to deference and should be upheld as a reasonable interpretation of the statute under *Chevron*.[12] This is especially true given that a video programming focus is supported by the legislative history of Section 613(f)(1)(A), which reinforces that competition and diversity in the national video programming market was at the very heart of Congress' decision to adopt the provision. Congress made clear that it enacted the cable horizontal ownership limit based on its concerns that large cable operators could: (1) exercise monopsony power to force unfair concessions from video programmers;[13] and (2) vertically foreclose entry by video programmers, thereby reducing program diversity.[14] Thus, as the Commission has acknowledged from the very first order it adopted in the cable horizontal ownership rulemaking, the purpose of the horizontal ownership limit relates entirely to the ability of cable operators adversely to affect video programming

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[12] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnotes omitted).

[13] *See* H.R. Rep. No. 628, 102nd Cong. 2d Sess. 42-43 (1992) ("*House Report*") ("[T]he size of certain MSOs could enable them to extract concessions from programmers, including equity positions, in exchange for carriage.").

[14] *See* S.Rep. No. 92, 102nd Cong, 1st Sess. 32 (1991) ("*Senate Report*") ("[T]here are special concerns about concentration of the media in the hands of the few who may control dissemination of information ... and will slant information to their own biases or ... provide no outlet for unorthodox or unpopular speech because it does not sell well, or both.").

competition and diversity.[15] In fact, the House Report language cited by CFA *et al.* support this conclusion, for all of the concerns referenced in the House Report -- including entry of new programming services, competition in the market for video programming, diversity of programming, and "other effects" on program quality and consumer satisfaction -- relate to the video programming marketplace.[16]

Finally, the reasonableness of the Commission's change to a video programming focus in the new rules is further underscored by the significant developments in the MVPD marketplace since the old rules were adopted, as described in the next section.

III. THE COMMISSION ADEQUATELY EXPLAINED ITS CHANGES TO THE INSULATION RULES AS NECESSARY TO REFLECT DEVELOPMENTS IN THE MVPD MARKETPLACE.

CFA *et al.*'s claim that the Commission did not provide sufficient justification for its changes to the insulation rules[17] is incorrect and ignores the new realities of the MVPD marketplace.

Congress directed the Commission to account for "the dynamic nature of the communications marketplace" in crafting its horizontal ownership rules.[18] The Commission's

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15 *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 8 FCC Rcd. 8565, at ¶ 10 (1993) ("Congress concluded that [the] degree of [cable] concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market. Congress was concerned in particular with preventing large vertically integrated cable systems from creating barriers to entry for new video programmers, and from causing a reduction in the number of media voices available to consumers."). *But see CFA Petition* at 7.

16 *See CFA Petition* at 8 (citing *House Report* at 43).

17 *CFA Petition* at 13.

18 47 U.S.C. § 533(f)(2)(E).

revisions to its insulation rules properly respond to this Congressional directive. As the Commission noted, "the current insulation criteria prevent investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition to the incumbent local exchange carriers or Internet."[19] Changing the insulation criteria from a "media-related" test to a "video programming" test, the Commission concluded, would permit cable operators to respond to the competitive challenges of a converging marketplace, while continuing to serve the underlying purposes of Section 613, namely to limit "the ability of one MSO or a group of MSOs, by virtue of their size, to impede the flow of programming from the programmers to consumers."[20]

CFA *et al.* simply refuse to acknowledge that the communications industry has changed since the Commission adopted the old insulation rules in the mid-1980s. At that time, cable operators provided cable service, phone companies offered phone service, and there was no market for wireless, satellite, or Internet services. The communications market is entirely different today. Broadband technology is rapidly eroding the old distinctions among various communications media, and communications providers are responding by investing in the facilities

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[19] *See Cable Attribution Order*, at ¶ 63.

[20] *See id.* CFA *et al.*'s suggestion that cable operators could provide Internet and telephony services through joint ventures and other "permissible relationships," *see CFA Petition* at 28-29, is unavailing. It is exceedingly difficult to negotiate joint ventures for the provision of rapidly evolving technologies and services over a common network. *See, e.g.*, AT&T/MediaOne Public Interest Statement, filed on July 7, 1999, in CS Docket No. 99-251, at 31-32; Reply Comments of AT&T/MediaOne, filed on Sept. 17, 1999, in CS Docket No. 99-251, at 18-23 (also citing to attached declarations of Terrell Wingfield, Douglas Holmes, and Professors Ordover and Willig).

necessary to offer a range of services, including voice, video, data, and Internet access.[21] Rather than addressing the implications of this new, and highly competitive, converging environment, CFA *et al.* advocate a mechanical application of the old and now entirely inappropriate attribution rules, regardless of how that approach might limit competition in the provision of telephone, Internet, and other broadband services to American consumers.[22]

In short, a "media-related" test may have made some sense in a world in which providers typically offered only a single communications service over their networks. However, convergence has rendered the "media-related" test overinclusive in the context of the cable horizontal ownership rules. Continued use of the word "media" might implicate the Internet and other related activity in the attribution rules where no such implication would serve the competitive aims of the statute. Thus, far from constituting a "radical departure" from Commission precedent,[23] the change in the insulation rules to a video programming focus both reasonably reflects the changes in the MVPD marketplace while also addressing Congress's video-programming specific concerns in Section 613.[24]

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21 *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd. 2398 (1999) (providing an overview of current and planned investment in broadband facilities by a range of communications providers). *See also Broadband Today: Staff Report to Chairman Kennard*, Cable Services Bureau (Oct. 1999) (detailing investment in broadband facilities).

22 *See CFA Petition* at 12-18.

23 *See id.* at 12-18.

24 It is particularly curious that on the one hand CFA *et al.* attack the Commission's relatively modest changes to the insulation rules as a "radical departure" from Commission precedent, and on the other hand support the *complete elimination* of the single majority shareholder exception, *see id.* at n. 7, and voice no objections to the equity-plus-debt ("ED") rules for cable, even though

(footnote continued ...)

IV. THE COMMISSION WILL BE ABLE TO ENFORCE ITS REVISED INSULATION RULES.

CFA *et al.*'s final objection to the revised insulation rules is that the Commission will be unable to enforce them.[25] CFA *et al.* argue, among other things, that the revised rules will be easily evaded[26] and will invite the type of case-by-case adjudications that the Commission has said it disfavors.[27] Both assertions are groundless.

CFA *et al.* suggests that the convergence of communications technologies will "only increase the ability of insulated parties to interfere in video programming decisions."[28] However, CFA *et al.* ignore the fact that the Commission has substantial experience in reviewing certifications and waiver requests involving corporations with numerous, varied, and complex media interests.[29] For example, in *Telemundo*, the Commission approved a waiver request only

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(... footnote continued)

those rules are substantially more onerous than the ED rules for broadcasters. Moreover, CFA *et al.* are wrong to suggest that the Commission has "a far higher burden" for relaxing the cable attribution rules than for tightening them. *See id.* at n. 7. CFA *et al.* provide absolutely no precedent or other basis to support their claim, nor could they.

25 *See id.* at 18-28.

26 *See id.* at 20-25.

27 *See id.* at 26-28.

28 *See id.* at 22.

29 *See Turner Broadcasting System, Inc.*, 11 FCC Rcd. 19595, at ¶ 43 (1996) (recusing Time Warner officers and directors from involvement in day-to-day operations of WTBS-TV); *Telemundo*, 10 FCC Rcd. 1104, at ¶ 25 (1994) (recusing director of multifaceted corporation from matters relating to Telemundo); *Craig O. McCaw*, 9 FCC Rcd. 5836, at ¶ 148 (1994) (recusing four AT&T directors from matters relating to broadcast interests); *Viacom, Inc.*, 9 FCC Rcd. 1577, at ¶ 12 (1994) (recusing director from matters relating to Paramount and Viacom television stations).

after the applicant represented to the Commission that: (1) the applicant would not participate in company meetings involving the transferee; (2) financial reports would be sufficiently aggregated so that performance figures of the transferee would not be separately displayed; (3) financial reports containing any discrete information on the transferee would be redacted before distribution to the officer; and (4) other officers and directors would be informed of the applicant's recusal at least quarterly.[30] CFA *et al.* suggest no reason why convergence will make it any more difficult for companies or directors/officers to insulate themselves from the video programming activities of an entity that also provides telephony and Internet services, for example (or for the Commission to police such insulation efforts), than it was under the old rules for an entity to insulate itself with respect to a particular media business in a multifaceted corporation.

Indeed, even assuming *arguendo* that CFA *et al.* were correct that convergence will make it more difficult for parties to insulate themselves in an entity that offers both video and non-video services, this would have been equally true even if the Commission had left the old rule -- with its focus on "media-related" activities -- in place. For example, assume an MSO offered both video programming (which is media-related) and cable-provided telephony (which is not media-related) over its cable systems. A director of that MSO who wished to be involved in the entity's telephony activities but to avoid attribution under the old media-related rule would have had to either certify that it was not involved in the video programming activities of the entity or obtain a waiver from the Commission. The process and the level of difficulty in terms of implementing and enforcing insulation and recusals in the world of convergence would be no

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30 *See Telemundo*, *supra* note 29, at ¶ 25. As noted above, other waiver applicants have adopted similar recusal measures.

different under the new rule for that same MSO. A director would have to certify or obtain a waiver as to the MSO's video programming activities (which are "video programming related") but -- as under the old rule -- would still not have such obligations with respect to the MSO's telephony activities (which are not video programming related).[31] In short, CFA *et al.*'s attacks on the revised insulation rules reflect a hostility to insulation rules generally, rather than to the specific rules adopted in the *Cable Attribution Order*.

Finally, CFA *et al.*'s contention that the new insulation rules for officers and directors conflict with the Commission's statements on minimizing case-by-case adjudications are similarly baseless.[32] Both the old and the new insulation rules for officers and directors include waiver provisions, so it is wrong for CFA *et al.* to suggest that the revised rules "actively encourage[ ] [waiver applications] and invite[ ] a new regime of case-by-case adjudication."[33] CFA *et al.*

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[31] Even if this hypothetical MSO were also to offer Internet services, it would not change this analysis. Even though under the new rule a director of this MSO could be involved in the MSO's Internet activities without certification or waiver, the director's involvement in those activities would not introduce the insulation complexities suggested by CFA *et al.* As the foregoing discussion indicates, any such complexities would already have been present under the old rule given the MSO's provision of telephony service.

[32] *See CFA Petition* at 26-27.

[33] *See CFA Petition* at 26. In fact, both the old and new rules are identical in all respects other than the justified change to a video programming focus as discussed above. Both start with the presumption that officers and directors are "considered to have a cognizable interest in the entity with which they are so associated." *Compare* 47 C.F.R. § 76.501, Note 2(g) (general attribution rules for officers and directors); *with id.* § 76.503, Note 1(c) (special rules for purposes of horizontal ownership limit). Both sets of rules also establish recusal standards that permit an officer or director to overcome this presumption depending on the nature of the corporate relationship. An officer or director in a parent corporation can avoid attribution in a subsidiary by certifying to the Commission that he or she has duties or responsibilities "wholly unrelated to the media subsidiary" (in the case of the general attribution rules) or "wholly unrelated to the video programming subsidiary" (in the case of the rules for horizontal ownership). In all other cases -- including where the person is a director or officer in a

(footnote continued ...)

cannot explain how the Commission could be inviting such a "new regime" when waiver applications were also available under the *old* regime, particularly since, as shown above, the change to a video programming focus in the rules will have no effect on the process or the level of difficulty in terms of implementing and enforcing insulation and recusals.

V. CONCLUSION

For the foregoing reasons, NCTA respectfully urges the Commission to reject the petition for reconsideration of CFA *et al.*

Respectfully submitted,

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(... footnote continued)

multifaceted corporation or is a common officer or director of two separate entities -- the person must apply to the Commission for waiver of the attribution rules. *Compare* 47 C.F.R. § 76.501, Note 2(g) (general rules); *with id.* § 76.503, Note 1(c) (special rules for horizontal ownership limit).

CERTIFICATE OF SERVICE

I, Laura Dennis, do hereby certify that I caused one copy of the foregoing Opposition of NCTA to be served by hand delivery on all parties on the attached service list, this 17th day of February, 2000.

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