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. 97-154

REPLY COMMENTS OF WORLD SATELLITE NETWORK, INC.

World Satellite Network, Inc. ("WSNet"),[1] by its attorneys, hereby submits reply comments in the above-referenced proceeding.[2]

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[1] WSNet competes in multichannel video markets by offering a variety of services and technologies. WSNet's satellite platform is used to provide a unique, cost-effective, digital upgrade for smaller cable systems, particularly in rural areas. WSNet is also a leading wholesale provider of analog television programming and equipment to private cable operators, multi-dwelling unit ("MDU") property owners, and wireless cable operators in the United States.

[2] FCC 01-263 (rel. Sept. 21, 2001) [hereinafter, the "*FNPRM*"].

INTRODUCTION

Section 613(f) of the Communication Act directs the Commission to set limits on the number of cable subscribers that may be reached by a cable system and the number of channels an operator may occupy with its own programming. In this proceeding, the Commission seeks to reexamine these vertical and horizontal cable television ownership limitations in light of the D.C. Circuit Court's recent decision in Time Warner Entertainment Co. v. FCC.[3]

WSNet supports the initial comments filed in this proceeding by screenwriters, churches, competitive cable operators, satellite companies and consumers, who ask the Commission to maintain meaningful restraints on the ever-growing consolidation and vertical integration of the cable industry. Moreover, WSNet urges the Commission to retain the previous 30 percent horizontal and 40 percent vertical ownership limitations. As set forth below, even with the previous limitations in place, multiple cable system operators ("MSOs") have been able to flex their anticompetitive muscle by denying competitors access to essential programming and potential customers.

WSNet also supports those parties which have asked the Commission to address in this proceeding the increasingly prevalent use of terrestrial delivery of vertically integrated video programming by MSOs. WSNet agrees with those parties that the shift of much of this programming is done to circumscribe the Commission's rules requiring cable companies to provide fair access to the programming they control.

I. MSOs' National Dominance Affects Local MVPD Competition

In *Time Warner II*, the D.C. Circuit Court instructed the Commission to establish a sufficient record that links its cable ownership limitations to their intended purpose of limiting harmful concentration in the cable industry.[4] Nothing in that decision,

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[3] 240 F.3d 1126 (D.C. Cir. 2001) [hereinafter "*Time Warner II*"].

[4] *See Time Warner II* at 1137.

however, precludes the Commission from retaining its previous limitations, as long as that linkage is demonstrated. The outcome of this proceeding turns, therefore, on the extent to which those limitations remain necessary. To this end, in the *FNPRM*, the Commission has asked for comment on "market conditions and changes that have taken place since the 1992 Act."[5] As set forth below, although the MVPD market has seen a slight erosion in the market power of MSOs, the franchised cable operators continue to dominate both the national and local MVPD markets. Accordingly, it makes little sense for the Commission to loosen its ownership limitations just as competitive MVPDs are beginning to gain a limited foothold in certain markets.

As the Commission itself has concluded, the multichannel video market "continues to be highly concentrated and characterized by substantial barriers to entry which serve to increase the cost of potential entry into a rival's market."[6] In fact, as of June 2001, 78 percent of all subscribers to MVPD services still receive their programming from a franchised cable operator and 87 percent of these subscribers receive their cable from one of ten MSOs.[7] Moreover, this consolidation continues. Recently, the first and third largest MSOs, AT&T and Comcast, announced plans to narrow this number to nine, by agreeing to merge their cable entities to form a company that would serve some 22 million subscribers in 41 states.[8] This merger, if approved, should spark another round of consolidation in the already heavily-consolidated MSO market.[9]

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[5] *FNPRM* at ¶ 7.

[6] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report,* 16 FCC Rcd 6005, 6066 (2001) [hereinafter, the "*Seventh Annual Report*"].

[7] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report,* CS No. 01-129 at ¶14 (rel. Jan. 14, 2002) [hereinafter, the "*Eighth Annual Report*"].

[8] *See* Brigette Greenberg, "Agreement Merges Nation's First, 3rd Largest Cable Companies," *Comm. Daily*, Dec. 20, 2001.

[9] *See id.* (comments of market analyst Blair Levin).

The national market power and heavy consolidation of MSOs is significant, however, only to the extent it affects local competition. As the Commission has stated, cable markets are inherently local because "[c]able services are furnished in local franchise areas by one or more MVPDs, and consumers cannot switch to another MVPD that does not offer service within that area."[10] Therefore, the Commission must concern itself with the ways in which its national ownership limitations affect competition for the local distribution of programming.

As of 2001, MSOs controlled 35 percent of all cable programming,[11] including eleven of the top twenty most popular networks as determined by primetime ratings.[12] Moreover, the MSOs have been able to use this vertical integration to the detriment of their local competitors. In a companion proceeding to the instant one,[13] various parties recount their difficulties in gaining access to programming controlled by the incumbent cable operators.[14] Still other parties recount unsuccessful battles with Comcast and Cablevision for access to vertically integrated regional sports programming those MSOs withheld by delivering it terrestrially.[15] The Commission itself has noted that: "[n]oncable MVPDs also continue to experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive agreements with cable operators."[16]

With control of large amounts of popular programming and with considerable market power in numerous local markets, MSOs have managed to use their combined

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[10] *FNPRM* at ¶ 19.
[11] *See Eighth Annual Report* at ¶14.
[12] *See id.* at ¶ 175.
[13] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, *Notice of Proposed Rulemaking*, CS No. 01-290 (rel. Oct. 18, 2001).
[14] *See, e.g.,* Comments of Everest Connections Corporation, CS No. 01-290, at 2 (filed Dec. 3, 2001); Comments of the American Cable Association, CS No. 01-290, at 15-16 (filed Dec. 3, 2001); Comments of Competitive Broadband Coalition, CS No. 01-290, at 10-11 (filed Dec. 3, 2001).
[15] *See, infra,* note 19.

vertical and horizontal power to undermine competition. RCN notes, for example, that in each of the seven major markets in which it competes, and where the incumbent often has refused to share essential regional sports programming, the franchised cable company commands between 90-95 percent of all subscribers.[17] Further evidence of the anticompetitive power of MSOs is that, on average, franchised cable operators have been able to force consumers to pay supracompetitive rates for cable services. In fact, the Commission reports that cable consumers continue to experience cable price hikes at rates significantly higher than inflation.[18]

Through monopolization and consolidation at the local level, MSOs have risen to national power. In turn, their national power has allowed them to purchase and control significant amounts of essential cable programming. Their possession of that programming has allowed them to further dominate local markets. In this proceeding, the Commission must maintain its ownership limitations and, in so doing, control this cycle. These limitations, in addition to the cable access provisions of Section 628, are necessary to create the conditions that will foster the entry of new competitors into the MVPD markets.

II. Section 613 Gives The Commission Independent Authority To Close The Terrestrial Loophole

In the program access proceeding, the Commission sought comment as to whether it should allow Section 628(c)(2)(D), which generally prohibits exclusive contracts for cable programming between vertically integrated programming vendors and cable companies, to expire on October 5, 2002. In that proceeding, numerous parties, including WSNet, called upon the Commission to renew the law and to correct

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[16] *Seventh Annual Report* at 6010.

[17] *See* Comments of RCN Telecom Services, Inc., CS No. 01-290, at iii (filed Dec. 3, 2001) [hereinafter "RCN Comments"].

[18] From June 2000 through June 2001, cable prices rose 4.24 percent compared to a 3.25 percent increase in the Consumer Price Index. *See Eighth Annual Report* at ¶9.

a regulatory anomaly in Section 628(c)(2)(D) that allows MSOs to deny their competitors access to their vertically integrated programming if that programming is delivered terrestrially.[19] MSOs, the commenting parties have pointed out, are increasingly using this tactic to deny their competitors access to essential programming, such as regional sports, necessary for competitors to attract customers in the market.

Although recognizing the existence of a terrestrial loophole and its anticompetitive effect, the Commission has questioned whether it has sufficient authority under Section 628(c)(2)(D) to close this loophole.[20] WSNet supports those parties who have urged that the Commission use the powers given to it by Congress in Section 613(f) to close the terrestrial loophole.[21]

Section 613(f)(2)(A) directs the Commission to promulgate rules and regulations that "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." In addition, Section 613(f)(2)(B) directs the Commission to "ensure that cable operators affiliated with video programmers…do not unreasonably restrict the flow of video programming of such programmers to other video distributors." The shift of delivery of cable programming to terrestrial delivery does unreasonably restrict video distributors from essential video programming. Moreover, the practice impedes the flow of that video programming to the consumer.

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[19] *See* Comments of the American Public Power Association, CS No. 01-290, at 6 (filed Dec. 3, 2001); Joint Comments of Altrio Communications, Inc., BellSouth Entertainment, LLC, Independent Multi-Family Communications Council, Qwest Broadband Services, Inc, Wireless Communications Association International, Inc., CS No. 01-290, at 13 (filed Dec. 3, 2001); Comments of Broadband Service Providers Association, CS No. 01-290, at 11-19 (filed Dec. 3, 2001); Comments of Carolina Broadband, Inc., CS No. 01-290, at 3 (filed Dec. 3, 2001); Comments of Competitive Broadband Coalition, CS No. 01-290, at 10 (filed Dec. 3, 2001); Comments of Echostar Satellite Corporation, CS No. 01-290, at 18-19 (filed Dec. 3, 2001); Comments of National Rural Telecommunications Cooperative, CS No. 01-290, at 9-10 (filed Dec. 3, 2001); RCN Comments at 29-35; Comments of Seren Innovations, Inc., CS No. 01-290, at 17-19; Comments of World Satellite Network, Inc., CS No. 01-290, at 7-8 (filed Dec. 3, 2001).

[20] *See* DirecTV, Inc. v. Comcast Corp., 15 FCC Rcd 22802 (2000).

Should the Commission determine that action under Section 628(c)(2)(D) is not authorized by its text, WSNet implores the Commission to close the terrestrial loophole under the authority granted it in Section 613(f).

CONCLUSION

The Commission should not ponder long the effect the loosening of the reigns on cable ownership will have on competition in the MVPD industry. If given the opportunity, MSOs will respond by increasing their size and programming holdings. They will then leverage this power, as they have done in the past, to the detriment of competitive MVPDs everywhere. The D.C. Circuit Court has asked no more than for the Commission to bolster its record with evidence that the cable ownership limitations remain necessary to ensuring competition in the MVPD market. WSNet submits that as a result of this and other proceedings, the Commission has more than enough support to justify its previous restraints on the MSO's monopolization of customers and content.

Respectfully submitted,

WORLD SATELLITE NETWORKS, INC.

Henry Goldberg
Eric J. Schwalb

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900
Its Attorneys

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[21] *See, e.g,* Comments of Broadband Service Providers Association, CS No. 98-82, at 5-6 (filed Jan. 4, 2002).