February 4, 2002

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-B204
Washington, DC 20554

Re: Echostar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, CS Docket No. 01-348

Dear Ms. Salas:

The Progress & Freedom Foundation ("PFF" or "Foundation"), a private, non-profit, non-partisan research institution established in 1993 to study the digital revolution and its implications for public policy, hereby submits these comments in the above referenced proceeding.[1]

PFF's research and analysis has for several years focused heavily on the convergence of computing and communications and the impact of that convergence on markets and competition. Our research has shown that what we refer to as the "digital revolution" has made possible new products and services delivered in a variety of new ways, reduced prices and costs, increased productivity and contributed dramatically to consumer choice and economic prosperity.[2] PFF's annual well-documented and oft-cited survey, *The Digital Economy Fact Book*, has chronicled the growth of the digital economy.[3]

The Foundation participates in Commission proceedings where it believes the results of its research can be useful to the Commission in formulating sound public policy that maximizes the benefits of the digital revolution for consumers. Thus, the Foundation has, in the past, participated in proceedings relating to the market for

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[1] The views contained in these comments are the views of the comments' authors and do not necessarily reflect the views of its directors, officers or the staff of the Foundation.

[2] For citation to various authorities, See Comments of the Progress & Freedom Foundation, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans*, CC Docket No. 98-146, September 24, 2001; Reply Comments of the Progress & Freedom Foundation, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans*, CC Docket No. 98-146, October 5, 2001. See also Jeffrey A. Eisenach and Randolph J. May, Eds., *Communications Deregulation and FCC Reform* (Boston: The Progress & Freedom Foundation and Kluwer Academic Publishers, 2001).

[3] For the most recent edition, see Jeffrey A. Eisenach, Thomas M. Lenard and Stephen McGonegal, *The Digital Economy Fact Book, Third Edition* (Washington, DC: The Progress & Freedom Foundation, 2001).

broadband communications,[4] the appropriate regulatory framework for interactive digital television services,[5] the Commission's role in evaluating mergers,[6] the effects of "open-access" regulation on broadband services offered by cable television providers,[7] and the appropriate ownership limits for cable television.[8]

It is with particular reference to our recently submitted comments concerning cable ownership, attached hereto and incorporated by reference, that we provide these brief comments in the matter of the proposed merger between Echostar and DirectTV.

Simply put, the proposed merger can be looked at one of two ways: Either it is a merger to monopoly in the market for satellite TV services, or it is a merger between two of many competitors in an increasingly dynamic and diverse market for the provision of electronic video programming and related digital communications services. We believe the merger should properly be viewed in the latter context and, when it is, that the potential benefits of the merger for consumers and competition far outweigh the potential costs.

As we noted in our comments in the cable ownership proceeding, "An industry subject to rapid and unpredictable change, particularly one driven by technological innovation, is not one in which market structures and firm organizations should be dictated by overly restrictive rigid rules."[9] Citing then-Commissioner Powell, who stated in 1998 that "digital . . . convergence has blurred the line between all communications media,"[10] we suggested that the market under consideration in that proceeding will, rather than the market for multichannel *video* services, "likely will come to be known simply as the digital multichannel world, a world in which video, voice, high-speed Internet access and data transfer increasingly will be bundled together and offered as a package."[11]

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[4] See Comments of the Progress & Freedom Foundation, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, September 14, 1998.

[5] See Comments of the Progress & Freedom Foundation, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, December 1, 2000.

[6] See Comments of the Progress & Freedom Foundation, *In the Matter of GTE Corporation, Transferor and Bell Atlantic, Transferee For Consent to Transfer of Control*, CC Docket No. 98-184, December 23, 1998. (Hereafter "Merger Comments.")

[7] See Comments of the Progress & Freedom Foundation, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, December 1, 2000.

[8] See Comments of the Progress & Freedom Foundation, *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, CC Docket No. 98-82, January 4, 2002. (Hereafter "Cable Ownership Comments.")

[9] Cable Ownership Comments at 9.

[10] Cable Ownership Comments at 14.

[11] Cable Ownership Comments at 7-8.

Such dynamism simultaneously increases the probability that any given combination is motivated by efficiency concerns and decreases the probability that it can or will lead to the exercise of market power. With respect to the first point, changing market conditions naturally lead firms to reconfigure assets in order to better respond to marketplace demands and consumer needs – i.e. to enhance efficiency. At the same time, such dynamism makes it vastly more difficult for firms to acquire and maintain market power.

Thus, we concluded, the Commission "must recognize that horizontal and vertical combinations . . . have an important role to play in enabling firms to achieve the economies of scale and scope necessary to build out and provide video and other services over competing platforms, whether they be cable, satellite, wireline, 3G wireless or whatever."[12]

We note that there appear to be a number of potential efficiencies resulting from the proposed merger, including the more efficient use of spectrum which would allow the combined firm to vastly increase the number of markets to which it could provide local programming. We would urge the Commission to give special attention, however, to the potential efficiency and pro-competitive effects of the proposed merger in the market for broadband Internet services, which currently are provided almost exclusively by cable companies, through cable modems, and telephone companies, primarily through DSL technology. As Chairman Powell recently said, widespread deployment of broadband is "the central communications policy objective today."[13]

Satellite-delivered broadband Internet services represent the most likely near-term prospect of providing the "third pipe" to homes and small businesses, and there is every reason to believe that the merged firms will have an enchanced ability and incentive to fulfill this promise, thereby contributing further to an already intense rivalry and reducing the probability that market power will develop in these markets. Equally important, perhaps, the merged firms will have a stronger capability to provide broadband services to rural and other underserved communities, which currently may have no high-speed access to the Web at all – and, in so doing, likely spawn

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[12] Cable Ownership Comments at 16. The dynamic nature of the marketplace, especially as it relates to the market for broadband services, has been emphasized by the Foundation in numerous filings before the Commission. In December 1998, for example, we urged the Commission to give appropriate consideration to the efficiency effects of three mergers then pending before it, AT&T/TCI, Bell Atlantic/GTE and SBC/Ameritech. "As one examines the efficiency impacts of the three mergers now before the Commission," we said then, "the pattern becomes clear. As suggested above, companies are scrambling to reconfigure assets, identify sources of needed expertise, acquire marketing skills and otherwise react to impact of technological and marketplace convergence in the telecommunications market generally and the broadband market in particular. Given the importance of the broadband marketplace to the national economy, the Commission should pay special in its analysis to the efficiency gains these mergers bring to that marketplace." (Merger Comments at 7.)

[13] Cited in Randolph H. May, "FCC Rules Slow Progress," *USA Today* (January 2, 2002), p. 8A.

competition for these customers as well. In both respects, the merger will further the Commission's goal of providing for the "reasonable and timely" deployment of advanced telecommunications services to all Americans.

In conclusion, and as discussed further in the attached comments submitted previously in the Cable Ownership proceeding, the Commission should examine this merger not in the context of an anachronistic framework that focuses on the market for cable television, but rather through a lens that focuses on what is, and what will soon be, the converged market for digital information services. When viewed through this lens, it is apparent that the pro-competitive, efficiency-enhancing effects of the proposed merger outweigh any possible anticompetitive effects, and that the merger should be permitted to proceed.

Respectfully,

Jeffrey A. Eisenach
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1301 K St. NW, Suite 550E
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202-289-8928

Attachment

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

In the Matter of	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION

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January 4, 2002

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SUMMARY

In and of itself, this proceeding concerns setting appropriate horizontal and vertical ownership limits for multiple system cable television operators. It is specifically occasioned by the D.C. Circuit's holding in the *Time Warner II case* that the current limits promulgated by the Commission are unlawful. As the Commission considers its actions going forward in this proceeding, we urge the Commission to have firmly in mind the larger changes being wrought by the digital revolution, changes occurring not only in the video marketplace, but in all sectors of the communications industry.

This larger context in which this proceeding should be viewed, of course, must include an appreciation of the First Amendment values impacted by the ownership limitations because, as the Court of Appeals emphasized in striking down the existing rules, the ownership limits directly restrict cable operators' free speech rights. To comport with the First Amendment, the FCC must justify any limits it chooses "as not burdening substantially more speech than necessary" to effectuate the congressional objective of fostering diversity in the programming marketplace.

Following the court's remand, the Commission proposes in the Further Notice to reexamine the ownership limitations in accordance with the statutory mandate, First Amendment principles, and industry conditions in the multichannel video programming distributor ("MVPD") marketplace. These comments discuss each of these considerations in concluding that the Commission should adopt the least regulatory alternatives possible.

The Commission's most recent *Video Programming* report, containing data now a year and a half old, found that while cable remained dominant in the MVPD marketplace, DBS grew much more rapidly. Overall, the Commission concluded, "competitive alternatives and consumer choices continue to develop." Importantly, the Commission took note of the business and technological convergence taking place in the communications industry. It observed that "the most significant convergence of service offerings continues to be the pairing of Internet service with other service offerings" and "[t]here is evidence that a wide variety of companies throughout the communications industries are attempting to become providers of multiple services, including data access."

Under these circumstances, some form of the "threshold" or "safe harbor" approaches discussed in the Further Notice offer the best hope of satisfying the statutory requirements for limits without actually harming innovation and competition in the communications marketplace.

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Washington, D.C. 20554

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COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION

I. INTRODUCTION AND BACKGROUND

The Progress & Freedom Foundation ("PFF" or "Foundation"), a private, non-profit, non-partisan research institution established in 1993 to study the digital revolution and its implications for public policy, hereby submits these comments in response to the Further Notice of Proposed Rulemaking in this proceeding.[14]

[14] Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, FCC 01-263, CC Docket No. 98-82, October 12, 2001 (hereinafter sometimes "Further Notice" or "FNPRM"). The views contained in these comments are the views of the comments' authors and do not necessarily reflect the views of the directors, officers, or staff of the Foundation.

PFF's research and analysis focuses heavily on issues related to the development of a competitive and less regulated communications marketplace, especially one that fosters the more rapid deployment of broadband digital communications and other new technologies. Our research has shown that what we refer to as the "digital revolution" has made possible new products and services delivered in a variety of new ways, reduced prices and costs, increased productivity and contributed dramatically to consumer choice and economic prosperity.[15] PFF's annual well-documented and oft-cited survey, "The Digital Economy Fact Book," has chronicled the growth of the digital economy.[16] Much of the Foundation's work has focused specifically on communications policy.[17]

In and of itself, of course, this proceeding concerns the Commission's statutory obligation to set appropriate horizontal and vertical ownership limits for cable television system operators. And it is specifically occasioned by the D. C. Circuit's decision holding that the Commission's current ownership limits are unlawful and remanding to the agency for further proceedings.[18] As the Commission recognizes, however, the issues involved can only be fully understood in the the larger context of the changes discussed below which are being wrought by the digital revolution not only in the multichannel video marketplace, but in all sectors of the communications industry. It is in this larger context, which includes an appreciation of the First Amendment values

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[15] For citation to various authorities, see our comments and reply comments in the Commission's most recent Section 706 Inquiry, CC Docket No. 98-146, filed on September 24 and October 5, 2001.

[16] For the most recent edition, see Jeffrey A. Eisenach, Thomas M. Lenard and Stephen McGonegal, *The Digital Economy Fact Book, Third Edition* (Washington, DC: The Progress & Freedom Foundation, 2001).

[17] See for example Jeffrey A. Eisenach and Randolph J. May, Eds., *Communications Deregulation and FCC Reform* (Boston: The Progress & Freedom Foundation and Kluwer Academic Publishers, 2001).

[18] Time Warner Entertainment Co., L.P. v. United States, 240 F. 3d 1126 (D.C. Cir. 2001). The rules that were invalidated bar a cable operator from having an attributable interest in more than 30% of the national subscribership

impacted by the Commission's rules, that we urge the Commission to consider the specific ownership questions at issue in this proceeding.

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") directs the Commission to establish "reasonable limits" on the number of subscribers that may be reached through commonly owned cable systems and on the number of channels that can be occupied by the cable system's owned or affiliated video programming.[19] As the Commission states in the Further Notice, a principal objective of the 1992 Act was to prevent the then dominant cable medium "from stifling the video programming market, and further to encourage the development of, and competition within, the video programming market."[20]

Or, as the Commission sums up more specifically in explaining the congressional objectives in directing the agency to establish the horizontal and vertical ownership limits:

> First, Congress was concerned about concentration of the media in the hands of a few who could control the dissemination of information which would enable cable operators to impose their own biases upon the information they disseminate. Second, Congress was concerned that an increase in concentration and vertical integration in the cable industry could result in anticompetitive behavior by cable operators toward programming suppliers, as well as toward potential new entrants.[21]

The Commission rules that were invalidated in implementing the congressional directive impose a 30% limit on the number of multichannel video subscribers that may

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to multichannel video programming (the "horizontal limit") and from carrying attributable programming on more than 40% of the channels up to 75 channels of capacity.

[19] 47 U.S.C. § 533 (f)(1)(A) and (B). In these comments, when we refer to commonly owned systems we are including those systems "attributed" to an operator by virtue of the Commission's attribution ownership rules.

[20] Further Notice, at para. 4.

[21] Further Notice, at para. 5.

be served by a multiple cable system operator (the "horizontal limit")[22] and a 40% limit on the channel capacity that an operator may use to carry attributable programming, with such limit applicable only up to 75 channels (the "vertical limit").

In reviewing the ownership rules, the Court of Appeals first pointed out that when cable operators select programming to make available to their subscribers, they are entitled to the protections of the First Amendment in exercising this editorial function. Quite simply, explained the court, "[t]he horizontal limit interferes with the [cable operators'] speech rights by restricting the number of viewers to whom they can speak" and "[the] vertical limit restricts their ability to exercise their editorial control over a portion of the content they transmit."[23] To comport with the First Amendment, the FCC must justify the limits it chooses "as not burdening substantially more speech than necessary" to effectuate the congressional objectives.[24]

Having in mind the First Amendment considerations, the court determined that the Commission failed to justify the limits it had chosen. The 30% horizontal limit was derived by the Commission to effectuate its premise that a 40% "open field" is necessary to prevent anti-competitive action by an operator. The Commission's reasoning went this way: A new programming network needs access to 40% of the

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[22] For purposes of calculating the percentage, subscribers include not only users of cable systems but to all subscribers to what the Commission refers to as multichannel video programming distributors ("MVPDs"), such as direct broadcast satellite ("DBS") and multichannel multipoint distribution services ("MMDS"). Thus, a multiple cable operator is able to serve a larger percentage of cable subscribers (now over 35%) if it serves them only on a cable platform.

[23] 240 F. 3d at 1129. In *Time Warner Entertainment Co. v. United States*, 211 F. 3d 1313 (D.C. Cir. 2000) (Time Warner I), the D.C. Circuit upheld against a facial First Amendment attack the 1992 Act provisions directing the Commission to establish ownership limits, but as the *Time Warner II* court put it, "constitutional authority to impose some limit is not authority to impose any limit imaginable." 240 F. 3d at 1129-30.

[24] 240 F. 3d at 1130.

MVPD subscribers nationwide to be financially viable.[25] A 30% limit would ensure the presence of at least four operators in the market and would prevent the two largest from controlling more than 60% of the market. Even if two operators colluded to deny access to a programming network, the network would still have access to 40% of the market, giving it a reasonable chance of financial viability.[26] But the court found that, even assuming for the sake of argument that this 40 % "open field" premise is correct, the Commission did not explain, among other things, why an ownership limit up to 60% would not be adequate to achieve the congressional objective.

Similarly, the court determined that the Commission never explained adequately the basis for the 40% vertical integration limit. It didn't explain why vertically integrated multiple operators have an incentive to reach carriage decisions beneficial to each other or what the probabilities are that firms would engage in reciprocal buying. "After all," said the court, "the economy is filled with firms that, like the MSOs, display partial upstream vertical integration. If that phenomenon implies the sort of collusion the Commission infers, one would expect the Commission to be able to point to examples."[27] The Commission did not provide any examples, and, moreover, according to the court, "even if one accepts the proposition that an MSO could benefit from sharing the services of specific programmers, programming is not more attractive for

[25] The Commission's 40% open filed premise was based on the surmise that a new programming network needs to reach approximately 20% of the 80 million of MVPD subscribers in order to succeed financially, and that a network has a 50% chance of obtaining subscribers that are not actively denied to it. So, the network needs to have access to at least 40% of all MVPD subscribers to ensure that it will reach the necessary 20% of viewers. Further Notice, at para. 52.
[26] Further Notice, at para. 46.
[27] 240 F. 3d at 1132.

this purpose merely because it originates with another MSO's affiliate rather than with an independent."[28]

The court cited the Commission's own orders for the propositions that vertically integrated multichannel distributors "evidently use loads of independent programming" and the proportion of vertically integrated channels of cable operators continue to decline.[29] In short, the FCC failed to justify the vertical limit as not burdening substantially more speech than necessary.

So now, in this proceeding, the Commission says that it is reexamining the ownership rules, "[i]n accordance with our statutory mandate, First Amendment principles, and the second *Time Warner* decision," recognizing that "the subscriber ownership and channel occupancy limits that we implement must reflect the MVPD industry's market conditions."[30]

[28] 240 F. 3d at 1132.
[29] 240 F. 3d at 1139.
[30] Further Notice, at para. 7.

II. TAKING INTO ACCOUNT THE STATUTE, FIRST AMENDMENT PRINCIPLES, AND INDUSTRY MARKET CONDITIONS, THE COMMISSION SHOULD IMPOSE MINIMALLY RESTRICTIVE CABLE OWNERSHIP LIMITS

Our purpose in submitting these comments is not to suggest specific new horizontal and vertical cable ownership limits in the remand proceeding. We do not envy the Commission the task that Congress has assigned it, particularly in a communications environment that is changing even more rapidly than Congress almost certainly envisioned when the 1992 Cable Act provisions were passed. The markers identified by the Commission—the statutory mandate, First Amendment principles, the court's decision, and the MVPD industry's market conditions—must indeed guide the agency's decision.

As discussed below, taken together, we think that these considerations point towards minimally restrictive ownership limits. Simply put, the remarkably dynamic nature of the communications marketplace makes it highly improbable that the harms Congress was concerned about when it passed the 1992 Act will come about *regardless of the level of concentration among MSOs*. This same dynamism substantially increases the potential harms to competition associated with overly restrictive regulation. In this context, it is important for the Commission to consider how the actions in takes in this proceeding may affect other issues it will shortly confront in the rapidly changing and converging multichannel "video" world[31], or, what, more accurately, likely will come to be known simply as the digital multichannel world, a world in which video, voice, high-speed Internet access and data transfer increasingly will be

[31] For example, ownership restrictions obviously may have an impact on the Commission's consideration of merger proposals, such as the AT&T Broadband/Comcast combination, EchoStar/Hughes, and others that may follow as the industry undergoes rapid technological and business change in anticipation of the coming competitive struggles among competing broadband platforms.

bundled together and offered as a package. Below we will discuss some of the points which warrant attention by the Commission under the decisional markers it has identified for this proceeding, and which generally will be relevant as well in considering related issues in the broader multichannel context.

A. The Statutory Mandate

While the explicit purpose of the 1992 Act's ownership provision is to "enhance effective competition,"[32] it is worth emphasizing that Congress clearly had in mind other considerations which demonstrate that it did not equate "enhancing competition" with merely counting competitors. Recall the congressional instructions that accompanied the directive to set "reasonable" ownership limits. The Commission is instructed by the statute to "account for any efficiencies and other benefits that might be gained through increased ownership or control."[33] And it is charged with not imposing limitations "which would bar cable operators from serving previously unserved rural areas" and "which would impair the development of diverse and high-quality video programming."[34]

Huge amounts of capital investment are necessary to upgrade cable systems to serve new geographic areas and, as importantly, to add digital bandwidth to new and existing systems so that an even wider array of programming may be offered. The cable industry claims that since the 1996 Act it has invested $50 billion to upgrade more than three-quarters of a million miles of plant with fiber optics.[35] Obviously, larger systems may be able to achieve cost efficiencies through scale economies that are not realizable

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[32] 47 U. S. C. § 533(f)(1).
[33] 47 U. S. C. § 533(f)(2)(D).
[34] 47 U. S. C. §§ 533(f)(2)(F) and (G).
[35] "We're Making Broadband Happen," Remarks of Robert Sachs, NCTA President and CEO, at Cable 2001, June 11, 2001. See also, Kagan World Media, Broadband Cable Financial Databook, 2001, indicating that by year-end 2001, the cable industry will have invested more than $55 million on plant upgrades, including over $14 billion in 2001.

by smaller systems, and they may be able to marshal the resources to make available more diverse programming and other communications offerings that smaller systems cannot.

The president of the National Cable and Telecommunications Association recently stated that, with new digital channels, cable operators are "providing consumers with dozens of new digital video networks; movies on demand; interactive enhancements; high speed Internet; and cable telephony."[36] Certainly, Congress intended for the Commission to consider and give appropriate weight to the fact that overly strict ownership limitations may work against achievement of the goals of expanding cable's reach and increasing the diversity of its programming.

Finally, and importantly, Congress directed that, in conjunction with consideration of the other factors, the Commission's ownership rules must "reflect the dynamic nature of the communications marketplace."[37] The significance of this direction, in light of the rapidity of marketplace changes presently occurring or on the near horizon, should not be minimized. Some of these changes are mentioned briefly in Section II C below.

B. First Amendment Principles and the Court's Decision

In this remand proceeding the Commission should be especially mindful of the First Amendment values at stake. As the D. C. Circuit explained succinctly, the horizontal limit implicates free speech rights by limiting the number of viewers to whom a cable operator may speak, while the vertical limit restricts the cable system's ability to

[36] Id.
[37] 47 U.S.C. § 533(f)(2)(E).

exercise editorial control over the content it carries.[38] Obviously any limits impinge to some extent on cable's First Amendment rights. But in an area in which the Commission has some discretion, the less restrictive the limits, the more the Commission honors the First Amendment values that should always be one of its paramount concerns.

To the extent that the ownership limitations are intended to promote a competitive marketplace conducive to a diversity of viewpoints, the Commission is likely to find, in considering the First Amendment implications of its actions, that the balance has tilted considerably further in the direction of less restrictive limitations than those voided by the *Time Warner* court. Although clearly tending to call into question the proffered justification for the cable speech restrictions, we may even put aside for the moment the broad universe of non-cable programming outlets that mitigate against any concerns that there may be a lack of diverse video programming available to the public.

Focusing on cable programming alone, the Commission acknowledges in the Further Notice that "it seems likely that cable system capacity will continue to increase, offering consumers an abundance of video programming choices and services."[39] And it points out that the number of programming networks more than doubled between 1994 and September 2001, from 106 to "approximately" (who knows the real number) 285.[40] Moreover, the Commission finds that over this 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 percent."[41] Each of these trends documented by the Commission points in the direction of less restrictive ownership

[38] 240 F. 3d at 1129.
[39] Further Notice, at para. 79.
[40] Further Notice, at para. 79.
[41] Further Notice, at para. 79.

limitations than those struck down by the court if they are to comport with the First Amendment.

In criticizing the Commission's reasoning offered in support of the voided ownership limitations, the court reminded the Commission that "normally a company's ability to exercise 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."[42] In the Further Notice the Commission takes note that court faulted the Commission for "mistakenly equating market share with market power,"[43] and it recognized that a cable operator's market power may well be eroded by the availability of alternative MVPD outlets, irrespective of cable's present market share. This acknowledgement leads nicely to a discussion of MVPD market conditions.

C. MVPD Market Conditions

When Congress directed the Commission in the 1992 Cable Act to take into account "the dynamic nature of the communications marketplace,"[44] presumably it had in mind that such dynamism—by its very nature creating unpredictability—would tend to support less, rather than more, restrictive ownership limitations. An industry subject to rapid and unpredictable change, particularly one driven by technological innovation, is not one in which market structures and firm organizations should be dictated by overly restrictive rigid rules.

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[42] 230 F. 3d at 1134.
[43] Further Notice, at para. 49.

The Commission's most recently released *Video Programming*[45] report, now a year old, contains all the facts and figures (which need not be repeated here) chronicling a changing marketplace. At the time the report was issued, cable retained, by far, the largest share of the MVPD market (80%), but the Commission found that non-cable alternatives, particularly DBS, grew much more rapidly.[46] Significantly, the Commission concluded that "[o]verall, the Commission finds that competitive alternatives and consumer choices continue to develop."[47]

Also worthy of note, the Commission reported, even as of June 2000, that "[t]he most significant convergence of service offerings continues to be the pairing of Internet service with other service offerings."[48] According to the Commission, as cable companies continue to expand the broadband infrastructure that permits them to offer high speed Internet access, as well as telephony, "[t]here is evidence that a wide variety of companies throughout the communications industries are attempting to become providers of multiple services, including data access."[49] In this regard, the Commission pointed to the efforts of the DBS companies to bundle Internet access and interactive television services with video offerings.

Finally, in addition to reporting on the status of more limited video alternatives such as services provided by wireless cable, SMATV systems, broadcast television, electric utilities, and the like, the Commission chronicled further growth in what it calls

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[44] 47 U.S.C. § 533 (f)(2)(E).
[45] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, FCC 01-1, CS Docket No. 00-132, released January 8, 2001.
[46] The Commission reported that as of June 2000 a total of 84.4 million households subscribed to either a cable or non-cable MVPD. Cable subscribership was 67.7 million, with 17.7 million non-cable subscribers, of which DBS constituted almost 13 million. The DBS growth rate was reported to be approximately three times the cable growth rate. Seventh Annual Report, art paras. 6-8.
[47] Seventh Annual Report, at para. 5.
[48] Seventh Annual Report, at para. 11.

the "Internet video" market segment. While observing that "the medium is still not seen as a direct competitor to traditional video services," it stated that the amount of real-time video available over the Internet "continues to become more widely available and the amount of content is increasing."[50]

The inclusion for the past several years of "Internet video" in the annual *Video Programming* report is simply one indication of how quickly the long-heralded world of "convergence" is coming about in a way that points towards the desirability for much less restrictive media ownership rules, including for cable, than those which traditionally have existed.[51] This is not—and should not be—surprising, of course. Recall, for example, the remarks of then-Commissioner Powell back in 1998 in the context of arguing for the adoption by the Commission of a new First Amendment paradigm:

> [T]he advances in technology have been astonishing since the time of *Red Lion*. Digital convergence…has blurred the line between all communications media. The TV will be a computer. A computer will be a TV. Cable companies will often phone service, and phone companies will offer video service. Digital convergence means sameness in distribution.[52]

That was 1998. Now consider the state of affairs as we enter 2002. Confronting the realities of accelerating convergence as a marketplace and technological phenomenon, and the huge capital required to build out or expand advanced broadband platforms, firms are scrambling to figure out how to achieve the economies of scale

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[49] Seventh Annual Report, at para. 11.
[50] Seventh Annual Report, at para. 14.
[51] Other regulations being reviewed by the Commission include: TV-newspaper cross-ownership rule (a company may not own a newspaper and television station in the same market); TV-cable cross-ownership rule (a company may not own a television station and cable system in the same market); TV ownership rule (prevents a company from owning television stations with a combined audience of more than 30% of U. S. homes); and TV duopoly rule (a company may not own two television stations in the same market). These rules have been subject to waiver grants along the way for various reasons, but, in the main, they have operated with the intended effect.
[52] Remarks by Michael Powell, "Willful Denial and First Amendment Jurisprudence," before the Media Institute, April 22, 1998.

necessary to deliver the integrated packages of broadband video, telephony, and high speed access. They are betting on business models that say that consumers will demand such broadband packages in the future.

Consider the EchoStar/Hughes merger proposal, and the AT&T Broadband/Comcast combination. Charlie Ergen, EchoStar's CEO, has stated that the efficiencies realized by virtue of the EchoStar/Hughes merger will enable the combined company to offer many more new video channels, including local television channels in twice as many markets, new interactive services, as well as expediting the provision of high speed Internet access.[53] EchoStar says that "by reducing wasteful redundancy," the merger will constitute a "huge advance" in what it claims is its long-standing mission to compete with the cable companies.[54]

As for the proposed AT&T Broadband/Comcast combination, the companies issued a statement contending that the new company would be better positioned to deliver Internet access, video on demand, and telephone services.[55] Brian Roberts, Comcast's president, stated that the merger "will enable us to accelerate the deployment of telephone services to many new markets" to better compete with the incumbent telephone companies.[56]

Or, for that matter, speaking of convergence, consider Microsoft. Already by far the world's dominant software provider, Microsoft is not only a major investor in cable

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[53] Statement of Charlie Ergen, CEO, EchoStar, before the House Subcommittee on Telecommunications and the Internet, December 4, 2001.
[54] Id.
[55] See Christopher Stern, "Giant Cable Merger Planned," Washington Post, December 20, 2001, at p. A1. On this point, see also Peter Pitsch and David Murray, "Are Telecom Mergers Anti-Competitive," *Future Insight 3.3* (The Progress & Freedom Foundation, June 1996). Based on an events analysis of three proposed cable-telco mergers in 1993, Pitsch and Murray find evidence that the mergers likely would have accelerated development of competition in the market for local telephony.
[56] Id.

companies (including the proposed Comcast/AT&T Broadband entity), but also is the second largest Internet access provider, and a participant in the interactive television, Internet TV, and set-top box segments. With its new XP platform, many anticipate that Microsoft will become a major player in the Internet voice telephony market.[57] And don't forget that the playing field includes companies such as AOL Time Warner, NewsCorp, Disney, Vivendi, WorldCom, the regional Bell Companies, and on and on, all scrambling to craft viable business models in the new digital broadband world of convergence.

The point here is not to address the merits of the EchoStar/Hughes, AT&T/Comcast, Microsoft/???, or any particular merger proposal. Rather, it is to say that it would be unreasonable—and even capricious—for the Commission not to have in mind this competitive marketplace context in considering the new cable ownership rules. What the Commission justifiably wants to promote is an environment in which there are multiple platforms for delivering broadband services.[58] To realize this goal, it must recognize that horizontal and vertical combinations, such as ones that may be facilitated by liberalized ownership rules, have an important role to play in enabling firms to achieve the economies of scale and scope necessary to build out and provide video and other services over competing platforms, whether they be cable, satellite, wireline, 3G wireless, or whatever.[59]

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[57] See John Markoff, "Microsoft Is Ready To Supply A Phone In Every Computer," New York Times, June 12, 2001 ("Microsoft is preparing to include both high-quality telephone and directory features in Windows XP…[a]nd that has some high-technology executives wondering whether the telephone companies are going to be the next target in Microsoft's sights.") See also Leslie Walker, "A Future According To Microsoft," Washington Post, June 28, 2001, at p. E1; Lou Dolinar, "Microsoft Set To Release Its Newest Windows: XP," Newsday, June 29, 2001, at p. A58.

[58] See,e.g., Michael Powell, "Digital Broadband Migration—Part II," October 23, 2001 ("There should be multiple broadband platforms.")

[59] With regard to the vertical limits, a recent scholarly empirical study of vertical integration in the cable industry should be of interest to the Commission. See Tasneem Chipty, Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry, 91 American Economic Review 428 (June 2001). Taking into

D. FASHIONING MINIMALLY RESTRICTIVE LIMITS

What form should ownership limits – some form of which, whether desirable or not, apparently are necessitated by the 1992 Act – should the Commission adopt? To begin, it is instructive to consider what the Commission's "Network Inquiry Special Staff" told the Commission in 1980. The Network Inquiry staff was charged with examining the ownership rules which applied to the then dominant players in the video marketplace, the three major television networks. Even as cable television was beginning to prosper from new satellite-delivered programming networks, the concern that had prompted the inquiry was the networks' supposed programming dominance. But in language with an eerie ring to it, the Network Inquiry report stated:

> [The Commission's rules] frequently impose numerical limitations that have no apparent relationship to the distinct conditions of competition and diversity among the several services, and, in many markets, affected by these rules. Further, these rules impose disparate limits on the ownership of facilities which provide substantially similar services…As currently constructed, these rules often may serve only to impair the realization of efficiencies in the use of television outlets.[60]

Two decades later, as the Commission reconsiders most of its ownership rules, including cable, the speed and unpredictability with which the marketplace is changing should cause the Commission to err on the side of giving the free marketplace more rather than less breathing space.

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account the amount of programming offered, the author concludes that "consumers in unintegrated markets are certainly no better off than consumers in integrated markets, despite the tendency of integrated operators to exclude certain program services." [p. 430]. In sum, "the analysis shows that the harmful effects of integration are offset by the efficiency-enhancing effects of integration; the evidence suggests that consumers in integrated markets are weakly better off, and statistically no worse off, than in consumers in unintegrated markets." [p. 450].

[60] Network Inquiry Special Staff, Executive Summary, "New Television Networks: Entry, Jurisdiction, Ownership, and Regulation, October 1980, at p. 17.

To achieve this end, the Commission should adopt some form of the "threshold" or "safe harbor" approach described in the Further Notice.[61] Specifically, it should conclude that the presence of a single competing MVPD service is sufficient, given the dynamic nature of the marketplace, to provide an effective prophylaxis against the potential harms Congress envisioned from MSO concentration. At the same time, such a threshold would not preclude the Commission from continuing to gather evidence on the existence of market power in the multichannel video marketplace, and any resulting harm inflicted on consumers. Should compelling evidence of market power or consumer harm be found, the Commission would be in a far better position to fashion appropriate remedies than under the current circumstances – i.e. when neither market power nor consumer harm have been shown by any reasonable standard to exist.

[61] Further Notice at para. 60-73.

III. CONCLUSION

For the all of the foregoing reasons, the Commission should revise its horizontal and vertical ownership rules so that they are substantially less restrictive than those which were invalidated by the *Time Warner* court.

Respectfully submitted,[*]

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