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

To: The Commission

CONCERNED CONSUMERS' COMMENTS ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

On September 21, 2001, the Federal Communications Commission ("FCC" or "Commission") issued a *Further Notice of Proposed Rulemaking* (the "*Further Notice*") which reexamined the vertical integration and horizontal concentration restrictions in light of the recent *Time Warner Entertainment Co. v. FCC*[1] decision. As a result of that

[1] 240 F.3d 1126 (D.C. Cir. 2001)

decision, the Commission is seeking comment on the following: 1) Whether the must-carry rules aid in eliminating the hurdles that cable operators can place between the programmer and consumer;[2] 2) Whether the leased access provisions provide sufficient protection and therefore justify modifying or eliminating the current vertical integration limits;[3] and 3) Whether any further regulatory approaches exist, other than those already proposed.[4] Concerned Consumers, hereby respectfully submit these comment and have determined that the must-carry rules, public, educational, and governmental access ("PEG") rules, and especially the leased access rules solve the problems commonly associated with vertical integration and horizontal concentration. We further propose a common carrier system similar to that of the local telephone industry, which will create new avenues for the unaffiliated programmer, encourage continued cable operator investment in original and innovative programming and in the process provide the consumer with the most competitive rates.[5] In support of these comments, the following is stated:

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[2] *See In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules; Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82; CS Docket No. 96-85; MM Docket No. 92-264; MM Docket No. 94-150; MM Docket No. 92-51; MM Docket No. 87-154, Further Notice of Proposed Rulemaking, FCC 01-263 ¶ 10 (Sept. 21, 2001). [hereinafter *Further Notice of Proposed Rulemaking*]

[3] *See Id.* at ¶ 84.

[4] *See Id.* at ¶ 51.

[5] As we are not schooled in the field of economics, this analysis will focus on prior law and rulemaking decisions to support our ultimate conclusions.

INTRODUCTION

Pursuant to the FCC's *Report on the Implementation of Section 11 of the Cable Television Consumer Protection Act of 1992*, the FCC's objective was to strike a proper balance between creating an avenue for unaffiliated video programmers to reach subscribers, and the incentive for Multiple Cable System Operators ("MSOs") to continue to invest in and develop new programming,[6] all while ensuring there remains diverse cable programming.[7] We agree with the D.C. Circuit court's decision in *Time Warner Entertainment Co. v. FCC*[8] that in the creation of vertical and horizontal limits pursuant to Section 11, "the Commission did not establish record evidence to support the limits, did not draw the necessary connection between the limits established and the alleged harms of concentration and integration the limits were designed to address, and did not take into account the changing market conditions."[9] We believe our solution strikes the essential balance between these competing interests.

DISCUSSION

I. Must-Carry Obligations

The first avenue that requires MSOs to provide diverse unaffiliated programming are the must-carry rules. The Supreme Court's decision to consider the must-carry

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[6] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC RCD. 8565, ¶ 45 (1993). Facts indicate that vertical integration between MSOs and program producers "promotes innovation in programming and increases the availability of financial resources for program development and distribution." DAVID WATERMAN & ANDREW A. WEISS, VERTICAL INTEGRATION IN CABLE TELEVISION 10 (THE AEI Press, 1997).
[7] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, supra* note 6 at ¶ 42.
[8] 240 F.3d 1126 (D.C. Cir. 2001)

obligations content neutral and thus subject to intermediate scrutiny in *Turner Broadcasting System, Inc. v. FCC* ("Turner II") has left the statutory framework established by Congress in place.[10]

Sections 4 and 5 of the 1992 Cable Act established that MSOs must carry a certain number of non-terrestrial broadcast stations. Specifically, 47 U.S.C. § 534(b)(1)(B) requires MSOs with more than 12 channels and more than 300 subscribers to, "carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system."[11]

Congress' support for the must-carry obligations included: 1) "the economic incentive that cable systems have to delete local broadcast signals";[12] 2) "the economic viability of free local broadcast television and its ability to originate quality local programming will be jeopardized";[13] and 3) the overall cable television system will be the "most efficient distribution system for television programming."[14] Must carry has been a well-considered response to the threat of cable domination at the expense of silencing the local broadcasters' voices. If one of the objectives of the current

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[9] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, supra* note 6 at ¶ 2.

[10] Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997). Although the Supreme Court ultimately held the must carry rules do not violate the First Amendment, our analysis will be structured around its relevance relative to opening avenues to unaffiliated programmers to reach subscribers.

[11] 47 U.S.C. § 534(B)(1)(a) limits the required amount of broadcast channels an MSO with 12 or fewer activated channels must carry to three

[12] DANIEL E. BRENNER, ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO §6.06[2].(8th Ed. 1995)

[13] *Id.*

[14] *Id.* We understand that today, there is a greater presence of alternative competing operators, known as multi-channel video programming distributors ("MVPDs"), such as direct broadcast satellite ("DBS"), multi-channel multi-point distribution services ("MMDS" or wireless cable) and satellite master antenna television ("SMATV") and that there now exist new outlets for local broadcasters to distribute their programming to the MVPD subscriber. *See* FRANK W. LLOYD, CABLE TELEVISION LAW 2001 UPDATE, 162. DBS, which currently has over 17 million subscribers, seems to be the only real competitor to MSOs especially considering the other MVPDs collectively serve fewer than four million subscribers. *Id*. Overall, cable television clearly has a stronghold in the area of programming distribution as it currently serves 67.7 million subscribers and receives $36.7 billion in revenue per year. *See Id.* at 161.

implementation of Section 11 of the 1992 Act is to allow for diverse programming supplied by unaffiliated programmers, then the implementation of must-carry is a means to that end because it is one method of shielding stations that could not otherwise survive in a vertically integrated system.[15]

Must-carry rules help further important interests. For example, they help create an avenue for unaffiliated local programmers to access cable subscribers, and diversify viewer programming, while continuing to allow cable operators to carry programming that will increase their subscriber base and income.

Cable operators benefit from the must-carry rules, in that local broadcast stations offer a large incentive for consumers to subscribe to cable services. We find support for this statement by equating this to the tremendous growth of Direct Broadcast Satellite ("DBS") following the enactment of the Satellite Home Viewer Improvement Act ("SHVIA") in 1999, which allowed DBS providers to offer local signals.[16] Since SHVIA's enactment, DBS subscribership has grown from 10.1 million to over 17 million.[17] Overall, the benefits must-carry creates outweigh the social costs that must-carry imposes, because it increases the range of programs available to consumers and allows unaffiliated local programmers access to a market that vertically integrated MSOs are supposedly preventing them from entering.[18]

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[15] Although we believe that network affiliates would continue to survive with or without must-carry rules, there are many small, unaffiliated broadcast stations that rely on must-carry protection for survival.
[16] *See* FRANK W. LLOYD, CABLE TELEVISION LAW 2001 UPDATE, 161.
[17] *Id*. The two major DBS providers at the time, DirecTV and Echostar grew 15 percent and 65 percent respectively.
[18] *See* John E. Lopatka and Michael G. Vita, *The Must Carry Decisions, Bad Law, Bad Economics*, 6 S. CT. ECON. REV. 61 at 121 (1998). The social cost in this analysis is the First Amendment restriction.

II. Public, Educational, and Governmental Access Channels

Section 611 of the 1984 Cable Act (the "1984 Act") promotes diversity by establishing public, educational, and governmental access channels.[19] Furthermore, 47 U.S.C. § 531(b) gives the *local franchise authority* the power to, "require as a part of a franchise…that channel capacity be designated for public, educational, or governmental use…" and affords the franchise authority flexibility to determine how those channels are to be used.[20] The cable operator is not given any editorial control over the public, educational, or governmental ("PEG") channels.[21] *Time Warner of New York City v. Bloomberg L.P.*,[22] however, upheld cable operators' rights to determine their programming decisions.[23] Intrinsic in this holding is that while PEG channels may not be an avenue for commercial program providers to gain access to the consumers, they do further the fundamental interest of program diversity, without substantially infringing on the cable operators' programming choices.[24]

III. Leased Access Obligations

Section (a) of 47 U.S.C. § 532 of the 1984 act states that:

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[19] *See* 47 U.S.C. § 531
[20] 47 U.S.C. § 531(b)
[21] 47 U.S.C. § 531(e)
[22] 118 F.3d 917 (2d Cir. 1997).
[23] *Id*. at 924. The 2d Circuit held that Time Warner Cable was entitled to a preliminary injunction against the City of New York's act of running a direct feed of the Bloomberg network on one of the local government access channels. The court ruled that while Time Warner Cable was required to carry PEG channels, the Bloomberg network did not necessarily fall under the definition of such channels and may therefore have been unlawful. As Judge Newman stated, "Congress made it clear that a [governmental] channel is not available for any use that the city wishes to make of it." *Id*.
[24] This example was evident in *Time Warner Entertainment Co. v. FCC*, in which the D.C. Circuit noted that a local franchise authority would raise serious First Amendment concerns if it required a cable operator to designate 75% of its channels to "PEG" programming. 93 F.3d 957 (D.C. Cir. 1996).

> The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the *widest possible diversity of information* sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.[25]

The leased access requirement obligates cable operators to carry unaffiliated commercial programming, thus providing them with a direct path to the subscriber.[26] Specifically, 10% of the cable operator's channels, "which are not required for use by federal law," if the cable operator has between 36 and 54 channels;[27] 15% of such channels if the cable operator has between 55 and 100 channels,[28] and 15% of *all* channels if the cable operator has more than 100 channels.[29]

The leased access provision adequately solves the problems the vertical and horizontal regulations were meant to remedy, and if used effectively, the leased access provision has the capability of eliminating the vertical integration and horizontal concentration requirements and all of the imprecision associated with those rules. Facts indicate the leased access statute is rarely used.[30] Nonetheless, we believe that by restructuring the law, leased access will be a sufficient substitute for the current FCC requirements.

[25] 47 U.S.C. § 532(a) (*emphasis added*).
[26] *See* 47 U.S.C. § 532(b)(1)
[27] 47 U.S.C. § 532(b)(1)(A)
[28] *See* 47 U.S.C. § 532(b)(1)(B)
[29] *See* 47 U.S.C. § 532(b)(1)(C)
[30] *See In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*; *Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, MM Docket No. 92-266. 16 F.C.C.R. 4346 ¶ 45 (2001). The FCC's survey of cable operators found that of the cable operators that have leased access channels, 57% reported an average of 1.8 leased channels. *Id.* Further, following a detailed inquiry, the FCC reported that no unaffiliated program provider has resorted to leased access channels after being denied access to the cable system. Donna N. Lampert, *Cable Television: Does Leased Access Mean Least Access?* 44 FED. COMM. L.J. 245 at 267 (1992).

We have determined that certain factors have restricted the development of leased access. In describing current inefficiencies of leased access, we will interpret them and propose solutions.

The first problem with the 1984 Act is it allows the MSO (the "lessor") to deny access to the unaffiliated programmer (the "lessee") if carrying the lessee will lead to negative economic effects on the lessor.[31] In restructuring the leased access rules in order to overcome this apparent inefficiency, we propose a system of arbitration where a neutral third party would be utilized to assess the various economic factors in order to determine whether an economic burden exists. The decision should be binding.

Second, there has been difficulty determining whether the MSO has the necessary number of channels set aside for "leased access" based on the number of currently activated channels the MSO transmits.[32] If this second statement is true, and MSOs are not setting aside the statutorily required number of leased access channels, then the FCC should implement a strict reporting system with which program providers and the general public can determine whether MSOs are following the statutory requirements.

Third, MSOs claim that leased access channels are necessary for ensuring program diversity, because diversity is achieved through the program structures already in place.[33] It is an unlikely scenario that unaffiliated programmers are satisfied with the diversity on cable systems and therefore yield to the variety of choices the operators provide. According to 47 U.S.C. § 532(c)(2), the cable operator has the power to

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[31] *See* Donna N. Lampert, *Cable Television: Does Leased Access Mean Least Access?* 44 FED. COMM. L.J. 245 at 267 (1992). According to 47 U.S.C. § 532(c)(1), the cable operator has the authority to regulate, "the price, terms, and conditions…sufficient to ensure that such use will not adversely affect the operation, financial condition, or market development of the cable system."
[32] *See Id.* at 271.
[33] *See* Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 959 (D.C. Cir. 1996).

establish pricing terms and conditions.[34] Even the Senate's Committee on Commerce, Science and Transportation noted that it is unreasonable for the cable operators to set leased access rates.[35] Therefore, a more likely explanation for unaffiliated programmers' reluctance to use leased access channels is the unfavorable pricing that cable operators have in place.

Finally, a fundamental concern is the remedy available to the potential lessee when the cost of access, set by the lessor, is unreasonably high. Currently, the sole remedy available is litigation in federal courts.[36] The burden remains with the unaffiliated programmer to prove with "clear and convincing" evidence that the proposed terms are unreasonable.[37] An FCC report in 1990 even went as far to propose an amendment to the 1984 Act that would restructure the section and provide a more efficient enforcement mechanism; however, no amendments have occurred.[38] Based on the above concern we believe the proposed method of arbitration may alleviate this dilemma. If arbitration proves unsuccessful, then a sound restructuring of the 1984 Act should entail a shift of the burden of proof to the lessor to prove "intrinsic fairness."[39]

Today, virtually all cable operators are required to set aside 15% of channels, "not required for use by federal law," for leased access because cable operators have, on average, 80 analog channels.[40] Nevertheless, 15% does not prevent the MSO from investing in new and innovative programming because this overall less restrictive

[34] *See* 47 U.S.C. § 532(c)(2)
[35] *See* S. Rep. No. 92, 102d Cong., 2d Session 30-32 (1991).
[36] *See* 47 U.S.C. § 532(f)
[37] 47 U.S.C. § 532(f)
[38] *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rec. 4962 ¶ 183.
[39] *See* In re Wheelabrator Technologies, Inc. Shareholders Litigation, 63 A.2d 1194 (Del. Ch. 1995). Analogous to the Delaware Chancellery court, who require this shift in duty of loyalty cases between corporate directors and controlling shareholders.

environment will offer the MSO more incentive to do so. Consequently, the 15% limit should stand unless the FCC determines the percentage does not meet Congress' intended results. At such point the FCC should increase the restriction as deemed necessary.

Leased access is the suitable replacement for the vertical integration and horizontal concentration requirements. Leased access is the solution to Congress' ultimate concerns for program diversity and distribution of unaffiliated programming. Leased access is the most effective replacement because it meets Congress' 'balance test' by providing a direct route for the unaffiliated programmer to gain access to the subscriber, without hindering the MSO's ability to fund new and diverse programming. Leased access will inevitably increase the number of voices to the public.

IV. Common Carrier

Congress and the FCC have overlooked the interest of providing the consumer with the highest quality of programming at the most competitive rate. From an initial reading of the FCC's horizontal concentration limits, one might infer the intent is to protect the consumer from a monopolistic cable operator.[41] In reading the *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, however, one realizes that Congress was ultimately "concerned that the concentration of cable systems in the hands of a few 'media gatekeepers' could potentially bar entry to new programmers and reduce the number of media voices available to consumers."[42] As we have already argued, the must-carry, PEG and leased

[40] *Further Notice of Proposed Rulemaking*, *supra* note 2, at ¶ 25.
[41] Congress was more concerned with the monopsony power that cable operators would exert on program providers than with protecting the consumer.
[42] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act on 1992*, 14 FCC Rcd. 19098, ¶ 9 (1999).

access rules in place provide adequate solutions to Congress's concerns. We therefore shift our analysis to protecting the consumer; namely, we propose a common carrier cable television system akin to that of the local telephone system.

On paper, the horizontal concentration restriction that precludes a cable operator from controlling more than 30% of the Multi Video Programming Distributor ("MVPD") subscriber base appears to give the consumer at least four MSOs to choose from.[43] The reality, however, is that these numbers are based on a national scale,[44] and therefore fail to protect the local consumer from potentially inflated rates. In fact, a proposed merger between Comcast's and AT&T's cable operations would result in a company that controls 70% of consumers in the top 20 markets, but would only control about 25% of the country's total subscriber base.[45] In a recently released report on cable industry pricing, the FCC noted that cable operators without local monopoly power charged, on average, 5.3% less than those that faced no local competition.[46] The above examples prove that horizontal concentration rules fail to protect the consumer.

We propose a method similar to 47 U.S.C. § 259 ("Infrastructure Sharing"), where, "the Commission shall prescribe regulations that require incumbent local exchange carriers…to make available to any qualifying carrier…network infrastructure, technology, information, and telecommunications facilities and functions as may be

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[43] *Id.* at ¶ 36.
[44] *See Further Notice of Proposed Rulemaking*, *supra* note 2 at ¶ 46.
[45] *See* Christopher Stern, *Cable's Long Reach* (last visited Dec. 2, 2001) www.washtech.com/news/telecom/11179-1.html. To further reinforce the inequities of the 30% rule, if every resident of New York City's five boroughs subscribed to a single MSO, that single MSO would control less than 12% of the national market, thus enabling it to locally monopolize cable distribution over the largest city in the country. With 18% remaining before an MSO would violate the horizontal concentration restrictions, it could monopolize other large national markets. *See Census 2000 PHC-T-5* (last modified April 2, 2001) http://factfinder.census.gov/home/en/datanotes/expplu.html.
[46] *See FCC Releases 2000 Report on Cable Industry Prices*, (Last visited Dec. 14, 2001) http://www.fcc.gov/csb/2001psnr.txt

requested by such qualifying carrier…" for the purpose of allowing that carrier to provide local telecommunications service.[47] In the area of cable programming, the incumbent would be defined as the local cable operator and the requirement would be to allow any competing operator use of the incumbent's infrastructure. To maintain fairness on both sides, the competitor would be required to provide its own programming. This will provide potential 'would be' MSOs the opportunity to break into the local market as it removes the greatest hurdle to local access, that being the cost of installing cable television infrastructure. By the same token, this will create another avenue for unaffiliated programmers to reach the consumer, as the new cable operators would be required to provide their own competitive programming in order to maintain a strong customer base.

Although 47 U.S.C. § 541(c) expressly prohibits subjecting a cable operator to common carrier regulation, if Congress were to investigate the benefits of a common carrier system with respect to cable, an informed debate would result in amendments to this statute.[48] Nonetheless, this provision has been rendered virtually inapplicable. As a result of the leased access provision, cable operators are required to provide service to unaffiliated programmers, thereby creating a framework where the operator acts as a "common carrier."[49] This system will also undoubtedly encourage the incumbent to continue to invest in original and innovative programming in order to compete in this new and highly competitive market.

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[47] 47 U.S.C. § 259(a)
[48] *See* 47 U.S.C. § 541(c)
[49] Time Warner Entertainment Co. v. FCC, 93 F.3d 957 at 965 (D.C. Cir. 1996)

CONCLUSION

WHEREFORE, in light of the foregoing, Concerned Consumers respectfully request that the Commission eliminate the vertical integration and horizontal concentration limits based on the ability of the statutory provisions discussed herein (must-carry, PEG, and leased access) to meet Congress's desired effect. Furthermore, we urge the Commission to consider creating a common carrier system in the cable industry as a method of promoting program diversity, opening new avenues for the unaffiliated programmer, encouraging continued cable operator investment in original and innovative programming and ultimately providing the consumer with the most competitive rates.

Respectfully Submitted,
CONCERNED CONSUMERS

By: ____________________________
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Date: December 18, 2001.