subscribers they serve, not the estimated number of homes passed within their franchise areas.[107] Moreover, the limit is now calculated in terms of an MSO's share of the total (cable and non-cable) MVPD market, rather than the cable market only.[108] The Commission recognized that the MVPD landscape was evolving and viable competition was emerging, affording programmers alternative avenues for distribution and consumers more choices in multi-channel programming sources. By defining the limit in terms of a percentage of the total MVPD nationwide subscribership, the Commission sought to establish a self-adjusting scale that would take into account, and directly respond to, the dynamic and changing video programming marketplace.[109]

B. The *Time Warner* Decision

48. The D.C. Circuit found that Section 613(f)(1) authorizes the Commission to set a limit that would prevent a "single company"[110] from foreclosing entry of a programming network, but does not authorize the agency to regulate the "legitimate, independent editorial choices of multiple MSOs."[111] Thus, absent a Commission record that would support findings of, or predictive judgments regarding, collusive or other joint anti-competitive conduct among multiple MSOs, the D.C. Circuit determined that the record only supported a 60 percent limit under the Commission's 40 percent open field premise.[112] The D.C. Circuit opined that the Commission might justify a lower limit, if it could establish that a single large MSO acting alone would be able to act anti-competitively by "extort[ing] equity from programmers or forc[ing] exclusive contracts . . . while serving somewhat less than the 60% of the market (*i.e.*, less than the fraction that would allow it unilaterally to lock out a new cable programmer)."[113] It found, however, that the Commission failed to offer record evidence of anti-competitive harm in terms of a single MSO, let alone multiple MSOs.[114] Accordingly, the D.C. Circuit reversed and remanded the 30 percent horizontal limit, finding that the Commission neither justified the limit with record support, nor established that the limit did not burden speech substantially more than necessary.[115]

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[107] *Id.* at 19108.

[108] *Id.* at 19110-12. The Commission also reformulated the calculation by counting only those cable subscribers served by a MSO's existing cable franchises (as of Oct. 20, 1999), and excluding all subscribers gained through development of new, non-incumbent systems, in order to spur competition and foster overbuilding. *Id.*

[109] Under the self-adjusting scale, increases in non-cable MVPD subscribership effectively raise cable MSOs' horizontal limit in terms of the number of *cable* subscribers they may serve and reflect MSOs' correspondingly diminished market share. Given non-cable MVPD gains, the Commission concluded that the self-adjusting 30 percent horizontal limit at the time was the effective equivalent of a 36.7 percent cap of cable subscriber ownership. *See 1999 Horizontal Order*, 14 FCC Rcd at 19113.

[110] *Time Warner*, 240 F.3d at 1131.

[111] *Id.* at 1130-35 (finding that the language of Section 613(f)(2)(A) that requires the FCC to ensure that a single cable operator or a group of cable operators "jointly" could not "unfairly" impede the programming flow, requires evidence of collusive or anti-competitive conduct or theoretical basis for such conduct). *See* ¶ 4, *supra*.

[112] *Id.* at 1132-33 (accepting, but not addressing the validity of, the Commission's 40 percent open field premise).

[113] *Id.* at 1133.

[114] *Id.* at 1132-34.

[115] *Id.* at 1130, 1136.

49. The D.C. Circuit cautioned the Commission, in revisiting the horizontal limit, to identify and support any findings of anti-competitive harm,[116] and to draw "the connection between [such] harm and market power."[117] The D.C. Circuit further cautioned the Commission to consider the pervasive presence of DBS and its impact on MSOs' market power in the upstream and downstream video programming markets.[118] In this respect, the D.C. Circuit faulted the Commission for mistakenly equating market share with market power by formulating the limit in terms of a percentage of MVPD subscribers.[119]

50. Accordingly, the D.C. Circuit's decision made clear that in establishing a subscriber limit, the "government must be able to ensure that a programmer have at least two conduits through which it can reach the number of viewers needed for viability - - independent of concerns over anti-competitive conduct."[120] In addition, the subscriber limit must be set in the context of MVPDs' market power. An MVPD's market power "depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability of competition*" (*i.e.*, the availability of an alternative MVPD outlet affords programmers access and consumers choice, and erodes cable's or an MSO's market power irrespective of current market share).[121] Further, the D.C. Circuit made clear that in order to sustain a limit below 60 percent (assuming the validity of the 40 percent open field premise), the government must establish a record of substantial evidence showing the existence or likelihood of anti-competitive actions by a large MSO acting individually or by multiple MSOs acting collusively in the MVPD market.

51. In the discussion that follows, we first present a more general version of the open field approach, which underlies our current rules. We seek to determine whether such a regulatory approach is still appropriate, and whether it can satisfactorily address the issues raised in the *Time Warner* decision. We then consider an approach designed to take into account the current market structure and performance of the industry. The overriding concern in these proposals is to ensure that alternative conduits for the delivery of multi-channel video programming to consumers remain viable. We also invite commenters to suggest alternative regulatory approaches.

C. Horizontal Limit Proposals

1. Limit Based on Market Share Measurements

52. **Open Field Approach:** One method of limiting horizontal concentration is to restrict the possible market share of cable MSOs, which is the basis of the Commission's current horizontal limit. The Commission's limit is designed to preserve at least four MSOs in the MVPD market and thereby ensure that MSOs individually or jointly do not defeat the entry of new programming networks. The limit bars any one MSO from serving more than 30 percent of MVPD subscribers, and effectively bars the two largest MSOs from serving more than 60 percent of MVPD subscribers. It is premised upon the

[116] *Id.* at 1132, 1133-34.

[117] *Id.* at 1134.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1131-32.

[121] *Id.* at 1134.

Commission's belief that a new programming network needs to reach approximately 20 percent of the 80 million MVPD subscribers in order to succeed. The limit is further premised on the theory that a network has a 50 percent chance of obtaining subscribers on systems that are not actively denied to it. Thus, the network needs to have access to MVPDs serving at least 40 percent of all MVPD subscribers to ensure that it will actually reach the necessary 20 percent of viewers. As discussed previously, the D.C. Circuit in *Time Warner* found that the Commission "is on solid ground in asserting authority to be sure that no single company could be in a position single handedly to deal a programmer a death blow," which would support a 60 percent cap, provided the Commission could substantiate its 40 percent open field premise.[122]

53. Some support for the 40 percent open field premise is found in the Federal Trade Commission's decision in the Time Warner-Turner Broadcasting System merger. Explaining its decision to place conditions on the merger, the FTC concluded that "because of the economies of scale involved, the launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers."[123] The FTC also found that there were "formidable entry barriers into content" and that entry into the market for "marquee" content "has proven slow and costly."[124] This finding would tend to support this Commission's open field formulation, at least for the purposes of protecting entry for general-audience programming. It is important to note, however, that the FTC decision was reached in 1997, when both MVPD competition and channel capacity were at lower levels than today.

54. In reexamining the horizontal limit, we recognize that different types of networks might need more or less than a 40 percent "open field" to survive, and that in the competition between networks of the same type a widely distributed network will have very significant advantages over a network with more limited distribution.[125] Although the costs of program production and distribution are not affected by the number of subscribers served once the initial investment in producing a program is made,[126] the necessary subscribership reach for success varies depending on the type of programming network.[127] In addition, for some types of programming networks, particularly high-cost networks,[128] advertising revenue may be critical. For these types of networks, the inability to reach large numbers of subscribers due to cable horizontal concentration could drive programmers out of business, deter entry, or reduce the quality and innovation of programming produced. The current 40 percent open field was intended to support the typical high-cost programming network that requires large audiences.

[122] 240 F.3d at 1131-32.

[123] *In re Time Warner, Inc.*, 123 F.T.C. 171, 207 (1997) (statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney) ("*FTC Time Warner Decision*").

[124] Rubenfeld, Daniel L. and Hal J. Singer, "Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger," *UC Berkeley School of Law Public Law and Legal Theory Working Paper Series, No. 54* (2000), at 643-44 (quoting *FTC Time Warner Decision*, in discussing attempts to compete against cable programming by creating "marquee" video streaming content for transmission over the Internet).

[125] For a discussion of different types of networks and their geographic markets, *see* ¶¶ 12-13, *supra*.

[126] The average fixed costs of producing a program, *i.e.*, total fixed cost divided by number of entities buying the programming, however, declines when there are a larger number of networks and MSOs buying the programming. In other words, the fixed costs of producing programming are shared by a larger number of entities.

[127] For example, high-cost, broader-based networks need to reach more subscribers than more specialized niche networks.

[128] This group includes broad-based networks such as USA Networks and TNT, which attempt to reach mass audiences, and likely have high costs.

55. The D.C. Circuit opinion suggests that the Commission could adopt an open field limit of less than 60 percent if it could demonstrate the non-conjectural potential for anti-competitive harm.[129] We thus seek comment on whether the 30 percent horizontal ownership limit, or any other limit based on the open field, is justified in order to address and deter likely joint, anti-competitive actions of two or more large MSOs, or anti-competitive actions of a single MSO acting independently. The limit previously adopted by the Commission was premised on the statutory instruction to protect against impediments to the flow of programming resulting from the conduct of a cable operator or "group of cable operators" and on the Commission's belief that joint conduct would be more likely if there were only a limited number of operators in the market. In this regard, the Commission noted that there were economic benefits that operators could gain from coordinating their program purchasing activities and that those benefits create incentives for acting jointly.[130] Some types of coordination among cable system operators with respect to programming seem to have been common in the industry.[131] Most favored nation and other types of contractual provisions might also result in communication regarding programming purchases and incentives to coordinate programming acquisition activities. The D.C. Circuit, however, found that none of the Commission's prior assertions in this regard were supported in the record.[132]

56. Accordingly, we seek comment and economic evidence that would support or refute the Commission's earlier conclusions. Specifically, we seek information on the types of coordinated or collusive conduct among cable operators that might be relevant to the establishment of a limit. We seek comment, and empirical evidence, on whether vertically integrated MSOs have incentives to reach carriage decisions that are mutually beneficial, in terms of purchasing programming from one another or carrying the same networks, to reduce costs.[133] We seek comment on whether these existing activities fall within or outside the court's interpretation of collusion, or point to collusive behavior, or actually constitute collusion. Alternatively, we seek comment on comparable activities in other industries that share similar attributes, such as partial vertical integration. Absent such evidence of joint, collusive action, we seek comment, empirical evidence, or theories that might provide a basis for any particular limit based on the open field approach. Commenters should address whether such a limit can be justified in order to constrain the ability of a single large MSO to determine unilaterally the success or failure of a programming network through anti-competitive actions.

57. Further, the D.C. Circuit in *Time Warner* noted the "possibility that there are theories of anti-competitive behavior other than collusion that may be relevant to the horizontal limit and on which the FCC may be able to rely on remand."[134] We present above possible harms that arise from high levels of horizontal concentration.[135] We seek comment on these possible harms, and any other possible harms,

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[129] 240 F.3d at 1133-34.

[130] *1999 Horizontal Order*, 14 FCC Rcd 19098 at ¶ 43.

[131] An indication of the nature of joint ownership in the 1990 time frame is set forth in the Commission's *Report* in Docket 89-600, 5 FCC Rcd 4962 (1990) at Appendix G, Table VII. The Commission's annual video competition reports, starting with the 1994 *Report* in Docket 94-48, 9 FCC Rcd 7442 (1994), continue to trace these relationships.

[132] *See Time Warner*, 240 F.3d at 1132, 1135.

[133] *Id.*

[134] *Time Warner*, 240 F.3d at 1133.

[135] *See* ¶¶ 28-35, *supra.*

including those that result from anti-competitive behavior that may arise from a highly concentrated MVPD market.

58. We seek evidence and comment that could address the D.C. Circuit's concerns, as expressed in *Time Warner*, and thus support a strict subscribership percentage limit as a protection against excessive horizontal concentration. We are particularly interested in comment and empirical evidence that would support or contradict the 40 percent open field premise. At what level of concentration does a large cable operator gain the market power necessary to refuse carriage of programming for reasons other than consumer demand? Does the 40 percent open field gauge remain a valid estimate for the typical programming network's needs and, if not, what represents an appropriate alternative level? For instance, given a more established programming market, is a 40 percent open field still an appropriate level to allow new entrants to compete against established networks? In this regard, commenters are asked to submit empirical evidence that would address the level of subscribership necessary to sustain each of the various types of video programming networks described above. In such a discussion, commenters should address whether the statute requires protection of entry for all types of programming networks. We seek comment and empirical evidence on the availability of non-cable MVPD outlets for such programming and the effect of such outlets on the open field limit. Additionally, we seek evidence on the nature of the supply curve faced by cable operators in the market for the purchase of cable programming. We request commenters to address how an open field limit could be crafted to adequately address elasticities of supply and demand, and take into account market power, rather than just measure market presence or share. We also ask commenters to address whether the Commission should consider a more stringent reporting requirement than that currently set forth in Section 76.503(g)[136] for purposes of monitoring cable ownership levels.

59. Finally, we seek comment in response to this discussion, and in response to the discussion below, with regard to how issues of diversity are properly weighed in our analysis. The court previously upheld the statute, thus sustaining it against constitutional challenge based on the governmental interests in promoting both competition and diversity. The *Time Warner* decision, however, indicates that the statement of purpose in Section 613(f) "supports a reading that sharply confines the authority to regulate solely in the interest of diversity."[137] Nevertheless, the statute's enumerated objectives are not exclusive since they are listed as "among other public interest objectives."[138] The court does suggest that diversity, while not the primary concern of the statute, is a factor entitled to consideration. Accordingly, we ask commenters to address how diversity concerns, as well as other public interest concerns, can be properly factored into the determination of our rules.

2. Limit Based on Market Power Measurements

60. **Threshold/Safe Harbor Approach:** Another possible approach to guard against the harms of excessive horizontal concentration is to measure cable MSOs' market power within the MVPD industry using something other than an MSO's market share, and base ownership limits on such a measure. We note that market share, which is the premise of the open field approach, is one potential measure of market power. Here we seek comment on other ways to measure market power and craft a horizontal cable ownership limit. Competition in the MVPD market can limit cable MSOs' market power

[136] *See* n. 22, *supra*.

[137] *Time Warner*, 240 F.3d at 1136.

[138] Section 613(f)(2).

vis-à-vis video programming networks. Therefore, the imposition and enforcement of cable ownership limits can be conditioned on market conditions and thereby address the harms that Congress sought to prevent. The purpose of Section 613(f) is "to enhance effective competition," and the legislative history, discussed above,[139] indicates a preference for competition over regulation. The *Time Warner* decision directs the Commission to take into account the presence and effect of competitors to cable in that an MVPD's market power "depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability of competition.*"[140] The value of a regulation that uses measures of market power is that it could be specifically tailored to the harms Congress sought to prevent. Such regulation, if practical to implement, would be more sophisticated than market share measures in that it would target directly the source of the potential harm: the cable industry's control over programmers' access to the home. This approach also would conform to the intent of Congress as expressed in the statute to prefer competition over regulation and with the opinion of the court in *Time Warner.*

61. To implement such an approach, we would have to: (1) establish a way of measuring market power within the MVPD industry; (2) determine the level of competition, taking into account market power in the industry and congressional intent, that would be needed to reach the level deemed effective competition; (3) determine the levels of market power that create the harms Congress sought to prevent; and (4) decide what action would be needed if those levels were met, or not met. Such a measure of market power could examine concentration within the industry and factors that might perpetuate this concentration, and market performance. The level of market power that causes harm would depend on empirical evidence or sound economic theory. If we found evidence that cable operators possess market power that causes significant harm, we could impose appropriate ownership limits until market power diminishes sufficiently. At that point, we could monitor the industry for the re-emergence of market power, or we could set thresholds that would trigger the imposition of regulation or enhanced scrutiny.

62. There may be several ways to measure effective competition and market power in this context. The appropriateness of using a particular standard may depend on the circumstances involved. We invite comment on the appropriate measure of competition, drawing from those suggested below or any other supported by sound economic theory. Because market power can influence market performance,[141] measures of market power often refer explicitly to performance. The two most commonly used measures of market performance are the Implicit Lerner Index[142] and the "q" ratio.[143] We seek comment on the relevance of such indicia as indicators of market power.

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[139] *See* ¶ 4, *supra.*

[140] *Time Warner*, 240 F.3d at 1134.

[141] We define market performance as the extent to which a given market satisfies consumer demand in the least costly manner taking into account the price and quality of the products under consideration.

[142] The Implicit Lerner Index measures the divergence between price and marginal cost which may result from the exercise of market power. For a further explanation, *see* Greer, Douglas F., *Industrial Organization and Public Policy*, Macmillan Publishing Company, 1984, at 48-50.

[143] The q ratio is the ratio of the market value of a firm, as measured by the market value of its outstanding stock and debt, to the replacement cost of the firm's physical assets. If the market value of a firm exceeds its replacement cost, this may be an indicator that excess economic profits are being earned. Although there are significant measurement problems associated with applying the q ratio, it is a potentially useful measure of market power. For a further explanation, *see Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services, Report on Competition,* 5 FCC Rcd at 4963, Appendix E (1990) ("*1990 Competition Report*").

(continued....)

63. We also invite comment on the use of the level of concentration in the distribution market as a proxy for a measure of market power in the video programming market. More specifically, we seek comment on the use of the Herfindahl-Hirschman Index ("HHI") in this regard.[144] The Commission has used HHI calculations previously to assess concentration in the MVPD market at the national level.[145] HHI calculations in this context may be misleading or inappropriate because they measure horizontal concentration at a national level and are designed for application to industries where participants compete directly. In the MVPD market, however, the markets are local and cable MSOs rarely compete against each other in individual local markets.[146] The Commission has previously observed, however, that MSOs have primarily derived their ability to take anti-competitive action against programming services or competing MVPDs from their ability to leverage local market power on an intermarket basis (i.e., their local market power is derived partially from their national size).[147] We invite comment on the appropriateness of the use of HHI calculations or other such specific measures of competition in the national market.

64. One method of implementing a regulation that takes into account market power is to determine the level of competition necessary to prevent the harms envisioned by Congress. At that level, we could establish a "threshold" or "safe harbor" for regulation. Under a threshold regulation, we would not enforce horizontal limits provided there were, in addition to cable, alternative means for video programmers to reach consumers sufficient to alleviate the concerns that motivated Congress to adopt Section 613(f). The establishment of a threshold or safe harbor may serve to prevent the levels of concentration that would enable a single cable MSO to determine the success or failure of video programming networks. Thus, for example, we might not restrict the horizontal reach of a cable operator so long as additional MVPDs imposed sufficient competitive pressure on the cable operator in both the market for the purchase of programming (the upstream market) and in the distribution of programming (the downstream market). Implementing such a threshold would depend critically, however, on identifying the level at which alternative MVPDs protect consumers by reducing cable operators' market power to the point where they cannot expropriate programmers, or choose programming for reasons other than quality. A second consideration is the economic viability of smaller competitors: we would seek to set a limit that prevents large cable MSOs from disadvantaging smaller rival alternative MVPDs anti-competitively.

65. Although there are many buyers of programming (many separate cable MSOs, two DBS operators, many smaller MVPDs, and broadcast outlets) and many sellers of programming (program producers, packagers, cable networks), the major cable MSOs do not currently compete with each other in the downstream market for program distribution. It appears that alternative providers, to satisfy a threshold, whatever form that threshold might take, should compete in both upstream and downstream markets. Entities competing in the same local distribution (downstream) market have a clear incentive to

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Also see Hazlett, Thomas W. and Matthew L. Spitzer, *Public Policy Toward Cable Television*, MIT Press and AEI Press, 1997, at 21-6.

[144] The HHI is a measure of concentration that is calculated by summing the squared market shares of all sellers in the market. It takes into account the number of firms in the market and the degree of inequality among firms' market shares. For further explanation, *see 2000 Competition Report* at n. 628.

[145] *See Seventh Annual Report*, 16 FCC Rcd at 6077.

[146] *See e.g., Waterman and Weiss* at 154.

[147] *See 1990 Competition Report* at 5006.

compete for the acquisition of programming in the upstream market, whereas MVPDs not competing with each other in the same local distribution markets may not have such an incentive.[148] We seek comment on the necessary level of competition in the MVPD market that would constrain MSOs' ability to exert market power in the upstream market for program purchasing.

66. DBS operators compete with cable operators both in local distribution markets as well as in the market for the purchase of programming. In view of the possibility that, from the point of view of programming networks, carriage on DBS may not be a complete substitute to cable carriage, we seek comment on whether DBS can provide a constraint on cable's market power in the market for the purchase of programming. We also seek comment on whether DBS can provide a constraint on cable's market power in the markets for the delivery of programming.[149] Indeed, it appears that DBS currently is the only competitor with the subscriber reach and penetration that might satisfy the requirements of a meaningful threshold standard.[150] As a result, a threshold regulation may ultimately suggest a cross-ownership restriction between cable and DBS. In this regard, we note that Section 613(c) authorizes the Commission to "prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system."[151] The *Senate Report* contained a provision that would have required the Commission to impose a cable/DBS cross-ownership restriction when 10 percent of the nation receives some form of direct broadcast satellite service, in order "to further diversity and prevent cable from warehousing its potential competition."[152] However, the *Conference Report* deleted this provision, stating:

> In view of the fact that there are no DBS systems operating in the United States at this time, it would be premature to require the adoption of limitations now. However, the conferees expect the Commission to exercise its existing authority [under Section 613(c)]

[148] When entities compete in the downstream market, i.e., for MVPD subscribers, they have an incentive to try to offer the highest quality programming possible. If they do not (*e.g.*, if they choose programming based on affiliation rather than consumer demand), some of their subscribers may switch to competing MVPDs and, as a result, their revenues would fall. If MVPDs do not compete downstream (*e.g.*, separate cable operators in non-overlapping franchise areas), they may not have an incentive to compete in their purchase of programming and, in fact, may have an incentive to collude. Through such collusion, non-competing MVPDs may have increased bargaining power with programming networks and, as a result, gain more favorable pricing in the acquisition of programming. This possibility does not imply that collusion will result in all situations. The likelihood of successful collusion, however, may be reduced when entities compete in the downstream market. Substantial competition in both upstream and downstream markets, thus may reduce the likelihood of collusion or other anti-competitive practices, and thereby reduce the need for extensive regulatory intervention.

[149] *See Time Warner*, 240 F.3d at 1134.

[150] We have previously attempted to encourage this kind of head-to-head competition in the *1999 Horizontal Order* (*see* 14 FCC Rcd at 19110-12). Cable operators appear to be well positioned to overbuild neighboring markets, and this type of competition would satisfy our threshold approach. Such behavior is seldom observed in the cable industry, indicating that it may not be economically viable to overbuild. We therefore assume that non-cable competitors are the primary source of this type of head-to-head competition.

[151] 47 U.S.C. § 533(c).

[152] *Senate Report* at 47, 81.

to adopt such limitations should it be determined that such limitations would serve the public interest.[153]

67. In a pending rulemaking proceeding, the Commission has sought comment on whether to adopt a cable/DBS cross-ownership restriction.[154] Specifically, the Commission sought comment on, among other things, whether to adopt a DBS ownership and cable cross-ownership restrictions or consider competition concerns on a case by case basis.[155] Most commenters suggested that there was no need to adopt specific ownership or cross-ownership rules, and that, at most, it might be appropriate to address such issues in the context of any specific merger or acquisition transactions.[156] Only a small number of commenters favored the adoption of specific ownership rules.[157]

68. We also note that the Commission has examined the issue of cross-ownership in the context of specific transfer application reviews.[158] In addition, in May 1998, the Antitrust Division filed an antitrust suit to prevent PrimeStar, Inc. (a company providing medium power satellite video services and owned by five of the largest cable MSOs), from acquiring the DBS assets of News Corp and MCI.[159] In October 1998, PrimeStar abandoned its plan to acquire those satellite assets.[160] Because the MVPD market has changed significantly since 1998, we seek further comment on a restriction on cable/DBS cross-ownership as it may relate to the adoption of a threshold/safe harbor limit on cable horizontal ownership.

69. *Threshold Implementation Issues.* In formulating a rule for a threshold regulation, we would not enforce horizontal limits, or presume public interest harm in this area in license transfer reviews, so long as an entity or entities, meeting certain criteria, competes in both the upstream and downstream markets. We would have to determine an appropriate measure for effective competition in

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[153] *Cable Television Consumer Protection and Competition Act of 1992*, 102d Cong., 2d Sess. Conference Report 102-862, 82 (1992) (*"Conference Report")*.

[154] *See In re Policies and Rules for the Direct Broadcast Satellite Service,* Notice of Proposed Rulemaking, IB Docket No. 98-21, 13 FCC Rcd 6907, 6937-42 (1998).

[155] *Id.* at 6939.

[156] Comments of Ameritech at 4; Comments of BellSouth at 3-5; Comments of DirecTV at 3-4; Comments of News Corp at 2-5; Comments of National Cable Television Association at 3-8; Comments of PrimeStar at 3-17; Comments of Tempo Satellite, Inc. at 7-8; Comments of Time Warner at 2-12; Comments of USSB at 7-8; Comments of the United Church of Christ and Consumers Union at 3; Reply Comments of News Corp. at 1-5; Reply Comments of PanAmSat at 2; Reply Comments of Primestar at 2-4; Reply Comments of Small Cable Business Association at 2-10; Reply Comments of Tempo at 3; Reply Comments of Time Warner at 1-11; Reply Comments of USSB at 2-6.

[157] Comments of EchoStar at 3; Comments of NRTC at 3-8; Comments of Univision at 2-8; Reply Comments of Univision at 2-6.

[158] *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc., and America Online, Inc.,* CS Docket No. 00-30, Memorandum Opinion and Order ¶¶ 241-51 (Jan. 22, 2001).

[159] *See U.S. v. Primestar, Inc., et al.* (May 12, 1998).

[160] U.S. Department of Justice, "Joel Klein Statement Regarding Primestar Abandoning Deal to Acquire News Corp./MCI's Direct Broadcast Satellite Assets," News Release (Oct. 14, 1998).

this context, and the level at which we would set a threshold according to that measure.[161] We invite empirically supported suggestions for any such formulation. An important issue is how to measure the presence of effective competition that will guard against harm. The "contestable markets" literature suggests that even monopolists may behave competitively if they face the threat of swift entry by effective competitors whenever the monopolist raises prices above cost or reduces product quality. Thus, potential competition may, in principle, constrain market power as effectively as actual competition. Some economic studies, on the other hand, link the extent of effective competition to the number of competitors in the market. One study, for example, suggests that at least three competitors are necessary in most cases to produce competitive outcomes and reduce the possibility of collusion.[162] In addition, the possibility of "swift entry" is not available in the MVPD industry because it takes years to build MVPD delivery systems. We invite comment on practical ways to measure when sufficient pressure exists to prevent large cable operators from exercising undue market power to the detriment of consumers. In particular, we seek comment on whether the number and/or size of competitors can serve as reasonably accurate measures of such pressure.

70. Thus, in implementing a threshold, we would have to determine whether a single competing service would be sufficient, or if we should require multiple competing services to meet the threshold. Additionally, we would have to determine what level of service would qualify to count toward the threshold. Accordingly, we seek comment on whether it would be appropriate to define a minimum channel capacity for any alternative MVPD to be counted toward the threshold. One possible minimum would be at least the average number of channels for a cable operator as shown in the *2000 Price Survey*.[163]

71. With regard to the enforcement of a threshold limit, we seek comment on the appropriate regulatory response to a finding that the threshold currently is not satisfied, or is met and subsequently not satisfied due to changed market conditions. One approach, embodied in our current rule, would be to prohibit cable operators from serving more than a specified percentage of cable or MVPD subscribers nationwide until the threshold has been met. Alternatively, instead of imposing a cap until the threshold is met, we could monitor the market for evidence of anti-competitive behavior by large cable operators. If we found behavior that was threatening or had the potential to threaten programmers' access to consumers, we could take action to impose horizontal limits at that time. Under this procedure, programmers could present evidence to the Commission that they are being denied access to subscribers unfairly and alternative MVPDs could present evidence that programming discounts offered to large cable operators are hurting their ability to act as alternative conduits of programming to consumers. We seek comment on whether a threshold limit would be appropriate and, if so, at what level we should set the limit. We also seek comment on whether such a limit could adequately take into account market power as opposed to simply measuring market share. In this regard, we request specific suggestions and empirical

[161] For example, one possible threshold might be based on the "effective competition" benchmark established by the 1992 Act for local rate regulation. Under such a threshold, horizontal aggregation would not be constrained so long as competing MVPDs offer service to 50 percent of U.S. households and provide service, at a minimum, to 15 percent of MVPD subscribers.

[162] *See, e.g.*, John Kwoka, Jr., "The Effect of Market Share Distribution on Industry Performance," *The Review of Economics and Statistics*, Vol 61, 1979 at 101-9. Kwoka found the performance of three firms holding equal market shares in a concentrated industry similar to the performance of firms in a non-concentrated industry. Also, *see* Bresnahan, T.F. and P.C. Reiss, "Entry and Competition in Concentrated Markets," *Journal of Political Economy*, Vol 1991 at 977-1009.

[163] *See e.g.*, *2000 Price Survey* at 4346.

support to the extent possible. Additionally, we invite comment on the alternative approach of monitoring the market for evidence of anti-competitive behavior. We seek comment on whether this approach is appropriate and, if so, how such a monitoring process could be structured. Comments may include suggested rule formulations and methods of implementation. Finally, we ask commenters to address whether this approach comports with the Commission's statutory mandate in Section 613(f)(1)(A), 47 U.S.C. § 533(f)(1)(A), and further whether this approach represents a structural limit that will serve as a "prophylaxis" and obviate the need for individual determinations of anti-competitive behavior.[164]

72. The threshold approach appears to provide a means of tailoring regulation to fit the marketplace as it changes, and it would provide a degree of certainty to actors in the relevant markets. This approach also seems to respond to the court's instruction that we take into account the presence and effect of competitors to cable, while assuring that programmers have alternative means of access to consumers. Under this approach, so long as a sufficient level of effective competition was maintained, cable operators would not be constrained by an ownership limit. In addition, this approach would create a disincentive for large cable operators to attempt to act anti-competitively against DBS operators and other competitors.

73. *Potential Limitations to the Threshold Approach.* The threshold approach appears to address many of the harms Congress sought to prevent with Section 613(f). This approach would serve to ensure that there are always at least two or more MVPDs available to downstream subscribers and to upstream programming networks. In this context, even if a single MSO were to serve all cable subscribers, if the threshold were set appropriately, the alternative MVPDs would be large enough to constrain the single MSO's market power and also to provide a sufficiently large outlet to ensure the viability of programmers. We recognize, however, that the threshold limit may fail to meet congressional intent due to several potential problems. For example, if the threshold were set too low, either due to inaccurate measurement or due to changing market conditions, any of the potential problems due to excessive concentration noted above could occur.[165] We seek comment on whether it is realistic to condition our regulation on measurements of changing market power using measures of limited accuracy. Do these limitations suggest the need for more stringent regulation, such as a strict ownership limit? We also are aware of the possibility that larger MSOs might be willing to support the activities of weaker competitors at levels just above a threshold, thus avoiding regulation. We seek comment on this possibility, and on any means of preventing it.

V. VERTICAL LIMIT

A. The Commission's Vertical Rule

74. The Commission's channel occupancy limit generally prohibits a cable operator from carrying national video programming services it owns or in which it has an attributable interest on more than 40 percent of its activated channels.[166] In setting the vertical ownership limit at 40 percent, the

[164] *See Time Warner v. United States*, 211 F.3d at 1320, 1322-23; *see also* n. 7, *supra*.

[165] *See* ¶¶ 28-34, *supra*. These problems include limiting the supply of or entry into the market for programming, foreclosing competition, and the development of X-inefficiencies.

[166] 47 C.F.R. § 76.504 provides, in pertinent part:

(continued....)

Commission sought to "maximize the number of voices available to cable viewers without impairing the ability or incentive of cable operators to invest in new and existing video programming services."[167] The Commission recognized that, although Section 613(f) contemplated the establishment of some limits on cable vertical integration, "MSO investment was responsible for the development and survival of several of the most popular video programming services," and that "vertical integration among the largest MSOs had contributed to program diversity by providing new programming services with an extensive subscriber base and information regarding viewer tastes and desires."[168] The Commission also recognized that vertical integration can produce efficiencies with respect to video programming acquisition, distribution and marketing, which might contribute to innovative programming fare and lower subscription rates.[169] The Commission believed that the 40 percent limit was "high enough to preserve the benefits of vertical integration,"[170] and further relied upon the fact that most cable operators who filed comments in the rulemaking proceeding supported the 40 percent limit on that basis.[171]

75. Additionally, the Commission recognized that the need for a vertical limit would likely decrease as channel capacity increased. Thus, the Commission's rule establishes that the limit applies to channel capacity only "up to 75 channels."[172] As a result, for higher channel capacity systems, the percentage limit is actually much lower than 40 percent. By way of example, for a 200-channel system, 85 percent of the channels could be occupied by operator-affiliated programming. Moreover, because future expansion of channel capacity through the use of advanced technologies or the presence of effective competition might reduce or render unnecessary the 40%/75 channel limit, the Commission stated that it would revisit the restriction at a later date.[173]

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(a) Except as otherwise provided in this section no cable operator shall devote more than 40 percent of its activated channels to the carriage of national video programming services owned by the cable operator or in which the cable operator has an attributable interest.

(b) The channel occupancy limits set forth in paragraph (a) of this section shall apply only to channel capacity up to 75 channels.

In calculating a system's capacity, "activated channels" includes all commercial and non-commercial broadcast, PEG, and leased access channels carried. *See Second Report*, 8 FCC Rcd at 8588-89.

[167] *Id.* at 8592.

[168] *Id.* at 8584-85.

[169] *Id.* at 8594-95.

[170] *Id.* at 8592-93.

[171] *Id.*

[172] 47 C.F.R. § 76.504(b). The 75 channel threshold thus reserves at most 45 channels for unaffiliated programming services (75 x .60 = 45).

[173] In this regard, the Commission noted that it continued "to believe that expanded channel capacity will reduce the need for channel occupancy limits" and that "this limitation will be subject to periodic review . . . will be eliminated if developments warrant." *Second Report*, 8 FCC Rcd at 8601-02. Additionally, the Commission observed that "Congress has . . . indicated that a primary objective of the Act was to 'rely on the marketplace to the maximum extent feasible, to promote the availability to the public of a diversity of views and information' and that the legislation was intended to protect consumer interests in the receipt of cable service 'where cable television systems are not subject to effective competition.' Thus . . . further analysis as to whether the restrictions might be phased out

(continued....)

B. The *Time Warner* Decision

76. The D.C. Circuit found that the Commission did not attempt to link the 40 percent numerical restriction with the benefits and harms resulting from common control of both programming supply and distribution sources or with current MVPD market conditions.[174] The D.C. Circuit dismissed the Commission's argument that "no MSO has yet complained that the 40 percent vertical limit has required it to alter programming." The court stated this was "no answer at all . . . [it] says nothing about the plans that the rule may have scuttled."[175] Concluding that the Commission neither justified the vertical limit with record support, nor established that the limit did not burden speech more than necessary, the D.C. Circuit reversed and remanded the limit. The court cautioned the Commission, on remand, to consider the constraining impact of competition on cable operators' ability to favor affiliated programming at the expense of unaffiliated programming, opining that competition "precludes cable operators from exercising the market power which originally justified channel occupancy limits."[176]

C. Current Market Conditions

77. The D.C. Circuit recognized that effective competition might "raise the stakes for a firm that sacrifices the optimal price-quality trade-off in its acquisition of programming" and thus constrain the "likelihood of improper favoritism of affiliated programmers" thereby justifying an exemption from the limits.[177] As previously discussed in the market description section, it appears that the competitive MVPD marketplace has evolved since the time the vertical limits were adopted, both locally and nationally, particularly as a result of DBS. Moreover, as discussed below, it seems that with increased channel

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where effective competition develops will be appropriate." *Id.* at 8603-04. In terms of effective competition, the Commission previously explained:

> Once effective competition has been established and a cable operator no longer occupies a program access bottleneck position, channel occupancy limits may no longer be necessary or desirable. With such developments, the incentive and ability of a cable system to favor its own programming over unaffiliated programming is diminished, and alternative outlets for programming should be available to the public.

Initial Notice, 8 FCC Rcd at 220. On reconsideration, the Commission affirmed the limit, finding no substantial objection to the prescribed limit had been raised by cable operators or cable programmers, but reaffirmed its commitment to reconsider the limit in light of future developments. *See 1995 Reconsideration Order*, 10 FCC Rcd at 7369, 7375, 7379.

[174] *Time Warner* at 1137-38.

[175] *Id.*

[176] *Id.* at 1138. The D.C. Circuit found plausible petitioners' argument that competition impacts cable operators' ability to favor in-house productions. The D.C. Circuit reasoned, "After all, while reliance on in-house suppliers offering an inferior price-quality trade-off will reduce a monopolist's profits, it may threaten a competitive firm's very survival." *Id.*

[177] *Time Warner*, 240 F.3d at 1139. With regard to possibly exempting cable operators that are subject to effective competition, the D.C. Circuit opined that "if the criteria of § 543(1)(1) [rate regulation definition of competition] are unsuitable, the Commission can consider concepts of effective that it finds more apt for these purposes." *Id.*

capacity and a trend away from cable ownership of programming, the landscape of the cable industry has undergone marked changes.[178]

78. In terms of capacity, cable operators, as well as other MVPDs, are continuing to upgrade and enhance system capabilities. These upgrades have enabled them to expand channel capacity and to add programming and other services through innovation. In the Commission's *2000 Competition Report*, we observed that:

> In October 1999, cable systems with capacity of 30 or more channels accounted for 85.4 percent of cable systems, or 8,236 systems. Cable systems with channel capacities of 54 channels or more accounted for 22.4 percent of cable systems in October 1999, or 2,164 systems. In addition, as of October 1999, 79 cable systems had a capacity of 91 or more channels. In October 2000, it was reported that cable systems with a capacity of 30 or more channels accounted for 86.6 percent of cable systems. This represents 8,032 systems nationwide. Systems with channel capacities of 54 channels or more accounted for 24.5 percent of cable systems in October 2000, or 2,247 systems. And as of October 2000, over 100 cable systems had a capacity of 91 or more channels.[179]

The above figures reference analog channels. With digital deployment, cable systems now are capable of offering subscribers hundreds of programming channels. Moreover, it seems likely that cable system capacity will continue to increase, offering consumers an abundance of video programming choices and services.

79. With respect to vertically integrated offerings, the Commission recently observed that, although the total number of programming networks has more than doubled between 1994 and September 2001 from 106 to approximately 285, the proportion of networks that were vertically integrated continued to decline.[180] Specifically, over the same period, the percentage of programming networks that were affiliated with at least one cable MSO declined from 53 percent to about 25 percent, a decline of 53 percentage points.[181] We seek comments on the ability of programming networks unaffiliated with cable operators to launch and survive in the industry as it stands today. Most helpful would be an historical analysis of the industry concerning the ability of new, independent networks to launch, remain independent, and survive, and that specifies the number that launched and failed or launched but subsequently became affiliated with cable operators.

80. We seek comments on how the changes in the MVPD market and in the level of vertical integration for cable MVPDs may have affected MSOs' ability to favor affiliated over unaffiliated programming. In addition, as discussed below, we also seek comment on how application of stringent

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[178] For example, 35% of all national programming networks were vertically integrated in 2000 compared to 53% in 1994. *Compare Seventh Annual Report,* 16 FCC Rcd at 6078-79 and *First Annual Report*, 9 FCC Rcd at 7522.

[179] *Seventh Annual Report,* 16 FCC Rcd at 6017-18 (internal citations omitted).

[180] *Id.* at 6078-79 (internal citations omitted). The September 20001 figure reflects AOL Time Warner's recent launch of four programming networks (@Max, 5 Starmax, OuterMax and W Max). Telephone interview with Laura Freeman, Assistant Manager for Corporate Affairs, AOL Time Warner (July 5, 2001)

[181] *Seventh Annual* Report, 16 FCC Rcd at 6078-70. The September 2001 figure reflects AT&T's recent spinoff of Liberty Media Inc. *See* http://www.libertymedia.com/our_affiliates/affiliates_main.htm.

vertical restrictions might impact economic efficiencies and affect cable operators' investment in, and production of, diverse and high quality programming.

D. Vertical Limit Proposals

81. Given the changes that have occurred in the MVPD industry generally and the cable industry specifically, as outlined above and in the market description section, we seek comment on how we could fashion meaningful and relevant channel occupancy limits. In this regard, we seek a better understanding of the economic underpinnings of the statutory requirement. We ask commenters to address the economic basis underlying the concern with vertical integration and market foreclosure. While both Congress and the Commission have long recognized that vertical integration produces efficiencies by enabling cable operators to make additional investments in programming,[182] they also were concerned that such integration may allow cable operators to engage in strategic, anti-competitive behavior.[183] Economic literature suggests that vertical integration between programmers and MVPDs can result in both market foreclosure (which can lead to higher prices) and efficiency gains (which tend to lower prices).[184] In order for vertical integration to have detrimental effects, two conditions must be satisfied. First, the vertically integrated MSO must have national monopsony power so that it could "significantly and profitably disadvantage a rival to its controlled downstream systems."[185] Second, the vertical integration must afford the MSO the means to implement such behavior (*i.e.*, but for vertical integration, the MSO would not be able to foreclose and disadvantage rival programmers).[186] We ask commenters to address whether such conditions exist in the industry, and if so, to discuss the implications thereof. Commenters should support their arguments with empirical evidence or theoretical justification. Moreover, although there is some evidence indicating that vertically integrated MSOs favor affiliated programming in terms of pricing, marketing, and carriage,[187] such behavior seems to diminish as channel capacity increases.[188] Indeed, it appears that as capacity expands, vertically integrated systems need to fill their channels and thus tend to increase the carriage of all networks, including those of rival, unaffiliated networks.[189]

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[182] *See Senate Report* at 25-27, 80; *House Report* at 41-43; *1995 Reconsideration Order*, 10 FCC Rcd at 7365-66; *Second Report*, 8 FCC Rcd at 8584-85; *Initial Notice*, 8 FCC Rcd at 218-19.

[183] *Id.*

[184] Chipty, Tasneem, "Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Industry," *American Economic Review*, Vol 91 (3), June 2001, at 428-53. Using an econometric model of the cable industry, Chipty found that the harmful effects of integration due to foreclosure are offset by the efficiency-enhancing effects of integration.

[185] *Waterman and Weiss* at 56. Utilizing an economies-of-scale model, it has been suggested that an MSO "serving a quarter or less of all cable subscribers might exert monopsony control over cable networks" and thus satisfy the first condition. *Id.* at 65-66.

[186] *Id.* at 56-57.

[187] *Id.* at 88, 90-91, 94.

[188] *Id.* at 88-89.

[189] *Id.* at 93, 100-01.

82. Any tendency to favor affiliated programming may be further mitigated by the attendant benefits of economic efficiencies that flow from integration.[190] We ask commenters to address the implications of vertical integration and how these implications may affect the need for, or the formulation of, vertical restraints. We also ask commenters whether regulatory measures designed to curb foreclosure might better be addressed by measures designed to constrain anti-competitive behavior rather than by limits designed to restrict MSOs' ability to carry affiliated programming. If so, we seek comment as to how such alternative regulatory measures may be structured and how they would fit within the statutory scheme of Section 613(f). If commenters favor continuing channel occupancy limits, they should submit empirical evidence supporting the existing limits, or any alternative limit suggested.

83. We ask commenters to discuss whether and to what extent current and likely future developments in the MVPD market mitigate past concerns regarding the power of MSOs, individually or collectively, to discriminate against unaffiliated programming networks. In that regard, we ask commenters to address whether, consistent with the requirements of Section 613(f), the Commission may relax, exempt specific cable operators from, or even forgo imposing, vertical limits if the Commission determines that such a course of action would be justified given the prevailing market conditions. For example, we seek comment as to whether a decision to eliminate the vertical limit could be reconciled with the Commission's statutory mandate set forth in Section 613(f)(1)(B), 47 U.S.C. § 533(f)(1)(B). In addition, we seek comment as to the criteria the Commission should apply in determining whether to exempt a cable operator from the vertical limit if the Commission were to adopt an exemption. For instance, the D.C. Circuit directed that the Commission consider whether an exemption is justified where a cable operator is subject to effective competition.[191] We ask commenters to address the impact of effective competition on cable operators' ability to favor affiliated programming, and whether such competition would justify relaxing, exempting specific cable operators from, or eliminating the vertical limit.[192] We seek comment as to the factors the Commission should consider in defining effective competition for purpose of the vertical limit. Is the definition of effective competition which specifically applies for the purpose of rate regulation adequate or inadequate as a mark of real competition for these purposes? For example, are there certain subsections of U.S.C. § 543(l)(1) that are pertinent to defining effective competition and others that should be included for these purposes? Are there other criteria the Commission should consider? Moreover, mindful that Section 613(f)(2) requires the Commission to weigh the potential benefits and detriments of vertical integration, we ask commenters to address the implications of relaxing or eliminating the current 40%/75 channel limit.

84. Specifically, we ask commenters to address what impact, if any, the modification, the exemption from, or even possibly the elimination of the current limit might have on producing economic efficiencies, fostering innovation in services, and encouraging greater investment in and development of diverse and responsive programming. In this regard, we ask commenters to address what effect, if any, relaxation, the exemption from, or possibly the elimination of the channel occupancy limit would have on programming diversity, and what weight the Commission should accord those effects.[193] We further seek

[190] *Id.* at 78. By contrast, Besen and Woodbury using data from TCI's carriage pattern conclude that TCI's carriage of affiliated services did not adversely affect the ability of non-affiliated services to compete. *See Besen and Woodbury* at 19.

[191] *See* 240 F.3d at 1138.

[192] *See Time Warner*, 240 F.3d at 1138.

[193] *Id.* at 1135 (holding that although Congress' primary objective underlying Section 613(f) was to promote competition, the Commission may consider, but not solely rely on, diversity concerns, in formulating limits).

comment on any detrimental effects that such course of action may have on the programming market in terms of potentially foreclosing the entry of new, independent programming networks, in today's evolving and dynamic MVPD marketplace. Additionally, consistent with Section 613(f)(2), we also ask commenters to address any additional public interest objectives the Commission should consider in reexamining its vertical limit. In addition, we seek comment on the possibility of fashioning a "process" rule rather than a fixed limit (*e.g.*, a rule that would place limits on a cable operator only after a finding that it had unfairly limited or foreclosed access), and if so, how such a rule should be crafted. We also encourage commenters to suggest alternative more relaxed, less stringent, limits than the Commission's current 40%/75 channel limit, supported by empirical evidence and taking into account the seven statutory, as well as any other relevant, public interest factors. Finally, we seek comment on what, if any, impact the leased access provisions may have on the possible modification, exemption from, or even elimination of the vertical restraint,[194] and what, if any, bearing the horizontal rules have on the need for vertical rules.

VI. ATTRIBUTION BENCHMARKS

A. The Commission's Cable Attribution Rules

85. The Commission's cable attribution benchmarks serve to identify ownership interests that enable owners or investors to exert influence or control over an entity's decisions. The benchmarks thus identify those interests that are deemed "attributable" and thereby implicated by the horizontal and vertical limits.[195] With the exception of the limited partner insulation criteria, the horizontal and vertical rules generally incorporate and utilize the benchmarks set forth in the Commission's general cable attribution rules.[196] The Commission adopted general cable benchmarks, based on the broadcast ownership rules, which attribute the interest of shareholders owning five percent or more voting stock.[197] The Commission further adopted the broadcast "single majority shareholder exemption," which exempted

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[194] The *Senate Report* noted that the 1992 Act was "largely designed to remedy market power in the cable industry. In this context, the leased access provision takes on added importance -- in addition to First Amendment concerns. It can act as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access or given access on unfavorable terms." *Senate Report* at 80.

[195] *See* 47 C.F.R. §§ 76.503 Note 2, 76.504 Note 1.

[196] *See* 47 C.F.R. §§ 76.501 Notes 1-5; *see also* 47 C.F.R. §§ 76.503 Note 2, 76.504 Note 1. There are a variety of attribution standards used in the Commission's rules, depending on the particular substantive rule and objective to be accomplished. In the cable area, there are two strains of attribution rules, the "general attribution standard," which the horizontal and vertical rules for the most part follow, and the so-called "program access attribution standard." For a detailed description of the Commission's general and specific cable attribution rules, *see 1999 Attribution Order*, 14 FCC Rcd at 19016-18, 19054-56. The *1999 Attribution Order* addressed both the general and program access standards. The D.C. Circuit only addressed: (1) the five and 33 percent general attribution benchmarks (which it upheld); and (2) the Commission's elimination of the majority shareholder exception and application of the limited partnership criterion that bars material involvement with video programming-related activities to preclude video programming sales (which it vacated). In this proceeding, we are only soliciting comment on the two aspects of the Commission's attribution rules that the D.C. Circuit vacated.

[197] *See* 47 C.F.R. § 76.501 Note 2(a); *see also Senate Report* at 80 (". . . it is the intent of the Committee that the FCC use the attribution criteria set forth in 73.3555 (notes) or other criteria the FCC may deem appropriate);" *Second Report*, 8 FCC Rcd at 8580-81, 8591-92 (concluding that the broadcast and cable attribution criteria serve the same objective, namely to identify ownership thresholds that impart the potential to influence or control an entity's programming or managerial decisions).

otherwise attributable minority voting interests from our general cable attribution rules where a single majority shareholder owned more than 50 percent of the corporation.[198] Moreover, as with the broadcast attribution benchmarks, interests of all limited partners, as well as officers and directors, are attributed under the general benchmarks unless their activities are unrelated to ("insulated" from) the cable entities' "media-related" activities.[199]

86. The Commission recently revised its general cable attribution benchmarks to attribute the interest of those who hold 33% or more of the cable entity's total assets ("equity plus debt"), including interests which otherwise would not be attributable (including non-voting and insulated interests).[200] And, as detailed below, the Commission also: (1) eliminated from the general attribution rules the single majority shareholder exemption, which was incorporated in the horizontal and vertical rules;[201] and (2) amended the horizontal and vertical rules to relax the limited partnership insulation criteria, by requiring that limited partners refrain from material involvement with the general partners' video programming-related -- rather than the broader media-related -- activities.[202]

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[198] The Commission found that the rationale underlying the 1984 adoption of the broadcast single majority shareholder exemption was appropriate and likewise applicable to cable. *See Second Report*, 8 FCC Rcd at 8580-81; *see also Corporate Ownership Reporting and Disclosure by Broadcast Licensees Amendment of Sections 73.35, 73.240 and 73.6363 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Amendment of Sections 73.35, 73.240 and 76.501 of the Commission's Rules relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems, Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, Report and Order, MM Docket nos. 20521, 20548, 78-239, and 83-46, 97 FCC 2d 997, 1008-09 (1984)("*1984 Broadcast Attribution Order*"). That rationale, as articulated in 1984, provided:

> In those instances where a corporate licensee, whether closely or widely-held, has a single majority voting shareholder, it appears neither necessary nor appropriate to attribute an interest to any other stockholder in the corporation. In these circumstances, the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings. These interests, therefore, will not be deemed cognizable for purposes of our multiple ownership rules. However, officers and directors of such licensee corporations will continue to have an attributable interest.

1984 Broadcast Attribution Order, 97 FCC 2d at 1008-09.

[199] *See* 47 C.F.R. §§ 76.501 Note 2 (a),(f)(1), (g); *see also* 47 C.F.R. §§ 73.3555 Note 2 (a), (g)(1), (h).

[200] *See 1999 Attribution Order*, 14 FCC Rcd at 19046-50 (addressing concerns that creditors and other investors with significant stakes have the incentive and the means to exert influence over cable entities' operations).

[201] In the *1999 Attribution Order*, the Commission eliminated the single minority shareholder exemption, which was set forth in 47 C.F.R. § 76.501 Note 2 (b) and provided "No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee or cable television system in which the minority interest is held." *See 1999 Attribution Order*, 14 FCC Rcd at 19046.

[202] Specifically, the *1999 Attribution Order* amended the horizontal and vertical rules to relax the limited partnership insulation criteria. The revised insulation standard, which is narrower than the media-related insulation standards set forth in the Commission's general attribution rules at 47 C.F.R. § 76.501 Note 2 (f)(2), provides, in pertinent part, that "a limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the video-programming related activities of the partnership and the relevant entity so certifies." *See* 47 C.F.R. §§ 76.503 Note 2 (b)(1); Note 2 (b)(1); 76.504 Note 1(b)(a); *see also 1999 Attribution Order*, 14 FCC Rcd at 19040-41.

B. The *Time Warner* Decision

87. The D.C. Circuit examined "several aspects of the rules for attributing ownership for purposes of the horizontal and vertical limits."[203] The D.C. Circuit recognized that the attribution rules are designed to capture interests that impart the potential to influence, as well as control, a cable entity, and upheld the five percent voting and 33 percent equity plus debt benchmarks.[204] As discussed in greater detail below, however, the D.C. Circuit found that the Commission had not justified its elimination of the single majority-shareholder exemption or its application of the limited partnership insulation criteria to bar programming sales, and vacated those aspects of the attribution rules. We therefore ask commenters to address these two aspects of the cable attribution rules, and to provide us with empirical and/or theoretical evidence, including evidence from the cable industry or evidence based on studies of other industries, that support or contradict the Commission's prior conclusions. Also as discussed below, in light of the *Time Warner* decision, we seek evidence on whether to reinstate the single majority shareholder exemption for purposes of our broadcast and cable/multipoint distribution service (MDS)[205] attribution rules.

C. The "Single Majority Shareholder" Exemption

1. Cable Systems

88. As stated above, the D.C. Circuit found that the Commission had not justified elimination of the single majority shareholder exemption and thus vacated the Commission's repeal of it. The court characterized the Commission's elimination as a tightening of the regulations for which the Commission had offered no affirmative justification or finding regarding the potential for minority shareholder influence.[206] Therefore, while we recognize that the D.C. Circuit has reinstated the exemption, we must determine whether minority shareholders that would otherwise be attributable under our rules should be exempt where there is a single majority shareholder. One regulatory approach would be to review the individual ownership structures presented in particular situations, including the size and nature of the interests, the extent to which they are passive or active, and the economic incentives created in relation to the rules involved. In the past, however, the Commission has rejected such an approach because parties would not know in advance how specific interests might be treated and the Commission would need to undertake burdensome and intrusive inquiries into the details of corporate governance and influence. We continue to believe that, to the extent possible, bright line attribution standards are preferable to *ad hoc* evaluations, and seek comment on this conclusion.

89. In considering the status of the single majority shareholder exemption, we first note that because we eliminated the exemption at the same time we adopted the equity plus debt rule, we did not need to address to what extent the equity plus debt rule might limit the exemption. Now that the exemption is reinstated, however, the equity plus debt rule would limit application of the exemption as it does under our broadcast rules. Thus, for example, if a minority shareholder's financial interest in a cable operator amounts to over 33% of the operator's total asset value, the minority shareholder's interest would be attributable under the equity plus debt rule, even if the cable operator has a single majority

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[203] *Time Warner*, 240 F.3d at 1139-40.

[204] *Id.* at 1140-42.

[205] MDS includes single channel multipoint distribution service and multichannel multipoint distribution service.

[206] *Id.* at 1143.

shareholder. In determining whether to eliminate the exemption, we must therefore consider the extent to which interests, not already covered by the equity plus debt rule, allow minority shareholders in a single majority shareholder corporation to exert influence.

90. While the Commission premised its adoption of the single majority shareholder exemption in 1984, on its conclusion that a minority interest shareholder would be unable to direct the affairs or activities of a licensee, our attribution rules are designed to identify not only interests that allow an entity to control a corporation, but also interests that give an entity the potential to exert influence over the licensee's core operations.[207] The elimination of the exemption reflected the Commission's view that influence could be asserted in several ways. For example, under general corporate law, directors and officers have certain fiduciary duties, which may make it necessary to be responsive to the interests of minority shareholders.[208] Minority shareholders that have contributed significant capital may have influence by virtue of the their ability to withdraw that investment. Minority shareholders may have access to confidential information. Management, although not legally obliged to do so, may feel a special responsibility to pay attention to the interests of significant, but not controlling, shareholders. Some of these considerations are akin to those considered by the Commission in conjunction with the equity plus debt rule.[209] In order to develop a record on the issue of the single majority shareholder exemption, we request comment on the mechanisms whereby such influences may be exerted and the extent of the influence likely to be involved. Is there a sound basis on which to conclude that a minority shareholder's influence over a corporation that has a single majority shareholder is so limited that the minority shareholder's interest should not be attributable under such circumstances? We are particularly interested in the extent to which significant minority shareholders lacking *de jure* control have a legal right to have their views considered by management and on the economic incentives majority owners have to give such minority shareholders an influential role. We also seek empirical evidence and/or theoretical models regarding the extent to which our concerns in this area already are addressed by the equity plus debt rule. If minority shareholders do have a degree of influence not covered by the equity plus debt rule, we ask commenters to discuss whether such influence is a matter that the rules should address and, if so, how these interests should be addressed under our rules.

2. Broadcast and Multipoint Distribution Service Industries

91. We also ask commenters to address whether the single majority shareholder exemption should be reinstated in the context of the broadcast and cable/MDS attribution rules.[210] The Commission

[207] *See 1999 Attribution Order,* 14 FCC Rcd at 19046 (expressing concern that a minority shareholder may be able to exert influence over a company even where a single majority shareholder exists).

[208] "[I]f the majority owner were to take actions that increased its profits at the expense of other investors in the system, the directors of the acquired system may be subject to shareholder suits for violating their fiduciary responsibilities to other shareholders. The threat of such suits may limit even the effective control of an investor with a majority interest." *See* Besen, Stanley A., Daniel P. O'Brien, John Woodbury, and Serge X. Moresi, *An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems*, Aug. 14, 1998, at 3, filed on behalf of AT&T in Docket 98-82.

[209] *See 1999 Attribution Order*, 14 FCC Rcd at 19046-51.

[210] Former Note 1(b) to Section 21.912 of the Commission's rules provided that "[n]o minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate MDS licensee or cable television system in which the minority interest is held." 47 C.F.R. § 21.912 Note 1(b) (1999). Similarly, former Note 2(b) to Section 73.3555 provided that "[s]ubject to [the equity/debt plus rule], no minority voting interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the (continued....)

recently amended its broadcast and cable/MDS attribution rules, but decided to retain the single majority shareholder exemption after seeking comment on whether to eliminate it.[211] Subsequently, on reconsideration,[212] the Commission granted a request to eliminate the single majority shareholder exemption, relying, in part, on its rationale for eliminating the exemption in the context of cable systems in its cable *1999 Attribution Order*, and further explaining that regardless of whether minority shareholder interests have the ability to control a licensee, they should be attributed because they potentially have the ability to exert influence over a licensee's core operations.[213] After the D.C. Circuit released its decision in *Time Warner*, we received three petitions for reconsideration and one set of comments supporting reconsideration of our decision to eliminate the single majority shareholder exemption in the context of the broadcast attribution rules.[214] We incorporate those petitions and comments by reference into the record in this proceeding. We further recognize that the *Time Warner* decision did not reinstate the single majority shareholder exemption for purposes of our broadcast and cable/MDS attribution rules. Given that the issues are related, however, we are separately issuing an order suspending enforcement of the elimination of the single majority shareholder exemption for the broadcast and MDS industries pending resolution of this proceeding.

92. In considering whether to reinstate the broadcast and cable/MDS single majority shareholder exemption, we invite comment on the same issues and questions raised with respect to the exemption as applied to cable systems.[215] We also invite comment as to whether there are differences, for purposes of attribution, between the broadcasting or MDS industries, and cable systems that would justify different

(...continued from previous page)
corporate broadcast licensee, cable television system, or daily newspaper in which the minority interest is held." *Id.* § 73.3555 Note 2(b).

[211] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, *Report and Order*, 14 FCC Rcd 12559, 12579, ¶ 36 (1999) ("*Broadcast Attribution R&O*").

[212] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097 (Jan. 19, 2001) ("*Broadcast Attribution MO&O*"). The *Broadcast Attribution MO&O* was published in the Federal Register on February 13, 2001, and the rule amendments became effective on April 16, 2001.

[213] *Broadcast Attribution MO&O*, 16 FCC Rcd at 1116-17, ¶¶ 41-44. In the *Broadcast Attribution MO&O*, the Commission noted that the rationale supporting adoption of the exemption in 1984, was based on the conclusion that minority interest shareholders would be unable to direct the licensee's affairs or activities. The Commission stated that "attribution rules are designed to identify not only interests that enable an entity to control a company, but also interests that give an entity the potential to exert significant influence on a company's major decisions, even if the entity cannot control the company. Minority shareholders may not be able to control the affairs or activities of licensees, but, in certain circumstances, they clearly have the potential to influence a licensee's actions." *Id.* at 1116, ¶ 43. The Commission found that eliminating the exemption for purposes of the broadcast and cable/MDS attribution rules would, therefore, improve the precision of the attribution rules in identifying cognizable interests. *Id.* at 1116, ¶ 42.

[214] The three petitioners are the National Broadcasting Company, Inc., Paxson Communications Corporation, and Viacom, Inc. The National Association of Broadcasters filed comments supporting the petitions. No oppositions were filed.

[215] *See supra* at ¶ 90. We note that while the "equity plus debt" rule limits the single majority shareholder exemption for cable systems, the "equity/debt plus" rule would limit the single majority shareholder exemption for the broadcast and MDS industries, if the exemption is reinstated. *See Broadcast Attribution R&O*, 14 FCC Rcd at 12579, ¶ 36, 12625, ¶ 152.

treatment with respect to this issue, or whether the industries are so similar that the treatment should be identical.[216]

D. The Insulated Limited Partnership Exception

93. The second aspect of our attribution rules vacated by *Time Warner*, and for which we seek comment, relates to the insulated limited partnership exception. As stated previously, under the rules, partnership interests are usually attributable unless "insulated."[217] The Commission's *1999 Attribution Order* relaxed the limited partnership standard for purposes of applying the horizontal and vertical rules to provide that a limited partner must not be materially involved in the general partner's "video programming-related activities," instead of the broader "media-related activities" standard found in the Commission's general attribution rules.[218] As amended, the horizontal and vertical rule afford a limited partner greater flexibility; it may insulate its partnership interest even if it participates in the partnership's other media activities so long as it is not materially involved in the partnership's video-programming related activities.[219] Thus, under the amended structural rules, a limited partnership interest is not attributed to a partner that is not directly or indirectly materially involved in the management or operation of the partnership's video programming-related activities and so certifies.[220]

94. Accordingly, for purposes of the horizontal and vertical limits, to be insulated, the limited partner may not engage in the following seven activities:

(1) act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video programming enterprises of the company;

(2) serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises;

(3) communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business;

[216] In the cable *1999 Attribution Order*, the Commission generally found no evidence that differences in ownership, financing, or management structures between the cable and broadcast industries warranted creating an attribution standard for applying the cable horizontal ownership, or other cable rules, that was different from the standard used in applying the broadcast multiple ownership rules. *Cable 1999 Attribution Order* at ¶ 33. As a result, the Commission saw no rational basis to distinguish between cable and broadcasting that would justify eliminating the exemption for the cable ownership rules while retaining it for the broadcast ownership rules. *Broadcast Attribution MO&O*, 16 FCC Rcd at 1116, ¶ 41.

[217] *See* 47 C.F.R. § 76.501(a); *see also* 47 C.F.R. §§ 76.503 Note 2; 76.504 Note 1.

[218] *1999 Attribution* Order, 14 FCC Rcd at 19040-42.

[219] *Id.* (finding that the broader media-related standard potentially could have captured interests relating to non-video programming activities, thwarting development of advanced services and technologies by discouraging investment and utilization of expertise in areas such as telephony or broadband).

[220] Specifically, the horizontal and vertical rules, as amended, provide explicitly state that an insulated limited partner shall not be "materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership." 47 C.F.R. §§ 76.503 Note 2 (b) (2); 76.504 Note 1 (b) (1).

(4) vote on the admission of additional general partners subject to the power of the general partner to veto any such admissions;

(5) vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter;

(6) perform any services for the partnership materially relating to its video programming activities, except that a limited partner may make loans to or act as a surety for the business; and

(7) become actively involved in the management or operation of the video programming businesses of the partnership.[221]

Consistent with and in reliance upon *Twentieth Century Corp.*,[222] the Commission has interpreted the criterion that bars a limited partner from performing any service that materially relates to video programming activities as precluding the sale of video programming to the general partner cable entity.[223] The Commission reasoned that "given that a cable operator's core media activity is the provision of video programming, there can be no service more material to a cable operator's video programming than the sale of video programming to the cable operator."[224]

95. The D.C. Circuit found that the Commission "has drawn no connection between the sale of programming and the ability of a limited partner to control programming choices."[225] In this regard, the D.C. Circuit posited that:

> Of course a programmer might secure contract terms giving it some control over a partnership's programming choices, but, given the independent criterion barring even communications on the video-programming business, exercise of that power would seem to be barred. Even if it weren't, the bargaining opportunity would depend on the desirability of the partner's programming, not on its status as a partner.[226]

96. The Commission's decision in *Twentieth Holdings Corp.* provides a useful illustration of how the "no material involvement" standard relates to the program purchasing issue.[227] Specifically, in *Twentieth Holdings Corp.*, the issue was whether a broadcast station owner could make its ownership non-attributable by placing the station in trust, while continuing to provide network programming to the station. The Commission held that it could not, finding that, since programming is at the heart of the station's operations, permitting communications as to programming would be a substantial breach of the concept of insulation.

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[221] *1999 Attribution Order*, 14 FCC Rcd at 19040-41.

[222] 4 FCC Rcd 4052 (1989).

[223] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, 9839 (2000).

[224] *Id.*

[225] *Time Warner*, 240 F.3d at 1143.

[226] *Id.* (citations omitted).

[227] *See* n.191, *supra*.

97. In this proceeding we seek comment on whether the concerns that the Commission articulated in *Twentieth Holdings Corp.* are relevant to the application of the cable attribution rules. At issue here is whether the sale of video programming constitutes direct or indirect material involvement with the general partner's video programming-related activities generally, and whether such sales are precluded by the "performance of service" criterion specifically. We ask commenters to submit empirical or theoretical evidence supporting or contradicting the Commission's conclusion that a limited partner's sale of video programming to the partnership imparts the potential to control or influence the partnership's acquisition of video programming. We ask commenters to address the D.C. Circuit's suggestion that the criteria barring communications pertaining to the video programming business is sufficient to ensure that a limited partner's status will not be able to influence or control the general partner's video programming-related activities generally, and its video programming acquisitions specifically. Finally, we ask commenters to address whether it is possible to apply the insulation criterion to allow the sale of video programming, and whether they still bar communications with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business.

VII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

98. As required by the Regulatory Flexibility Act ("RFA"),[228] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in this *Further Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to this IRFA and must be filed by the deadlines for comments on the *Further Notice* provided in paragraph 127 of this item. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[229] In addition, the *Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.[230]

A. Need for, and Objectives of, the Proposed Rules

99. Section 613(f) of the Communications Act is intended to encourage competition in the multichannel video programming distribution ("MVPD") market, and to prevent the exercise of undue market power by large cable operators, who own or have attributable interests in multiple cable systems. Specifically, Section 613(f) requires the Commission to establish reasonable limits on the number of cable subscribers that may be reached through commonly owned or attributed systems (horizontal limits) and on the number of channels that can be occupied by the cable system's owned or attributed video programming services (vertical limits). Pursuant to its statutory mandate, the Commission issued horizontal and vertical limits, and defined the attributable interests implicated by the limits. In *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), the D.C. Circuit remanded the Commission's horizontal and vertical limits, and vacated two aspects of the Commission's attribution rules. By this *Further Notice*, we seek comment on the Commission's rules affected by the *Time Warner* decision.

[228] *See* 5 U.S.C. § 603. The RFA has been amended by the *Contract With America Advancement Act of 1996*, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). *See* 5 U.S.C. § 601 *et. seq.* Title II of the CWAAA is the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA").

[229] *See* 5 U.S.C. § 603(a).

[230] *Id.*

100. In 1999, the Commission amended its broadcast and cable/MDS attribution rules, deciding to retain the single majority shareholder exemption after seeking comment on whether to eliminate it.[231] On reconsideration, the Commission granted a request to eliminate the single majority shareholder exemption, relying on its rationale for eliminating the exemption in the context of cable systems in its cable *1999 Attribution Order*, and further explaining that regardless of whether minority shareholder interests have the ability to control a licensee, they should be attributed because they potentially have the ability to exert influence over a licensee's core operations.[232] Because the Commission relied, in part, on the reasoning rejected in *Time Warner* to eliminate the single majority shareholder exemption under its broadcast and cable/MDS attribution rules, the *Further Notice* also seeks comment on whether to reinstate the exemption.

B. Legal Basis

101. The authority for the action proposed in this rulemaking is contained in Sections 2(a), 4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, 533.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

102. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[233] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[234] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[235] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[236]

103. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually.[237] This definition, among others, includes cable system operators, direct broadcast satellite services, multipoint

[231] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, *Report and Order*, 14 FCC Rcd 12559, 12579, ¶ 36 (1999) ("*Broadcast Attribution R&O*").

[232] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 1097, 1116-17, ¶¶ 41-44 (Jan. 19, 2001) ("*Broadcast Attribution MO&O*").

[233] 5 U.S.C. § 603(b)(3).

[234] 5 U.S.C. § 601(6).

[235] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[236] 15 U.S.C. § 632.

[237] 13 C.F.R. § 121.201, North American Industry Classification System ("NAICS") Codes 51321 and 51322.

distribution services and satellite master antenna systems. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than $11 million in revenue.[238] We address below each service individually to provide a more precise estimate of small entities.

104. *Cable Systems.* The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[239] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[240] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the proposed rules.

105. The Communications Act of 1934, as amended, also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[241] The Commission has determined that there are 67,700,000 subscribers in the United States.[242] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[243] Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.[244] We do not request nor collect information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000,[245] and therefore are unable to estimate accurately the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

106. *Direct Broadcast Satellite Service ("DBS")*: Because DBS provides subscription services, DBS falls within the SBA-recognized definition of "Cable and Other Pay Television

[238] *See U.S. Department of Commerce, Bureau of the Census, Industry and Enterprise Receipts Size Report,* Table 2D, NAICS Codes 51321 and 51322 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[239] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration,* MM Doc. Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995).

[240] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[241] 47 U.S.C. § 543(m)(2).

[242] *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* Public Notice DA 01-158 (January 24, 2001).

[243] 47 C.F.R. § 76.1403(b).

[244] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[245] We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.1403(b) of the Commission's rules, 47 C.F.R. § 76.1403(b).

Services."[246] This definition provides that a small entity is one with $11 million or less in annual receipts.[247] There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues that may be in excess of the threshold for a small business.[248] The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

107. *Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS") and Local Multipoint Distribution Service ("LMDS"):* MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS").[249] LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[250]

108. In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues of less than $40 million in the previous three calendar years.[251] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[252] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating $11 million or less in annual receipts.[253] This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of the IRFA, we find there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

[246] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[247] *Id.*

[248] *Id.*

[249] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd at 9589, 9593 ¶ 7 (1995).

[250] *See Local Multipoint Distribution Service,* Second Report and Order, 12 FCC Rcd 12545 (1997).

[251] 47 C.F.R. § 21.961(b)(1).

[252] *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

[253] 13 C.F.R. § 121.201, NAICS Codes 52321 and 52322.

109. The SBA definition of small entities for pay television services, which includes such companies generating $11 million in annual receipts, appears applicable to ITFS.[254] There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business.[255] However, we do not collect annual revenue data for ITFS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

110. Additionally, the auction of the 1,030 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[256] An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding calendar years.[257] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[258] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

111. In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

112. *Satellite Master Antenna Television ("SMATV") Systems.* The SBA definition of small entities for "Cable and Other Pay Television Services" specifically includes SMATV services and, thus, small entities are defined as all such companies generating $11 million or less in annual receipts.[259] Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December 1995.[260] Other estimates indicate that SMATV operators serve approximately 1.5 million residential subscribers as of June 2000.[261] The best available estimates indicate that the largest SMATV operators serve between 15,000 and 55,000 subscribers each. Most SMATV operators serve approximately 3,000 to 4,000 customers. Because these operators are not rate regulated, they are not

[254] *Id.*

[255] SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

[256] *See Local Multipoint Distribution Service,* Second Report and Order, 12 FCC Rcd 12545 (1997).

[257] *Id.*

[258] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

[259] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[260] *See Third Annual Report,* 12 FCC Rcd at 4403-4.

[261] *See Seventh Annual Report,* 16 FCC Rcd at 6048.

required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

113. *Open Video Systems.* Because OVS operators provide subscription services,[262] OVS falls within the SBA-recognized definition of "Cable and Other Pay Television Services."[263] This definition provides that a small entity is one with $11 million or less in annual receipts.[264] The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of those are currently providing service.[265] Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.[266]

114. *Program Producers and Distributors.* The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will use the SBA classifications of Motion Picture and Video Tape Production (NAICS Code 51211),[267] Motion Picture and Video Tape Distribution (NAICS Codes 42199, 51212),[268] and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 71132, 51229, 53249).[269] These SBA definitions provide that a small entity in the cable television programming industry is an entity with $21.5 million or less in annual receipts for NAICS Codes 51211, 42199 and 51212, and $5 million or less in annual receipts for NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 71132, 51229 and 53249.[270] Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (NAICS Code 51211), and that 6,987 of these firms had $16.999 million or less in

[262] *See* 47 U.S.C. § 573.

[263] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[264] *Id.*

[265] *See* http://www.fcc.gov/csb/ovs/csovscer.html.

[266] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[267] Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Such producers of live radio and television programs are classified in NAICS Code 51211.

[268] Such establishments primarily engaged in the distribution (rental or sale) of theatrical and nontheatrical motion picture films or in the distribution of video tapes and disks, except to the general public. Motion pictures and video tape distribution are classified in NAICS Codes 42199 and 51212.

[269] Such establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters, including producers of live television programs. Such producers of live theatrical presentation are classified in NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 71132, 51229, and 53249.

[270] 13 C.F.R. § 121.201.

annual receipts and 7,002 of these firms had $24.999 million or less in annual receipts;[271] (b) there were 1,139 firms classified as Motion Picture and Video Tape Distribution (NAICS Codes 42199 and 51212), and 1,007 of these firms had $16.999 million or less in annual receipts and 1,013 of these firms had $24.999 million or less in annual receipts; and (c) there were 5,671 firms in the United States classified as Theatrical Producers and Services (NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 71132, 51229, and 53249), and 5,627 of these firms had $4.999 million or less in annual receipts.[272]

115. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated. Thus, we estimate that our rules may affect approximately 6,987 small entities primarily engaged in the production and distribution of taped cable television programs and 5,627 small producers of live programs that may be affected by the rules adopted in this proceeding.

116. *Home Satellite Dish Service ("HSD")*: Because HSD provides subscription services, HSD falls within the SBA-recognized definition of "Cable and Other Pay Television Services."[273] This definition provides that a small entity is one with $11 million or less in annual receipts.[274] The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.[275] HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.[276]

117. According to the most recently available information, there are approximately four program packagers nationwide offering packages of scrambled programming to retail consumers.[277]

[271] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, NAICS 51211, (U.S. Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) ("*SBA 1992 Census Report*"). Because the Census data do not include a category for $21.5 million, we have reported the closest increment below and above the $21.5 million threshold. There is a difference of 15 firms between the $16,999 and $24,999 million annual receipt categories. It is possible that these 15 firms could have annual receipts of $21.5 million or less and would therefore be classified as small businesses.

[272] 13 C.F.R. § 121.201, NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 71132, 51229, and 53249.

[273] 13 C.F.F. § 121.201, NAICS Codes 51321 and 51322.

[274] *Id.*

[275] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, 12 FCC Rcd 4358, 4385 (1996) (*"Third Annual Report")*.

[276] *Id.* at 4385.

[277] *Id.*

These program packagers provide subscriptions to approximately 1,476,700 subscribers nationwide.[278] This is an average of about 370,000 subscribers per program package. This is smaller than the 400,000 subscribers used in the commission's definition of a small MSO. It is likely that some program packagers may be substantially smaller.

118. *Radio and Television*. The SBA defines a radio station that has $5 million or less in annual receipts as a small business.[279] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[280] Included in this industry are commercial, religious, educational, and other radio stations.[281] Radio broadcasting stations, which primarily are engaged in radio broadcasting and which produce radio program materials, are similarly included.[282] Radio stations, however, that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.[283] As of June 30, 2001, the Commission had licensed 12,932 radio stations (both commercial and noncommercial).[284] According to Commission staff review of BIA Publications, Inc., Master Access Radio Analyzer Database on March 14, 2001, about 10,400 commercial radio stations had revenue of $5 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by reinstatement of the single majority shareholder exemption.

119. The SBA defines small television broadcasting stations as television broadcasting stations with $10.5 million or less in annual receipts.[285] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[286] Included in this industry are commercial, religious, educational, and other television stations.[287] Also included are establishments primarily are engaged in television broadcasting and which produce taped television program materials.[288] Separate establishments primarily engaged in

[278] *See Seventh Annual Report*, 16 FCC Rcd at 6110 Table C-1 (2001).

[279] 13 C.F.R. § 121.201, NAICS Code 513112.

[280] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1*, Appendix A-9 (1995) (*1992 Census, Series UC92-S-1*, at Appendix A-9).

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] FCC News Release, No. 25641 (July 13, 2001).

[285] 13 C.F.R. § 121.201, NAICS Code 513120.

[286] *1992 Census, Series UC92-S-1*, at Appendix A-9.

[287] *Id.*; *see* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987), at 283, which describes "Television Broadcasting Stations" (SIC code 4833, now NAICS code 513120) as: "Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials."

[288] *1992 Census, Series UC92-S-1*, at Appendix A-9.

producing radio program material are classified under another NAICS number.[289] There are currently 1,304 commercial television stations and 374 noncommercial educational television stations on the air (a total of 1,678 stations).[290] According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database on March 14, 2001, fewer than 800 commercial TV broadcast stations had revenues of less than $10.5 million. We note, however, that under SBA's definition, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. Our estimate, therefore, may overstate the number of small entities because the revenue figure on with it is based does not include or aggregate revenues from non-television affiliated companies.

D. Description of Projected Reporting, Recordkeeping and other Compliance Requirements

120. The *Further Notice* seeks comment on possible regulatory approaches to implement the subscriber and channel occupancy limit provisions of Section 613(f), and on two aspects of its attribution rules that identify the ownership interests implicated by those limits. In considering a subscriber limit approach, the *Further Notice* does solicit comment on whether it would be appropriate to impose reporting requirements, more stringent than those set forth in the Commission's current rule,[291] in order to monitor cable ownership levels. More stringent reporting, recordkeeping, and other compliance requirements, however, likely would affect large MSOs and/or MVPDs, not small entities.

121. The *Further Notice* also seeks comment on whether to reinstate the single majority shareholder exemption for purposes of broadcast and cable/MDS attribution rules. The Commission discussed the effects of projected reporting, recordkeeping, and other compliance requirements based on elimination of the exemption in its reconsideration order released earlier this year.[292] We note that the Commission is suspending enforcement of the elimination of the single majority shareholder exemption for broadcast and cable/MDS attribution rules for all pending cases and until this proceeding is resolved. If the exemption is formally reinstated, reporting requirements will remain unchanged from those requirements that have been in effect since 1984. Thus, the reporting requirements for licensees, including small entities, will not be affected.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

122. The IRFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include, among others, the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

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[289] *Id.*

[290] FCC News Release, No. 25641 (July 13, 2001).

[291] *See* 47 C.F.R. § 76.503(g) (requiring any cable operator that serves more than 20 percent of the MVPD market, to file a certification that it will comply with the subscriber limit concurrently with transfer applications).

[292] *Broadcast Attribution MO&O*, 16 FCC Rcd at 1133.

123. The D.C. Circuit, in *Time Warner*, reversed and remanded the Commission's cable subscriber and channel occupancy limits, and vacated two aspects of the Commission's attribution rules. The *Further Notice* seeks comment on several regulatory alternatives to implement the subscriber and channel occupancy limits of Section 613(f), and the two aspects of the attribution rules (the elimination of the single majority shareholder exemption and the application of the insulation criteria to bar limited partners' sale of video programming). For example, alternatives considered in the *Further Notice* include whether to relax, exempt specific cable operators, including small cable operators, from, or eliminate, under certain circumstances, the ownership limits. Other alternatives considered in the *Further Notice* include whether to maintain or eliminate the single majority shareholder exemption and whether or not to bar a limited partner from selling video programming to the general partner cable entity in order to maintain insulated limited partner status for purposes of the attribution rules. In addition, the *Further Notice* considers whether to reinstate or maintain elimination of the single majority shareholder exemption for purposes of the broadcast and cable/MDS attribution rules. We would expect that whichever alternative is chosen, the Commission will seek to minimize any adverse effects on small entities.

F. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals

124. There are no federal rules that specifically duplicate, overlap or conflict with the Commission's proposed regulatory approaches to implement Section 613(f) or to re-examine the status of the single majority shareholder exemption for purposes of the broadcast and cable/MDS attribution rules.

VIII. PAPERWORK REDUCTION ACT

125. This FNPRM may contain either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this FNPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this FNPRM; OMB comments are due 60 days from date of publication of this FNPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

126. Written comments by the public on the proposed and/or modified information collections are due on or before 75 days after date of publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward C. Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to Edward.Springer@omb.eop.gov.

IX. PROCEDURAL PROVISIONS

127. *Comments and Reply Comments.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[293] interested parties may file comments on or before 75 days after date of publication in the Federal Register, and reply comments on or before 105 days after date of publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[294] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, electronic filers should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

128. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington DC 20554. One copy of each filing also must be filed with other offices, as follows: (1) Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554; and (2) Ava Holly Berland, Cable Services Bureau, 445 12th Street, SW, 3-A832, Washington, DC, 20554. In addition, five copies of each filing must be filed with Linda Senecal, Cable Services Bureau, 445 12th Street, SW, 3-A729, Washington, DC 20554.

129. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, CY-A257, Washington, DC 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, (202) 418-7365 TTY, or bcline@fcc.gov. Comments and reply comments also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf, and also from the Commission's Electronic Comment Filing System. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Qualex International, Portals II, 445 12th Street, SW, Room, CY-B402, Washington, DC, 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via email qualexint@aol.com.

130. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or send an email to access@fcc.gov.

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[293] 47 C.F.R. §§ 1.415 and 1.419.

[294] *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 Fed. Reg. 24121 (1998).

131. The media contact for this proceeding is Michelle Russo at (202) 418-0270. The Cable Services Bureau contacts for this proceeding are Daniel Hodes, Kiran Duwadi, Ava Holly Berland or Andrew Wise at (202) 418-7200, TTY at (202) 418-7365 or (888) 835-5322, or at dhodes@fcc.gov, kduwadi@fcc.gov, hberland@fcc.gov, awise@fcc.gov.

132. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[295] Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[296] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules. Finally, one copy of each disclosure filing also must be filed with other offices, as follows: (1) Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554; (2) Ava Holly Berland, Cable Services Bureau, 445 12th Street, SW, 3-A832, Washington, DC, 20554; and (3) Linda Senecal, Cable Services Bureau, 445 12th Street, SW, 3-A729, Washington, DC, 20554.

X. ORDERING CLAUSES

133. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 2(a), 4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, 533, the Further Notice of Proposed Rulemaking is ADOPTED.

134. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 4(i), 303(j) and 613(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(j) and 533(f) and section 1.106 of the Commission's rules and regulations, 47 C.F.R. § 1.106, the petitions for reconsideration jointly filed by the Consumer Federation of America, the Center for Media Education, the Association of Independent Video and Filmmakers, and the Office of Communication, Inc., and United Church of Christ IS DISMISSED AS MOOT.

135. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Further Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[295] 47 C.F.R. § 1.1206(b).

[296] *See* 47 C.F.R. § 1.1206(b)(2).

SEPARATE STATEMENT
OF COMMISSIONER MICHAEL J. COPPS
ON CABLE OWNERSHIP NPRM

In commencing this proceeding today, the Commission takes steps to fulfill statutory and judicial mandates. Pursuant to the 1992 Cable Act, the Commission established horizontal and vertical ownership rules for cable systems. In a decision this year, however, the D.C. Circuit ordered the Commission to revisit these rules, and to build a strong record upon which to base such changes.

Given the directive of the D.C. Circuit, it is critical that in the proceeding commenced today, we solicit information from all stakeholders to aid us in building a record that will clearly and strongly support our conclusions. Whatever one's position on the outcome of this proceeding, detailed input is important to the Commission's collection of the data necessary to make informed decisions about these rules. The more information we have from stakeholders, the better we will be able to base our decisions not on our impressions of these industries and how they operate, but on the data compiled through proceedings such as this.

I look forward to reviewing the information compiled in response to this NPRM. I intend to review the record thoroughly and without prejudgment. If I am to support any changes to these rules – or any other rule – I expect to know with as much precision as possible how those proposed changes serve the public interest, convenience and necessity.