

Federal Communications Commission
Washington, D.C.

March 6, 2000

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

Re: Acceptance of Comments As Timely Filed in (MM Docket No. 92-264)

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

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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 MM Docket No. 92-264; 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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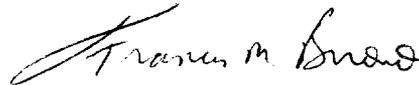
Ms. Magalie Roman Salas
February 18, 2000
Page 2

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,

A handwritten signature in cursive script that reads "Francis M. Buono".

Francis M. Buono
Counsel for NCTA

cc: Andy Schwartzman, Media Access Project

Attachment



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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) dbrenner@ncta.com		
7. Mailing Address For Correspondence (required) 1724 Massachusetts Avenue, NW		
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4. Law Firm Name (optional)		
5. Attorney Name (optional)		
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National Cable Television Association

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5. **Attorney Name** (optional)

Daniel L. Brenner

6. **Email-id** (optional)

dbrenner@ncta.com

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8. **City** (required)

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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 Section 11(c))	
of the Cable Television Consumer)	MM Docket No. 92-264
Protection and Competition)	
Act of 1992)	
)	
Horizontal Ownership Limits)	

**OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION TO
PETITION FOR RECONSIDERATION**

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Association

February 17, 2000

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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

**OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION 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 decision to change the cable horizontal ownership formula from a cable homes-passed test to an MVPD subscriber-based test is inconsistent with the plain meaning and purpose of Section 613 of the Communications Act; (2) the Commission's revised rules improperly delegate authority for

¹ See *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Third Report and Order, FCC 99-289 (rel. Oct. 20, 1999) ("*Third Rept. & Order*").

reporting MVPD subscriber counts to private entities; and (3) the Commission's revised rules improperly exclude overbuilt communities from MVPD subscriber counts.²

For the reasons discussed below, the aforementioned claims of CFA *et al.* are without merit and should be rejected by the Commission.³ Specifically, the Commission's change from a cable homes passed test to an MVPD subscriber test and its exemption for overbuilt communities are fully justified based on the plain language of the statute, its legislative history, and changes in the MVPD marketplace that have occurred since the cable homes passed test was adopted in 1994, most importantly the explosive growth of DBS.

Moreover, the Commission's decision to allow cable operators to rely on industry estimates of MVPD subscribers is consistent with Commission precedent and is entirely justified. CFA *et al.*'s claim that reliance on industry data will allow MSOs to "game" the system ignores the fact that the rules require MSOs with 20% or more of all MVPD subscribers to report their subscriber numbers *directly to the Commission* and that *all* MSOs have an incentive to be accurate in their reporting of subscriber numbers to Kagan and others since the license fees they pay to programmers are based on the MSO's subscriber numbers. Equally important, relying on private reporting services saves the Commission the time, expense, and resources that would be required to compile data from various MVPD sources and update that data to ensure accuracy

² Petition of CFA *et al.*, filed in MM Docket No. 92-264 (Jan. 3, 2000) ("*CFA Petition*"). See 47 C.F.R. § 76.503 (revised rules for national subscriber limits).

³ Even assuming *arguendo* the constitutionality of the statute and rules, while NCTA supports the Commission's decision to change the horizontal ownership formula from a cable homes passed-based test to an MVPD subscriber-based test, it continues to have objections to other aspects of the revised horizontal ownership rules (and the companion cable attribution rules), and therefore reserves its right to challenge these other aspects of the revised rules.

throughout the year. Private services, such as Kagan and Nielsen, perform these functions well, without costing taxpayers anything. In short, there would be no benefit, but significant costs, associated with bringing this reporting and monitoring function within the Commission.

II. THE COMMISSION'S DECISION TO CHANGE ITS CABLE HORIZONTAL OWNERSHIP FORMULA FROM A CABLE HOMES PASSED-BASED TEST TO AN MVPD SUBSCRIBER-BASED TEST IS CONSISTENT WITH SECTION 613 OF THE COMMUNICATIONS ACT.

A. CFA *et al.* Are Incorrect In Suggesting That The Change To An MVPD Subscriber-Based Test Violates The Plain Meaning Or The Legislative History Of Section 613.

CFA *et al.* contend that the plain language of Section 613(f)(1)(A) requires the Commission to retain the old cable homes-passed test because the statute refers expressly to "cable subscribers," not DBS or other non-cable subscribers, and to subscribers an entity is "authorized to reach," not merely to actual subscribers.⁴ CFA *et al.* misconstrue the plain meaning of Section 613(f)(1)(A). Congress clearly gave the Commission discretion to adopt a subscriber-based formula for the cable horizontal limit and to include non-cable MVPD subscribers in the calculation of this limit.⁵

1. Commission Authority To Use A Subscriber-Based Formula.

Section 613(f)(1)(A) specifically requires the Commission 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 a person, or in which such person has

⁴ CFA *Petition* at 4.

⁵ See Comments of NCTA, filed in MM Docket No. 92-264, at 16-19 (Aug. 14, 1998) ("*NCTA Comments*"); Comments of TCI, filed in MM Docket No. 92-264, at 62-65 (Aug. 14, 1998) ("*TCI Comments*"); Comments of Time Warner Inc., filed in MM Docket No. 92-264, at 27-32 (Aug. 14, 1998) ("*Time Warner Comments*");

an attributable interest.”⁶ The fact that the plain language of the Act uses the term "subscribers" and not "homes passed" alone refutes CFA *et al.*'s suggestion that the Commission is precluded from adopting a subscriber-based test.

Congress' use of the words "authorized to reach" in this section does not require a contrary conclusion. CFA *et al.* argue that these words can only mean that Congress required the Commission to adopt a homes passed-based formula because "[e]very home to which the cable operator can deliver service is a home which a franchised operator 'is authorized to reach' [and] [l]imiting the count to those who purchase the service ignores a large number of customers the operator is 'authorized to reach.'"⁷ However, a more reasonable interpretation is that the phrase "authorized to reach" is synonymous with "permitted to serve," so that the statutory provision simply means that the Commission is required to set limits on the number of subscribers a cable operator is "permitted to serve" through owned and affiliated cable systems.

At the very least, the phrase "authorized to reach" is ambiguous, and the Commission's adoption of a subscriber-based limit is therefore entitled to deference and should be upheld as a reasonable interpretation of the statute under *Chevron*.⁸ This is especially true given that the Commission's subscriber-based formula is supported by the legislative history of Section 613(f)(1)(A). The Senate and House reports relating to Section 613 consistently discuss the

⁶ 47 U.S.C. § 533(f)(1)(A) (emphasis added).

⁷ CFA *Petition* at 4.

⁸ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.*, 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).

horizontal limit in terms of the MSO's share of *subscribers*,⁹ and the Conference Report reflects the "permitted to serve" interpretation of the phrase "authorized to reach" suggested above.¹⁰ CFA *et al.* ignore this legislative history.

Equally important, a subscriber-based test makes perfect sense in light of the principal congressional objectives in enacting the horizontal ownership provision and the dynamics of the MVPD marketplace. Congress enacted the cable horizontal ownership limit based on the concerns that cable operators could: (1) exercise monopsony power to force unfair concessions from programmers;¹¹ and (2) vertically foreclose entry by programmers, thereby reducing program diversity.¹² Thus, as the Commission has acknowledged, the purpose of the horizontal

⁹ See H.R. Rep. No. 628, 102d Cong., 2d Sess. 42 (1992) ("Horizontal concentration refers to the share of cable *subscribers* accounted for by the largest MSOs.") (emphasis added) ("*House Report*"); S. Rep. No. 92, 102d Cong. 1st Sess. 34 (1991) ("To address the issue of national concentration in the cable industry and enhance effective competition, the legislation directs the FCC to place reasonable limits on the size of MSOs (by the number of *subscribers*.") (emphasis added).

¹⁰ See H.R. Rep. No. 862, 102d Cong., 2d Sess. 81 (1992) ("Subsection (f)(1) [of the Senate Bill, which was ultimately adopted] requires the FCC to establish reasonable limits on [] the number of cable subscribers that any one cable operator *may serve through cable systems owned by the cable operator or in which the operator has an attributable interest*") (emphasis added).

¹¹ See H.R. Rep. No. 628, 102nd Cong. 2d Sess. 42-43 (1992) ("[T]he size of certain MSOs could enable them to extract concessions from programmers, including equity positions, in exchange for carriage.").

¹² See S. Rep. No. 92, 102nd Cong, 1st Sess. 32 (1991) ("[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.").

ownership limit relates particularly to the ability of cable operators adversely to affect programming competition and diversity.¹³

Cable operators and non-cable MVPDs deal with program suppliers based on the number of subscribers they serve, not the number of homes they pass.¹⁴ Thus, in the real world, any monopsony or vertical foreclosure power that a cable operator could wield is related to subscribers, not homes passed. As the Commission noted in its recent horizontal order, "an operator's actual number of subscribers more uniformly and accurately reflects power in the programming marketplace than does the number of homes passed."¹⁵ CFA *et al.* decline to refute this Commission conclusion.

¹³ 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.").

¹⁴ See *In Re Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Sixth Annual Report, CS Docket No. 99-230, FCC 99-418, at ¶ 175 & n. 629 (rel. Jan. 14, 2000) ("*Video Competition Report*") (noting that "the total license fee paid for a program is based, in part, on the total number of subscribers served by the MVPD" and that "[a]s the subscribership increases, so does the total license fee paid by the MVPD"). See also *In Re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Rept. & Order, 8 FCC Rcd. 3359, at ¶ 108 (rel. April 30, 1993) ("The record in this proceeding indicates that volume-related information is often available on some rate cards through 'volume discounts' based upon a distributor's number of subscribers.").

¹⁵ *Third Rept. & Order*, at ¶ 22. See also *id.* ("While an operator may pass a large number of homes in its franchise area, the operator could have a low penetration rate in that area due to competition from other MVPDs or other factors, thereby rendering the number of homes passed an inaccurate indicator of the operator's market power. Moreover, an operator does not purchase programming for the number of homes that it passes, but rather for its actual number of

(continued ...)

Finally, the reasonableness of the Commission's adoption of a subscriber-based limit is underscored by the inherent shortcomings in the homes-passed approach, particularly in the current MVPD environment. As other commenters have noted in previous filings in this docket, homes-passed measurements are highly inaccurate.¹⁶ Moreover, a homes-passed test would, as the Commission has observed, be meaningless in the context of an MVPD-based horizontal rule.¹⁷

2. Commission Authority To Include Non-Cable MVPD Subscribers In The Formula.

The Commission also has authority to include *non-cable* MVPD subscribers in the formula measuring cable horizontal concentration. First, the statute does not dictate to the Commission the *manner* by which the appropriate horizontal limit must be calculated and, contrary to CFA *et al.*'s suggestion, certainly does not contain any language prohibiting the Commission from taking all MVPD subscribers into account when measuring a cable MSO's horizontal ownership concentration level.

Second, the statute directs the Commission to ensure that its rules "reflect the dynamic nature of the communications marketplace."¹⁸ As NCTA and others explained in detail in prior

(... continued)

subscribers; thus, an operator's share of subscribers more accurately reflects its market power.") (footnotes omitted).

¹⁶ See, e.g., *TCI Comments* at 60-61 (citing Kagan study that concluded the number of homes-passed could be anywhere from 96 million to 115 million); *Time Warner Comments*, at 28-30 (noting that cable homes passed data is "unreliable and difficult to obtain").

¹⁷ See *Third Rept. & Order*, at ¶ 23 (noting that while a DBS provider passes every home in the country, "homes passed does not accurately reflect their market power because DBS providers only serve approximately 10% of MVPD subscribers").

¹⁸ 47 U.S.C. § 533(f)(2)(E).

comments in this proceeding, the Commission simply cannot give effect to this congressional directive unless it revises its formula to reflect the increased competition from non-cable MVPDs.¹⁹ By changing the relevant marketplace in the formula to include all MVPD subscribers, the Commission properly updated the formula to reflect the significant developments in the MVPD marketplace that have occurred since the initial cable homes passed-based test was adopted over six years ago.

As the Commission correctly noted in the *Third Rept. and Order*, the MVPD marketplace has changed dramatically in recent years as the number of DBS subscribers continues to rise.²⁰ The "inclusion of both cable and non-cable MVPD subscribers in the denominator will," as the Commission concluded, "reflect the dynamic nature of the marketplace and the diminishing market power of cable operators as non-cable MVPDs increase their subscribership."²¹ Indeed, given the Commission's findings about the growth of DBS, it would be irrational not to take DBS into account in measuring a cable operator's horizontal market power.

¹⁹ See *NCTA Comments* at 16-19; *TCI Comments* at 15-21, 56-59; *Time Warner Comments* at 27-32.

²⁰ See *Third Rept. & Order*, at ¶¶ 29-30. Between June 1998 and June 1999, the number of DBS subscribers jumped 40% -- from 7.2 million to 10.1 million -- and as of June 1999, DBS constituted 12.5% of all MVPD subscribers. See *Video Competition Report*, at ¶ 8 (citing MVPD subscriber numbers as of June, 1999).

²¹ See *Third Rept. & Order*, at ¶ 30. See also Public Interest Statement of AT&T/MediaOne, filed in CS Docket No. 99-251, at 45-60 (July 7, 1999) (noting that existing and growing competition from non-cable MVPDs serve as alternative outlets for video programming, thus constraining the ability of any cable operator to exercise monopsony power or engage in vertical foreclosure); Reply Comments of AT&T/MediaOne, filed in CS Docket No. 99-251, at 39-47 (Sept. 17, 1999) (noting effect of MVPD competition on the video programming market).

Third, failing to account for all MVPD subscribers in the horizontal ownership test would lead to absurd results. For example, under CFA *et al.*'s approach, if an MSO today had 30% of all cable homes passed and tomorrow the DBS industry captured half of the MVPD marketplace, the MSO would still be at 30% of cable homes passed. Yet, the MSO's power in the marketplace, and particularly its ability to exercise monopsony power or vertical foreclosure, clearly would have been reduced dramatically. CFA *et al.*'s efforts to exclude DBS and other non-cable MVPD subscribers from the horizontal ownership formula are especially insupportable when one considers that DirecTV (with over 8 million subscribers) is now about the same size as the third largest cable MSO -- Comcast. If Comcast subscribers are included in the denominator when measuring AT&T's horizontal concentration, for example, why should DirecTV's subscribers be excluded, since DirecTV has approximately the same number of subscribers as Comcast and thus constitutes a comparable outlet for programmers?

In short, an approach which excluded non-cable MVPD subscribers from the cable horizontal ownership formula would distort a cable operator's relative influence in the current video programming marketplace. CFA *et al.* fail to explain how it could be reasonable in such an environment for the Commission to completely ignore the subscribership of non-cable MVPDs when crafting its revised rules, particularly when this approach would lead to such absurd and indefensible outcomes.

Moreover, contrary to CFA *et al.*'s suggestion, the Commission's inclusion of non-cable MVPDs in the cable horizontal ownership formula is not inconsistent with the legislative history of Section 613. CFA *et al.* claim that the conference committee on the 1992 Cable Act

specifically rejected a House version of Section 613 that would have directed the Commission to adopt an MVPD-based rule on horizontal ownership.²² Hence, according to CFA *et al.*, Congress has already spoken against adoption of an MVPD subscriber-based test.

CFA *et al.*'s interpretation, however, cannot withstand scrutiny. The House version of Section 613 did *not* direct the Commission to adopt a horizontal ownership rule for cable operators based on cable's share of the entire MVPD market. Rather, the measure would have required the Commission to impose ownership limits on all MVPDs, not just cable operators.²³ Thus, in rejecting the House version, Congress was merely indicating its intent to limit application of the horizontal ownership provision to cable MSOs, but was not at all constraining the Commission's ability to take non-cable MVPD subscribers into account when applying the rules to such MSOs.

In short, the Commission's decision to include non-cable MVPD subscribers in the cable horizontal ownership formula is consistent with the plain language of the statute and with congressional intent.²⁴

²² CFA *Petition* at 5.

²³ See H.R. 4850, 102d Cong., 2d Sess. § 18(a)(1)(B) (1992) (directing Commission to "impose limitations on the proportion of the market, at any stage in the distribution of video programming, which may be controlled by any *multichannel video programming distributor* or other person engaged in such distribution) (emphasis added). See also *House Report* at 123 (same).

²⁴ Indeed, to the extent the statute places *any* potential limitation on the Commission's discretion to take non-cable MVPD subscribers into account, it is that such non-cable subscribers may not be included in the *numerator* of the formula when counting the number of subscribers served by the cable MSO. This interpretation would be based solely on the most literal construction of Section 613(f)(1)(A) which directs the Commission to "establish reasonable limits on the number of *cable subscribers* a person is authorized to reach *through cable systems* owned by such person." (emphasis added). However, in no event can this language be read to limit the

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B. CFA *et al.* Mischaracterize The Purpose And Effect Of The Commission's "Sliding Scale" Approach For Measuring Cable Horizontal Ownership.

CFA *et al.* contend that the "sliding scale" mechanism which the Commission incorporated into the revised formula will undermine the very purpose of Section 613(f)(1)(A) and the Commission's rules. Specifically, petitioners claim that the sliding scale will enable a large cable operator to acquire an ever larger share of *cable* subscribers as the universe of *MVPD* subscribers continues to grow, thereby enhancing its ability to exercise monopsony power in the video programming market.²⁵

CFA *et al.*'s attacks on the sliding scale amount to little more than a rehashing of its arguments against including all non-cable MVPD subscribers in the formula. CFA *et al.* simply refuse to acknowledge the fact that the MVPD marketplace has changed in the last decade, and that DBS -- which increased its subscribership by 40% over the last year compared to just 1.8% for cable -- is a major buyer of video programming.²⁶ In this changed environment, the Commission's decision to incorporate a sliding scale into the formula which measures a cable operator's relative power in the video programming market based on its share of all *MVPD* subscribers, not simply *cable* subscribers, is justified and consistent with the statute.

Moreover, CFA *et al.* are wrong in suggesting that the "new sliding scale will allow one or two dominant cable MSOs to grow to positions of unchallenged dominance among MVPD

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Commission's authority to expand the *relevant market* considered in the formula (*i.e.*, the formula's *denominator*).

²⁵ CFA *Petition* at 10-13.

²⁶ See *Video Competition Report* at ¶¶ 15, 20, 70. In fact, DirecTV and EchoStar are now ranked among the ten largest MVPDs. See *id.* at ¶ 15.

providers."²⁷ The following hypothetical reveals the error in petitioners' statement: If the number of MVPD subscribers equaled 85 million, an MSO could serve up to 25.5 million of those subscribers under the 30% cap. If the total number of MVPD subscribers were to rise to 100 million, the cable operator could then serve up to 30 million subscribers, *i.e.*, its ownership percentage would still be capped at 30% of the relevant MVPD subscriber market. Hence, contrary to the suggestions of *CFA et al.*, the horizontal ownership cap does not "rise" under the sliding scale.²⁸ Further, if such a cable operator which served 30 million MVPD subscribers decided not to carry a certain programming service, that programming service could still obtain carriage on MVPD systems serving the other 70 million subscribers. It is self-evident that a cable operator cannot exercise monopsony or vertical foreclosure power under such circumstances, particularly if, as the Commission has suggested, a programmer only "needs 15 million subscribers in order to have a reasonable chance to achieve economic viability."²⁹

There is also no merit to *CFA et al.*'s suggestion that the "sliding scale" approach will allow cable operators to "extend[] their monopsony power to alternate means of delivery[]." ³⁰ The "sliding scale" as implemented by the Commission will, in fact, have the opposite result. As the Commission noted, a cable operator will reach the 30% limit more quickly by adding non-

²⁷ *CFA Petition* at 11.

²⁸ *See id.* at 11-12.

²⁹ *See Third Rept. & Order*, at ¶ 42. *See also id.* at ¶ 41 ("Staff analysis further supports 15 million as a minimum subscriber number for viability."). Importantly, *CFA et al.* do not challenge the Commission's conclusion that a programmer requires 15 million subscribers (and not necessarily 15 million *cable* subscribers) to achieve long-term viability.

³⁰ *See CFA Petition* at 5-6.

cable subscribers because those subscribers are counted in the *numerator* as well as the *denominator* under the revised formula.³¹ In contrast, if the Commission had followed CFA *et al.*'s logic and not incorporated non-cable subscribers into the formula, a cable MSO could have added an unlimited number of non-cable subscribers because doing so would not have affected the MSO's subscribership count under the rules.

Finally, CFA *et al.* is incorrect in claiming that by including non-cable MVPD subscribers into the formula, "the Commission effectively *raises* the cap to 36.7%."³² While CFA *et al.* do not indicate how they calculated this 36.7% figure, NCTA presumes it is a reference to statements in the *Third Rept. & Order* in which the Commission noted that a 30% limit based on current MVPD subscribers is the equivalent of a 36.7% limit based on cable subscribership alone.³³ However, this mathematical fact has no relevance here and certainly does not mean that the inclusion of non-cable MVPD subscribers in the cable horizontal ownership formula "effectively increased" the horizontal limit by nearly seven percentage points. As noted, the Commission properly concluded that changed circumstances in the MVPD marketplace since 1993 required a change in the cable horizontal ownership formula's relevant market from cable homes passed to MVPD subscribers. Seen in this light, the incorporation of non-cable MVPD subscribers into the formula did not signify an effective increase in cable's permissible horizontal concentration level.

³¹ See *Third Rept. & Order*, at ¶ 32. See also 47 C.F.R. § 76.503(a) ("[N]o cable operator shall serve more than 30% of all multichannel video programming subscribers nationwide through *multichannel video programming distributors* owned by such operator or in which such cable operator holds an attributable interest.") (emphasis added).

³² See *CFA Petition* and 11 (emphasis added); see also *id.* at 3.

³³ See *Third Rept. & Order*, at ¶ 37 and n. 82.

Rather, the Commission recognized that retention of a purely cable-based approach would have *overstated* a cable MSO's relative monopsony and vertical foreclosure powers in the current MVPD marketplace.³⁴

III. THE COMMISSION'S DECISION TO ALLOW CABLE OPERATORS TO RELY ON INDUSTRY ESTIMATES OF MVPD SUBSCRIBERS IS CONSISTENT WITH COMMISSION PRECEDENT AND SERVES THE PUBLIC INTEREST.

CFA *et al.* claim that reliance on industry estimates of MVPD subscriber counts is "an invitation to gamesmanship, manipulation and outright trickery" because there is no way for industry reporting services to check the accuracy of subscriber counts provided by cable operators.³⁵ As with other speculative harms catalogued in their petition, CFA *et al.*'s assertion defies logic, common sense, and the realities of the video programming marketplace.

First, CFA *et al.*'s contention that a cable operator would under-report its subscribership levels to private industry reporting entities as it approached the 30% cap is not supportable.³⁶ The Commission's revised rules require a cable operator that serves 20% or more of all MVPD subscribers to report its subscriber numbers *directly to the Commission* at the time it files a license transfer application in connection with a proposed acquisition.³⁷ These reports are a matter of

³⁴ See Drs. Stanley M. Besen and John R. Woodbury, Charles River Associates, "An Economic Analysis of the FCC's Cable Ownership Restrictions," August 14, 1999 (attached as Appendix A to *TCI's Comments*), at 18 ("[T]here is now a substantial body of clear evidence that the concerns of Congress, which provided the basis for the Commission's [30% cable homes-passed] rule, were vastly overstated.").

³⁵ See *CFA Petition* at 13.

³⁶ See *id.*

³⁷ See 47 C.F.R. § 76.503(g). These revised rules became effective on February 9, 2000.

public record. CFA *et al.*'s suggestion that MVPDs near the cap would under-report their subscriber numbers in order to game the rules ignores this reporting aspect of the rules.

Second, CFA *et al.* claim that smaller cable operators that are not near the 30% limit would "inflate their subscribership figures to enhance their image as viable competitors."³⁸ This statement reflects a basic misunderstanding of the video industry. All MVPDs (cable, as well as others) generally pay license fees to video programmers based on the number of subscribers served by the MVPD. Hence, were an MVPD to inflate its subscribership numbers to private industry reporting entities as CFA *et al.* suggests, it would end up paying higher license fees to its programmers and would be unable to recover such higher fees from actual subscribers. In effect, the subscriber-based nature of license fee payments will motivate all MVPDs to strive for accuracy in reporting their subscriber counts.

Third, CFA *et al.*'s statement that the "Commission cannot delegate a critical government function to a private reporting agency"³⁹ overlooks the Commission's well-established practice of using industry estimates for a broad range of Commission activities. For example, the Commission has used private industry data to help calculate its annually-adjusted regulatory fees⁴⁰ and to assess whether certain cable systems are subject to effective competition and therefore free from all rate regulation.⁴¹ Likewise, Commission rules specifically rely on information from

³⁸ See CFA *Petition* at 13.

³⁹ See *id.* at 14.

⁴⁰ See, e.g., *In Re Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, 14 FCC Rcd. 9868, at ¶ 13 (1999) (describing how the Commission calculates individual service regulatory fees).

⁴¹ Specifically, for example, cable operators seeking to demonstrate that one of its cable systems is subject to effective competition often rely on DBS subscriber information published by
(continued ...)

Nielsen Media Research for purposes of determining whether a local broadcast television station qualifies for must carry status on a local cable system.⁴² In addition, the Commission relies extensively on industry estimates in compiling its annual video competition report to Congress, including its estimates for total MVPD subscribers.⁴³

Finally, contrary to the claims of *CFA et al.*, the Commission's decision to allow cable operators to use "any published, current and widely cited industry estimate of MVPD subscribership"⁴⁴ clearly serves the public interest because: (1) the estimates of leading private data services are followed and respected by all segments of the video industry, not merely cable operators;⁴⁵ and (2) relying on such services saves the Commission the time, expense, and

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SkyTRENDS. *See, e.g., In re Mountain Cable Company*, 14 FCC Rcd 13994, ¶ 17 (1999) (relying on SkyTRENDS data to prove that DBS penetration exceeded 15 percent of households in the franchise area).

⁴² *See* 47 C.F.R. § 76.55(e)(2). In fact, by directing the Commission to determine a broadcasting station's market by using "commercial publications," Section 614(h)(1)(C) of the Communications Act illustrates that Congress itself explicitly recognizes the propriety of such Commission reliance on private industry data sources.

⁴³ *See, e.g., Video Competition Report*, at App. C, Table C-1 (relying on Nielsen Media Research for the number of TV households; Paul Kagan Associates for the number of cable, MMDS, and SMATV subscribers; and SkyREPORT for satellite subscriber numbers).

⁴⁴ *See Third Rept. & Order*, at ¶ 35.

⁴⁵ Hence, *CFA et al.* are wrong to suggest that "industry reporters have every incentive to accommodate cable MSOs in their desire to manipulate the raw data." *See CFA Petition* at 14. Even assuming *arguendo* that *CFA et al.*'s fanciful conspiracy theories were true and that cable operators attempted to "appeal for a change of some inconvenient fact through back channels," *see id.*, a private reporting service would have every incentive to reject that appeal because changing the data to satisfy the cable operator would risk not only discrediting the service with programmers and other segments of the industry, as well as the Commission and other government entities that use the service's estimates, but also encouraging those customers to subscribe to a competing reporting service.

resources that would be required to compile data from various MVPD sources and update that data to ensure accuracy throughout the year. Private services, such as Kagan and Nielsen, perform these functions well, without costing taxpayers anything. In short, there would be no benefit, but significant costs, associated with bringing this reporting and monitoring function within the Commission.

IV. THE COMMISSION PROPERLY EXCLUDED SUBSCRIBERS IN OVERBUILT COMMUNITIES FROM A CABLE OPERATOR'S SUBSCRIBERSHIP COUNT.

CFA *et al.*'s objections to the overbuild exception⁴⁶ are baseless. As an initial matter, CFA *et al.* are incorrect in stating that the overbuild exception violates the plain language and purpose of Section 613(f)(1)(A).⁴⁷ The Commission has the authority under Section 613 to set an ownership limit and then carve out exceptions to that limit to achieve other public policy goals. For example, under the old horizontal rules, the Commission established an ownership limit of 30%, but then allowed a cable operator to reach 35% of all cable homes-passed nationwide provided the additional cable systems were minority-controlled.⁴⁸ The Commission created this exception to "foster the participation of minorities in the cable industry."⁴⁹ The Commission has taken a similar approach here, establishing the cap at 30% of MVPD subscribers and exempting subscribers in overbuilt communities to promote competition.⁵⁰ CFA *et al.*'s complaint is really

⁴⁶ See CFA *Petition* at 15-16.

⁴⁷ See *id.* at 15.

⁴⁸ See 47 C.F.R. § 76.503(b) (repealed).

⁴⁹ See *Third Rept. & Order*, at ¶ 67. Although the Commission has since eliminated the minority exception, its decision to do so was not predicated on a lack of authority under Section 613(f)(1)(A).

⁵⁰ See *id.* at ¶¶ 33-34.

with the Commission's policy choice relative to overbuilt communities, not with the Commission's clear authority under Section 613(f)(1)(A) to make that choice.

In addition, CFA *et al.*'s suggestion that exempting overbuilt communities will retard, rather than promote, competition⁵¹ is without merit. In fact, if a cable operator spends millions or billions of dollars on overbuilds, it would be doing so with the express purpose of entering the very type of competition the Commission and Congress have long sought.⁵² It is baffling that CFA *et al.* would object to a Commission rule that is so clearly designed to promote increased competition and greater consumer choice.⁵³

⁵¹ See CFA *Petition* at 15-16 (contending that the exception will enable large cable operators to crush their weaker cable rivals).

⁵² The Commission recognized this fact when explaining its decision to exempt overbuilt communities from subscribership counts. See *Third Rept. & Order*, at ¶ 37 ("[T]o the extent that cable operators have concerns regarding efficiencies of scale and competition with incumbent telephone service providers, we will permit cable operators to grow in size through overbuilding without counting subscribers reached in that manner towards an operator's horizontal limit.").

⁵³ Moreover, CFA, *et al.*, are simply wrong in contending that the exclusion of overbuild subscribers understates a cable company's market power. To the contrary, the overbuild exception was required by the fundamental principle, endorsed by both the Commission and the courts, that market power analyses that rely on market share must reflect the reality that excess capacity -- such as that created when one cable system overbuilds another -- can deprive even a firm with a large market share of its normal market power. See, e.g., *Third Rept. & Order* ¶ 16 ("We recognize that a large market share does not in and of itself indicate that a firm or a collection of firms has the ability to exercise market power or engage in anticompetitive behavior"); *Review of the Prime Time Access Rule*, 11 FCC Rcd 546 (1995) ("Even a firm with a very large market share cannot automatically be presumed to have market power; more research would be needed regarding whether there are competitive factors such as ease of entry, excess capacity held by competitors, etc., that would defeat any attempt by the firm to exercise market power despite its very large market share").

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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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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