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

REPLY COMMENTS OF AT&T CORP.

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February 19, 2002

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Further Notice of Proposed Rulemaking ("*Further Notice*") in the above-captioned proceeding,[1] AT&T hereby respectfully submits these reply comments.

I. INTRODUCTION AND SUMMARY

The opening comments reflect a broad consensus regarding the legal standard the Commission must use in determining what cable ownership limit, if any, is "reasonable" within

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[1] *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further NPRM, CS Dkt. No. 98-82, FCC 01-263 (rel. Sept. 21, 2001) ("*Further Notice*").

the meaning of Section 613(f) of the Communications Act. As *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*") confirms, the Commission must conduct a dynamic assessment of real-world marketplace conditions and must tailor any proposed limit to a "real" and "non-conjectural" risk that cable operators can and will engage in harmful anticompetitive behavior by abusing "market power" over video programmers.[2] Even proponents of a horizontal limit recognize this standard,[3] and either struggle, unsuccessfully, to show that a low numerical limit can be justified under it,[4] or suggest that the Commission impermissibly ignore it.[5]

The comments also demonstrate that, in conducting this dynamic analysis of market power, the Commission must evaluate real-world marketplace conditions that are very different from those that existed in 1992, when Congress enacted Section 613(f), or even in 1999, when the Commission last addressed the question of cable horizontal ownership limits. Video programming is now distributed worldwide by cable, broadcasting, DBS, C-band, MMDS,

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2 *See* Comcast at 15-16; Time Warner at 7-9; Cablevision at 5-6; NCTA at 7-8; Progress & Freedom Foundation ("P&FF") at 4.

3 *See* Consumer Federation of America ("CFA") at 14, 16.

4 *See id.* at 106-37.

5 *See* RCN at 7 n.16. According to RCN, "the *Time Warner* decision suffers from inconsistencies, is occasionally obscure in meaning, and on the whole imposes an erroneous and impractical burden on the Commission in respect to the degree of 'proof' required in the record to sustain cable ownership rules against attack." *Id.* The short answer to this, of course, is that agencies are required to follow binding precedent even if that precedent is "inconsistent[]" and "obscure." In any event, as AT&T explained in its comments (at 8-14), the *Time Warner II* decision is both correct and provides the Commission with clear guidance as to the standard that must be applied in this proceeding.

SMATV, and cable overbuilders (and, soon, terrestrially delivered MVDDS).[6] Non-cable MVPD subscribership has grown nearly ten-fold since 1992,[7] and DBS has emerged as a ubiquitous competitive alternative to cable that provides cable operators with strong incentives to purchase the programming -- from whatever source -- that consumers most want to view.[8]

Those commenters that actually undertake the dynamic assessment of relevant real-world facts that *Time Warner II* requires all reach the same, inescapable conclusions: (i) programmers have many robust, non-cable outlets for delivering content to consumers, and (ii) consumers' demonstrated willingness to switch to DBS and other alternative distribution outlets if cable operators do not offer the programming that they want gives cable operators every incentive not only to base their program purchasing decisions on consumer tastes, but also to encourage, rather than block, new programming entry.

Several commenters urge the Commission simply to reinstate the 30% ownership limit, but offer no supporting economic analysis. The Writers Guild of America, for example, laments corporate consolidation generally, but fails to show any connection between this phenomenon and the foreclosure of commercially attractive programming. In fact, as AT&T demonstrated in its opening comments, a cable operator's incentive and ability to foreclose programming that is appealing to consumers actually *decreases* as the cable operator gets larger.[9] In all events, as

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6 *See* Comcast at 25-28; NCTA at 13; Time Warner at 10-11; Cablevision at 7-9; P&FF at 12.

7 *See* AT&T at 16-17; NCTA at 13.

8 *See In the Matter of Annual Assessment of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Rept., CS Dkt. No. 01-129, FCC 01-289, at ¶¶ 56-58 (Jan. 14, 2002) ("*2001 Video Competition Report*"); Time Warner at 10-12; Cablevision at 7-8; NCTA at 12-15; P&FF at 12.

9 *See* AT&T at 47-49.

Time Warner II makes clear, the First Amendment precludes reinstatement of the 30% limit -- or any other numerical limit -- based on mere speculation that such consolidation prevents programmers from reaching audiences that wish to see their programs.

Among proponents of a numerical limit, only CFA even attempts the required economic analysis, and its effort is flawed from start to finish. CFA argues at length that cable operators possess market power over *consumers* in *local* retail markets.[10] Not only does it fail to support this conclusion with competent evidence, its underlying contention is utterly irrelevant here. The relevant inquiry is whether limits on cable operators' *national* share are necessary to prevent them from exercising market power over *programmers*, and thereby impeding the flow of programming to consumers.

On this fundamental point, CFA's "showing" is wholly inadequate. Its lengthy filing contains only a few scattered pieces of evidence bearing on the question of buyer market power, which in fact *undermine*, rather than support, its request for a 30% (or lower) limit. Based on an unsubstantiated survey, CFA claims that *only* 31% of dissatisfied cable customers, and 17% of cable customers overall, would consider switching to DBS.[11] But, as AT&T has demonstrated, even under the most conservative assumptions, a loss of around 1% of customers would prove fatal to the success of a cable operator's foreclosure strategy.[12] These same statistics, moreover, completely refute CFA's contention that cable and DBS are not substitutes -- a claim that rests on a series of transparently flawed factual premises. And the anecdotal evidence CFA and others offer of "bad acts" by cable companies is both factually inaccurate and, more important, wholly

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[10] *See* CFA at 112-15, 141-48 & 151-171.

[11] *See id.* at 159-60.

[12] *See* AT&T at 50 & Besen Dec. ¶ 50.

irrelevant, inasmuch as none of these alleged acts demonstrates that cable operators are able to use buyer market power to foreclose video programming that consumers wish to see.

Tacitly acknowledging that it cannot support its proposed limit with probative evidence, CFA resorts, in the end, to relying on presumptions that it claims can be drawn from antitrust law. However, *Time Warner II* makes abundantly clear that any ownership limit must rest on proof of actual, not *presumed*, anticompetitive harms. In any event, CFA misconstrues the antitrust precedents.

Finally, several commenters ask for changes in the attribution rules that would move those rules in precisely the wrong direction. Contrary to some commenters' claims, *Time Warner II* properly vacated the "sale of programming exception" to the safe harbor for insulated limited partnership interests, and reinstating any such exception would be irrational and inconsistent with Commission precedent and with the plain language of the insulation rules. Moreover, the single majority shareholder rule, which "facilitates the financing of media outlets without conferring an unreasonable or unacceptable degree of influence on minority shareholders,"[13] should be reinstated. When a company is dominated by a single majority shareholder, a minority shareholder simply cannot rationally be presumed to be able to use its economic position to influence the controlling shareholder to make programming decisions that would deny subscribers access to programming that they desire and thereby make its service offerings less attractive to consumers. Lastly, the Commission should reject CFA's proposal to eliminate reliance on industry estimates of MVPD subscribers.

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[13] Media General at 2.

II. THE RECORD OVERWHELMINGLY REFUTES THE CLAIMS OF COMMENTERS THAT ADVOCATE REINSTATEMENT OF THE OWNERSHIP LIMIT VACATED BY *TIME WARNER II*.

The comments confirm that there have been fundamental marketplace changes since the passage of the 1992 Cable Act. Producers and packagers of video programming now have a number of alternative MVPD and non-MVPD distribution channels through which they can reach consumers, including existing cable subscribers.[14]

The comments likewise underscore the *Time Warner II* court's holding that the "*availability*" of DBS provides a powerful constraint on the ability and incentive of cable MSOs unfairly to impede video programming.[15] DBS, which was not yet launched when Congress enacted Section 613(f), is now ubiquitously available throughout the United States and widely viewed as a close substitute for cable.[16] DBS is growing at approximately 12 times the rate of cable, with about half of DBS customers having been former cable customers.[17] As a

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14 *See* AT&T at 16-24 (detailing worldwide distribution of programming by MVPD and non-MVPD distributors); Comcast at 21-28 ("Through their affiliates' ability to invoke statutory must-carry rights, [broadcast networks] now have a guaranteed outlet for video programming on the very cable systems at issue here."); NCTA at 11-15.

15 *See* AT&T at 35-39; Comcast at 22-24; NCTA at 11-15; P&FF at 11-12. *See also Time Warner II*, 240 F.3d at 1134 (noting that "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" (emphasis in original)).

16 *See* AT&T at 17-21 & Ordover Dec. ¶¶ 113-19; Comcast at 22-24; Time Warner at 11. *See also Time Warner II*, 240 F.3d at 1134 (with its national footprint, DBS can "be considered to pass every home" (citation omitted)).

17 *See 2001 Video Competition Report* ¶ 13 (contrasting cable's 1.9% growth rate with DBS' 24% growth rate); AT&T at 19; Comcast at 23; NCTA at 11-15.

consequence, "virtually every cable subscriber displeased with cable can now immediately switch to a DBS provider."[18]

At the same time, the number of, and demand for, video programming networks has grown enormously.[19] This trend will only continue as cable MSOs and competing distributors invest billions to increase capacity (that must be filled with new programming) in a "race to the top" to provide more attractive packages of consumer services.[20]

As a result, "[t]here is little incentive in the current, competitive MVPD environment for a cable operator, no matter how large, to suppress the quantity or quality of the programming that would be attractive to its subscribers. Inferior programming would . . . cause the cable operator

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18 Time Warner at 12.

19 *See* P&FF at 11 (noting that "the number of programming networks more than doubled between 1994 and September 2001"); AT&T at 25-26 (documenting increase in number of programmers and diversity of programming).

20 *See* Comcast at 29-31; NCTA, Shelanski Dec. at 8; Time Warner at 13-14. Moreover, the proportion of *cable-affiliated* national programming networks has consistently declined. *See* AT&T at 25. In this regard, AT&T takes issue with the Commission's statement in its *2001 Video Competition Report* that vertical integration in the cable industry has remained unchanged over the last year at 35%. *See 2001 Video Competition Report* ¶ 157. In particular, the Commission's decision to count Liberty Media's programming interests in its analysis even after its spin-off from AT&T grossly overstates the level of vertical integration in the programming marketplace today. *See id.* ¶ 158. If those program services affiliated solely with Liberty were not counted in the Commission's analysis, the level of vertical integration falls from 35% to *22.8%* (*i.e.*, subtracting 37 Liberty services from 104 affiliated services equals 67 non-Liberty affiliated services; dividing the 67 services by 294 total national services equals 22.8%). Even assuming that a purely mechanical application of the attribution rules would treat Liberty program services as affiliated with a cable operator (as a result of Liberty's ownership of a few cable systems in Puerto Rico), the suggestion that there has been no reduction in the level of vertical integration notwithstanding the AT&T spin-off of Liberty is unrealistic. Indeed, the Commission's *Further Notice* properly noted the sharp decline in vertical integration (to 25% at the time) based on the fact that AT&T had spun off Liberty. *See Further Notice* ¶ 79 n.181.

to lose further ground to DBS rivals."[21] Cable operators thus "have an interest in *facilitating* entry by new video programming services -- not in blocking it,"[22] so that they can "ensure that they are in the position to meet increasing consumer expectations about the variety and quality of the programming that they receive."[23]

A. Proponents Of A Numerical Limit Have Failed To Provide Any Economic Evidence Demonstrating A Non-Conjectural Risk That Cable Operators Would Be Able To Exercise Market Power Against Video Programmers.

Despite this broad consensus, several parties ask the Commission to reinstate the 30% limit struck down by *Time Warner II* or otherwise to impose a stringent cable horizontal ownership limit.[24] Of these commenters, however, only CFA even tries to make an economic showing that such a limit is warranted. Even CFA concedes that *Time Warner II* requires the Commission to make "a stronger evidentiary showing than would otherwise be required."[25] Accordingly, CFA pays lip service to the concept of market power, discussing the concept at length and purporting to engage in the dynamic analysis the D.C. Circuit mandated, but wholly fails to provide valid, relevant empirical evidence justifying its proposed limits.

CFA argues, first, that both "Lerner index" and "q ratio" statistics show that cable MSOs currently exercise market power over consumers in local retail markets.[26] Second, CFA points to

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21 NCTA, Shelanski Dec. at 5. *See also Time Warner II*, 240 F.3d at 1134 ("If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch.").

22 Time Warner at 16 (emphasis added).

23 NCTA, Shelanski Dec. at 5.

24 *See, e.g.*, RCN at iii; Sherjan at 4; Writers Guild at 15.

25 CFA at 14; *see also id.* at 16 (Commission must "point to specific evidence in the record").

26 *See id.* at 141-48.

the results of a Consumers Union "survey" that, according to CFA, shows that DBS does not effectively compete for many current cable subscribers.[27] None of this "evidence" remotely demonstrates the existence of a non-conjectural risk of cable operators exercising market power against video programmers.

CFA's attempt to prove that cable MSOs have power over subscribers in *local retail* markets is utterly irrelevant to the question whether *national* ownership limits are warranted. The critical issue is whether a cable operator can, by owning a certain percentage of all cable systems in the country, exercise market power over *video programmers* and thereby impede the flow of programming to consumers. To possess market power over programmers, a cable operator must control a sufficient percentage of all relevant national and international distribution channels. On that score, CFA offers no evidence at all.[28]

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[27] *See id.* at 158-70.

[28] CFA's evidence is not only irrelevant, it does not even advance CFA's claim that MSOs possess retail market power. Citing Lerner index statistics, CFA attempts to show that, because the retail price for cable service exceeds the marginal cost of cable service, cable MSOs have market power. *See* CFA at 74-79. However, because cable operators have substantial fixed costs, the pricing of services at marginal cost would not permit them to recover, let alone realize a return on, their investment. *See* AT&T, Ordover Dec. ¶ 157. Thus, the fact that cable operators price above marginal costs does not show that they have market power.

CFA's q ratio argument is equally flawed. In attempting to show a high ratio between the market value of video programming distribution assets and the "reproduction costs" of those assets, CFA relies on data from several recent cable system transactions that included much more than facilities used to distribute video programming. Moreover, as the article CFA cites makes clear, recent increases in per-subscriber valuation of cable companies largely reflect the potential revenue stream from selling broadband and other next-generation services, not traditional video programming services. *See* Thomas Hazlett & George Bittlingmayer, *The Political Economy of Open Access,* Joint Center Working Paper 01-06, at 5 (May 2001). In any event, CFA's ratio contains obvious and quite serious errors in both the numerator and the denominator. According to the Commission's *2001 Video Competition Report* (Table B-5), for the 23 cable system transactions reported in 2001, the average dollar value per subscriber was $3,655, little more than half what CFA claims. The only support CFA provides for its cable system replacement

(continued . . .)

Somewhat more germane, though ultimately no more helpful to CFA's cause, is the consumer survey and associated "evidence" CFA cites to show that DBS is not a viable alternative to cable. According to CFA, Consumers Union conducted an extensive survey of consumer preferences, the results of which allegedly show that DBS primarily competes with cable in "rural" markets and for "high end" customers. From this, CFA argues that DBS does not compete for the majority of cable customers who, CFA says, are interested only in a low-cost "lunch bucket" basic service (basic and expanded basic tiers of service).[29] Even if the survey was conducted appropriately, reported accurately, and showed, as CFA claims, that cable is attractive primarily to customers who want a low-cost "lunch bucket" service, CFA's conclusion that DBS does not prevent the exercise of cable market power against programmers does not follow.[30]

CFA's argument assumes, without basis, that *all* "lunch bucket" customers have homogeneous preferences -- *i.e.*, that no "lunch bucket" customer would leave a cable operator for a "high end" DBS service if the cable operator were to reduce quality. In reality, however, consumer preferences are heterogeneous, and many "lunch bucket" customers would shift to

(. . . continued)
cost/subscriber is the Hazlett/Bittlingmayer article, which relies solely upon an estimate in the Commission's *706 NOI Report* of the *incremental* costs of *upgrading* cable plant to provide high-speed Internet access.

29 CFA at 153, 158-59.

30 *See id.* at 152-53. AT&T has requested that CFA place the underlying service data and methodology into the public record of this proceeding. The need to review the underlying methodology is particularly acute because it is well recognized in economics that surveyed preferences may not closely track actual preferences. *See* Peter A. Diamond & Jerry A. Hausman, *Contingent Valuation: Is Some Number Better Than No Number?*, 8 J. Econ. Perspectives 45-64 (1994). AT&T reserves the right to supplement its comments if CFA places the survey data and methodology in the record of this proceeding.

DBS if cable quality declined. In fact, the survey itself reveals that nearly 20% of all cable customers, and nearly one-third of those dissatisfied with their cable service, would consider switching to DBS.[31] As Dr. Besen has explained, the loss of a far smaller number of customers would cause a cable operator to lose more money (in lost customers) than it could ever hope to recoup, even assuming it could both foreclose programming rivals and also gain market power over buyers of its own affiliated programming.[32] Thus, CFA's survey data *confirms* that DBS does prevent the exercise of market power against programmers, by ensuring that a cable MSO that degrades the quality of its offerings will lose more revenues through lost customers than it could possibly gain through a foreclosure strategy.

Nor is it true, as CFA contends, that DBS is a different product that does not compete with cable for "lunch bucket" consumers. To begin with, CFA's claim ignores the fact that cable providers have tens of millions of customers receiving digital services that, by CFA's own admission, compete head-to-head with DBS.[33] Contrary to CFA's bare assertions, moreover, DBS does in fact offer a "lunch bucket" service. Both DirecTV and EchoStar offer "value" packages that give customers the option of buying less than the full array of DBS programming at a price very comparable to basic and expanded basic cable services. For example, DirecTV's

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31 CFA at 164-65.

32 *See* AT&T, Besen Dec. ¶¶ 41-57.

33 *See* CFA at 153, 158-59.

Total Choice package is priced at $31.99 per month and gives customers 105 non-premium channels.[34] EchoStar likewise offers “America’s Top 50” for $22.99 per month.[35]

Indeed, DBS operators themselves confirm that they compete with cable on price. DirecTV and EchoStar set their prices with “the objective . . . to gain market share by luring away consumers from the leading cable providers.”[36] According to the DBS operators, “the companies collect detailed data on cable pricing of many systems and, as necessary, adjust their pricing to remain competitive on a national basis.”[37] CFA’s assertion that the average DBS subscriber spends more than does the average cable subscriber does not prove otherwise.[38] Even if CFA’s claim is true, this does not show, as CFA mistakenly believes, that the *price* of any given service is higher on DBS than it is on cable. Rather, this “evidence” simply suggests that DBS subscribers either take more premium services or buy packages that include more channels (and therefore, are higher priced) than those packages typically purchased by cable subscribers.[39]

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34 *See* http://www.directv.com/programming/programmingpages/0,1093,135,00.html.

35 *See* http://www.dishnetwork.com/content/programming/packages/at_50/ index.asp?viewby=1& packid=548&sortby=1.

36 EchoStar/DirecTV Application, Willig Dec. ¶ 11 (Dec. 3, 2001).

37 *Id.*

38 *See* CFA at 156, 168-69.

39 *See, e.g.*, Marc E. Nabi, et al., *Eye in the Sky 3Q01 Preview*, Oct. 8, 2001, at 22 (reporting that DBS subscribers on average ordered pay-per-view movies and events much more frequently than cable subscribers); John K. Martin, Jr., et al., ABN AMRO, *Cable TV Industry -- The Five Year Plan*, Jan. 2, 2002, at 83 (estimating that nearly 3 million DBS subscribers take the “NFL Sunday Ticket” package, which is not available on cable). CFA also says, without citation or support, that DBS has “high[] front end costs.” CFA at 155, 168. That is false. DBS providers have eliminated up-front charges, as part of their effort to lure existing and prospective cable subscribers. *See* AT&T, Ordover Dec. ¶ 114 & n.64. *See also* http://www.dishnetwork.com/ content/getdish/FreeSatelliteSys/index.shtml (noting that Dish Network will provide satellite TV system and installation to new customers at no charge).

Lastly, the "fact" that 11% of survey respondents bought both cable and DBS service likewise does not demonstrate that the two are complements and not substitutes.[40] Rather, this is simply a relic of the legal limitation that prevented DBS from offering local programming. Prior to the passage of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), DBS consumers that wanted local broadcast programming needed either to buy basic cable or use an antenna. Contrary to CFA's claims, since the enactment of SHVIA, DBS operators have been aggressively adding local programming.[41] More fundamentally, the fact that a small fraction of consumers are still purchasing both basic tier cable and DBS[42] cannot be said to call into question whether DBS and cable compete vigorously for the lion's share of video programming distribution customers.

B. A Numerical Limit Cannot Be Justified On The Basis Of Inapposite Presumptions Drawn From Antitrust Laws.

Recognizing that it ultimately cannot provide the Commission with the substantial evidence of non-conjectural harms that would occur absent an ownership limit, CFA asks the Commission to assume that such harms will occur based on a "presumption" that a "merger which leads to a firm possessing 30% or more of a relevant market would be anticompetitive."[43]

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40 *See* CFA at 162.

41 *See 2001 Video Competition Report* ¶¶ 59 & 122. Citing a two year old article, CFA says that DBS operators do not intend to beam local programming to its customers but, instead intend to rely on having customers buy new antennas. *See* CFA at 156. The reality is that DBS operators will launch several new spot-beam satellites in the next year that will "provide hundreds of additional local channels to television households across the country." Press Release, DirecTV, Inc., *DIRECTV Successfully Launches Spot Beam Satellite* (Nov. 26, 2001) (http://www.directv.com/press/pressdel/0,1112,443,00.html).

42 *See 2001 Video Competition Report* ¶ 57 n.190 (citing report that 2 million households -- or 2.2% of MVPD households -- subscribe to both DBS and cable).

43 CFA at 25-27 (citing *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 270 (1966)).

Even if the antitrust laws established such a presumption -- and they do not -- that would not provide the "substantial evidence" required by *Time Warner II*.

In this context, the First Amendment requires the Commission to "justify the limits that it has chosen as not burdening substantially more speech than necessary."[44] To discharge this "heavy burden,"[45] the Commission must "demonstrate that the recited harms [to fair competition] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[46] A procedural device drawn from the antitrust laws would provide no more "insight into the question of what the appropriate horizontal limit is," than "the economic commonplace that, all other things being equal, collusion is less likely when there are more firms."[47] *Time Warner II* makes abundantly clear that any ownership limit must rest on proof of *actual*, not *presumed*, anticompetitive harms.

In all events, it is simply not true that the antitrust laws establish any general presumption that a 30% market share is a level that raises significant competitive issues. To the contrary, it is now well recognized that static market shares by themselves are not a proxy for market power. As the Commission has explained, "[e]ven a firm with a very large market share cannot automatically be presumed to have market power; more research would be needed regarding whether there are competitive factors such as ease of entry, excess capacity held by competitors, etc., that would defeat any attempt by the firm to exercise market power despite its very large

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44 *Time Warner II*, 240 F.3d at 1130. *See also United States* v. *Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992).

45 *Quincy Cable TV, Inc.* v. *FCC,* 768 F.2d 1434, 1457 (D.C. Cir. 1985).

46 *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994).

47 *Time Warner II*, 240 F.3d at 1132-33.

market share."[48] Indeed, it has been "many years since anyone knowledgeable about" such matters "thought that concentration by itself imported a diminution in competition."[49]

Rather than being "dispositive," "[e]vidence of market concentration simply provides a convenient starting point for a *broader inquiry* into future competitiveness."[50] Numerous cases recognize that a multiplicity of relevant factors are used to determine market power, including ease of entry, existence of excess capacity, degree of product homogeneity, and cross-elasticities of supply and demand.[51] Thus, it is established antitrust law that no one factor can effectively establish market power, which instead requires a "comprehensive inquiry" into all relevant factors.[52]

Finally, even if the First Amendment allowed the Commission to rely on a market share-based rebuttable presumption -- and plainly it does not -- the 30% market share found sufficient in *Philadelphia Nat'l Bank* is utterly irrelevant in this context. *Philadelphia Nat'l Bank* involved the merger of direct competitors both for depositors and borrowers in the same geographic area.[53] In contrast, cable systems compete for customers in different geographic areas. More

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48 *Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules*, 11 FCC Rcd. 546, ¶ 24 n.44 (1995).

49 *Capital Cities/ABC, Inc.* v. *FCC*, 29 F.3d 309, 315 (7th Cir. 1994). *See also Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 37 n.7 (1984) ("A common misperception has been that a . . . high market share . . . suffice[s] to demonstrate market power.").

50 *Baker Hughes*, 908 F.2d 981, 984 (D.C. Cir. 1990) (emphasis added). *See also United States* v. *General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (emphasizing comprehensive nature of market power determination).

51 *See Baker Hughes*, 908 F.2d at 984-86 (citing authorities).

52 *Id.* at 984.

53 374 U.S. at 364.

critically, as CFA acknowledges, program services that cable systems license are *public goods*,[54] so that they can be used simultaneously in many different geographic areas. Thus, rather than competing for the right to offer these services, cable operators in different geographic areas share the costs of the programming services.[55] Indeed, as AT&T explained, larger MSOs may actually pay a disproportionately large share of these costs in order to ensure that these services can offer programs that are of high quality.[56]

CFA attempts to buttress its "presumption" argument by suggesting that MSOs will be more likely to collude to gain monopsony power than in other industries because they buy "specialized products."[57] However, cable operators would have no incentive to collude in the procurement of programming to the point that program production was harmed. To the contrary, given the relatively elastic demand for cable services, cable system "losses from subscribers dissatisfied with receiving the degraded offerings of weakened program producers" will outweigh the "benefits from reduced payments to programmer[s]."[58] Moreover, a rigorous examination of the industry structure here shows that "reaching a formal or tacit agreement, policing it and punishing cheating [is] extremely difficult."[59] In particular, program services are differentiated products whose "financial attractiveness to an MSO depends on subscriber

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54 *See* CFA at 59.

55 *See* AT&T, Ordover Dec. ¶¶ 66-77; Time Warner, Joskow-McLaughlin Dec. at 8-10.

56 *See* AT&T at 47-49. *See also* Time Warner, Joskow-McLaughlin Dec. at 14-16.

57 CFA at 90.

58 NCTA, Shelanski Dec. at 10-11. *See also* Comcast at 20 n.42.

59 Time Warner, Joskow-McLaughlin Dec. at 20.

characteristics, channel capacity and the existing program line-ups across the MSO's systems."[60] Likewise, program carriage contracts are individually negotiated, with MSO-specific pricing and non-pricing terms, and often each individual MSO negotiates a carriage contract with a programmer at a different point in time than the other MSOs that wish to carry that program.[61]

C. The Commission Is Not Obligated To Adopt A Numerical Ownership Limit Where It Would Be Unreasonable To Do So.

Finally, CFA attempts to bridge the fatal problems in its analysis by claiming that the Commission is statutorily *required* to adopt a rigid ownership limit, even where there is no evidence to support it.[62] CFA's position is inconsistent with, not compelled by, the plain language of Section 613(f).

Section 613(f)(1)(A) states: "In order to enhance effective competition, the Commission shall, *within one year after the date of enactment of the Cable Television Protection and Competition Act of 1992, conduct a proceeding* to prescribe rules and regulations establishing *reasonable* limits on the number of cable subscribers a person is authorized to reach."[63] In response to this directive, the Commission conducted the required proceeding and prescribed a horizontal ownership limit based on the conditions prevailing at the time. Nothing in Section

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60 *Id.*

61 *See* AT&T, Ordover Dec. ¶¶ 149-50.

62 CFA at 21-24. CFA engages in sheer histrionics when it claims that the Commission is "utter[ly] unwilling[] to enforce its [existing] rules against cable MSOs." *Id.* at 24-25. *See also* RCN at 11 n.27 (making similar allegations). The only evidence that CFA cites is to a handful of Commission orders that either rejected complaints or issued what CFA considers to be inadequate penalties. Of course, what this "evidence" shows is that in these specific instances the Commission reasonably found the complaints to lack merit, not, as CFA says (at 25) that the Commission has turned a "blind eye" to complaints by video programmers.

63 47 U.S.C. § 533(f)(1)(A) (first italicized phrase omitted by CFA).

613(f), however, bars the Commission from modifying its approach as conditions change. Indeed, the language, structure, and purpose of the statute make clear that it would be arbitrary for the Commission to conclude that a statute requiring adoption of a "reasonable" limit within one year of the statute's enactment compels the Commission to maintain that limit even where subsequent changes in competitive conditions render it unreasonable.[64]

Section 613(f) directs the Commission to prescribe a "*reasonable*" limit in order "to *enhance effective competition*."[65] If marketplace conditions are such that a fixed limit is not necessary "to enhance effective competition," the most "reasonable" approach is not to impose a limit. As the Commission itself has recognized, the statute's purpose, as well as its legislative history, "indicates a preference for competition over regulation."[66] Where market forces ensure the statutory goal of competitive market access, Congress plainly intended the Commission to rely on those forces rather than regulations.[67] Thus, the word "reasonable" must be read to permit, and indeed to require, the Commission to impose a much higher limit -- or even to

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64 The statute requires that the Commission's rules "reflect the dynamic nature of the communications marketplace." *Id.* § 533(f)(2)(E).

65 *Id.* § 553(f)(1)(A) (emphases added).

66 *Further Notice* ¶ 60; *see also* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(2), 106 Stat. 1460 (1992) (policy of the Cable Act is to "rely on the marketplace, to the maximum extent feasible, to achieve" statutory goals).

67 Indeed, in the *Further Notice*, the Commission contemplated use of a "threshold" or "safe harbor" regulation, under which it "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)." *Further Notice* ¶ 64; *see also id.* (noting that the Commission "might not restrict the horizontal reach of a cable operator so long as additional MVPDs imposed sufficient competitive pressure on the cable operator").

decline to adopt a numerical limit altogether -- where the agency concludes that would be the most reasonable course based upon the record evidence and current marketplace conditions.

This interpretation is compelled not only by the language and purpose of the statute, but by the First Amendment as well. Statutes must be construed in a manner that avoids serious questions as to their constitutionality.[68] Because any horizontal ownership limit restricts speech, the Commission may impose one only if it "'advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'"[69] If a particular horizontal limit is imposed in circumstances where it is not necessary to ensure effective competition and programmer access, the limit would fail to advance important governmental interests and would impermissibly restrict more speech than necessary.[70]

III. THE ANECDOTAL "EVIDENCE" OF ALLEGED ANTI-COMPETITIVE BEHAVIOR PROVIDED BY A FEW COMMENTERS IS BASELESS OR FACTUALLY INCORRECT, OR ACTUALLY SUPPORTS AT&T'S POSITION REGARDING THE OWNERSHIP LIMIT.

CFA and a few other commenters make a number of claims regarding allegedly anti-competitive conduct by AT&T and other cable operators in the video programming market. These allegations are entirely without merit and should be rejected by the Commission. Indeed,

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68 *See Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 465-66 (1989); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

69 *Time Warner II*, 240 F.3d at 1130 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)).

70 It is important to note that AT&T has not advocated that a single MSO should be able to serve *all MVPD* subscribers nationwide. Rather, AT&T has maintained that, based on current marketplace conditions and the overwhelming evidence submitted in the proceeding, any "absolute prophylactic" limit on the number of cable subscribers an MSO may serve would be seriously suspect under the *Time Warner II* decision.

no programmers filed comments suggesting that they have experienced the anti-competitive harms alleged by CFA and others.

A. Response To Claims About BayTV

CFA alleges that AT&T engaged in "content discrimination" when it discontinued carriage of BayTV, a San Francisco Bay Area-based cable network providing local news and information, and replaced it with Food Network.[71] CFA completely mischaracterizes the nature of AT&T's relationship with BayTV and the reasons behind its decision to end the service last July. AT&T's decision to replace BayTV with Food Network, an unaffiliated service, was driven by customer demand.[72] As noted in the very article cited by CFA, Food Network had been the most requested service by Bay Area subscribers.[73] In short, AT&T's experience with BayTV and Food Network underscores the very point AT&T made in its initial comments, namely that in the highly competitive MVPD marketplace, AT&T must respond to consumer demand in its selection of program services, even if that means carrying an *unaffiliated* service, such as Food Network, in place of an *affiliated* service, such as BayTV.

B. Response To Complaint By Sherjan Broadcasting

Sherjan Broadcasting, the licensee of Class A television station WJAN-CA in Miami, Florida, reprises a complaint it made in the video competition proceeding about the leased access

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71 *See* CFA at 134-35.

72 AT&T sold its interest in Food Network in March, 2001, well before its decision to terminate BayTV.

73 *See* Linda Haugsted, *AT&T Pulls Plug on BayTV News Network*, Multichannel News, July 9, 2001.

rates charged by AT&T for carriage of the station on AT&T's cable systems in the Miami area.[74] As AT&T advised the Commission previously, Sherjan has filed a lawsuit against AT&T on this matter in federal court, and the issue will be addressed in that forum.[75] While Sherjan's claims are without merit for various reasons, AT&T highlights that the leased access rate increases referenced by Sherjan were the first such increases it experienced for most of the relevant AT&T systems in five years or more. Further, even after these increases, AT&T's rates are still well below the maximum permitted under the Commission's leased access rules, as Sherjan has conceded in its litigation against AT&T.[76]

C. Response To Claims About TV Land And New England Cable News

In addition, CFA claims that AT&T has attempted to limit the distribution of programming to rival distributors. In particular, CFA contends that AT&T has denied TV Land to American Cable Association ("ACA") members.[77] As an initial matter, CFA is plainly wrong in suggesting that AT&T has an exclusive contract for TV Land and can somehow control the national distribution of the service. AT&T has no such exclusive arrangement with TV Land. Moreover, Viacom, the owner of TV Land, controls all distribution rights for the network, and stated recently in the Commission's program access proceeding that TV Land has not been

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74 *See* Sherjan at 3-4. *See also* Sherjan Comments, filed in CS Dkt. No. 01-129, at 3 (Aug. 3, 2001).

75 *See* AT&T Reply Comments, filed in CS Dkt. No. 01-129, at 9 n.29 (Sept. 5, 2001).

76 Moreover, AT&T is proud of its commitment to Spanish-language programming in south Florida and throughout its cable systems. Indeed, AT&T offers its Miami-area subscribers seven Spanish-language broadcast services; three Spanish-language services on its basic digital tier; and "AT&T Espanol," a special digital tier package that includes nine Spanish-language services.

77 *See* CFA at 128-129.

offered on an exclusive basis since 1999.[78] Finally, CFA misunderstands the nature of the Headend-In-The Sky ("HITS") service. HITS is merely a platform for satellite delivery of cable services, and HITS customers must contract separately with content providers (in this case, Viacom) to obtain the rights to the program services distributed by HITS. CFA's claims regarding HITS' distribution of programming to CT Communications Network, Inc., a DSL-based video delivery service, should be dismissed for similar reasons.[79]

D. Response To Claims About Cable's Commitment To Public Affairs, Culturally Diverse, Local, And Religious Programming.

Finally, CFA and other commenters also mischaracterize the cable industry's commitment to providing public affairs, culturally-diverse, locally-oriented, and religious programming.[80] In fact, the cable industry has taken a strong leadership position in providing these types of programming services. For example, cable is now a recognized leader in educational programming, providing more than four times as much children's programming as all other sources combined and partnering with schools to meet the educational needs of

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[78] *See* Viacom Reply Comments, filed in CS Dkt. No. 01-290, at 4-5 (Jan. 7, 2002).

[79] *See* CFA at 129. CFA also criticizes AT&T for allegedly refusing to sell New England Cable News ("NECN") to Braintree Electric Light Department ("BELD"). *See id.* at 127-28. But NECN has had a Commission exemption from the exclusivity prohibition under the program access rules, and thereafter has been delivered terrestrially since 1995 and thus has never been subject to the prohibition. AT&T also believes this is an improper forum for considering a host of other program access-related comments. *See, e.g.*, Broadband Service Providers; Joint Cable Overbuilders; RCN. These commenters readily acknowledge that they made exactly the same arguments in the Commission's pending program access proceeding (CS Dkt. No. 01-290), and, hence, their comments should be considered in that proceeding, not here.

[80] *See, e.g.*, CFA at 219; Catholic Bishops at 4. CFA suggests, for example, that such programming is at risk of being reduced or eliminated if the Commission does not impose strict limits on cable ownership, but provides no evidence to substantiate this claim.

America's children.[81] In addition, cable operators and programmers provided more election coverage in 2000 than the broadcast television networks,[82] and regional networks provided the most comprehensive coverage of local political races.[83]

The cable industry has demonstrated the same level of commitment to providing culturally-diverse programming. AT&T, for example, has responded to the growing diversity of its subscriber base with more diverse programming services, including substantially more programming aimed at Latino audiences[84] and other minority groups.[85] Cable programmers are

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81 *See* NCTA, *Cable Television Handbook*, Jan. 2001, at 1-C-6, 1-D-2 ("*Cable Television Handbook*") (citing the 1999 State of Children's Television Report finding that 46% of all children's TV programs with high educational content are provided by cable networks); Jerry Beck, *Educational Programming*, Kidscreen, Aug. 1, 2000 (reporting that more than 8,500 local cable companies and 36 U.S. cable programmers have together invested $2 million per week in America's schools for the last 10 years); NCTA, *Cable & Telecommunications Industry Overview 2001*, Dec. 2001, at 12 ("*Cable Television Overview*") (noting that through the Cable in the Classroom initiative, cable companies supply U.S. schools with free cable hook-ups and free continuing cable service to receive more than 540 hours monthly of commercial-free, educational programming).

82 *See Cable Television Overview* at 10. *See also* Kathy Chen, *In Race for Presidential Campaign Coverage, Cable Moves into the Lead over Broadcast TV*, Wall S. J., Sept. 20, 2000 (noting that cable television is a leader in providing TV-campaign coverage).

83 *See Cable Television Overview* at 10 (noting NewsChannel 8's coverage of the Virginia gubernatorial race in 2001, and New York 1's coverage of New York City mayoral race in 2001).

84 *See supra* note 76 (noting Spanish-language services on AT&T south Florida systems).

85 For example, in February 2000, AT&T's Pittsburgh system ran AIDS-awareness programming in honor of Black History month and invited local health care and religious communities to a special, preview screening of the programming. *See* Monica Hogan, *Industry Promotes Black History Month*, Multichannel News, Jan. 31, 2000. Likewise, AT&T's Atlanta system began carrying a 24-hour Korean station on its digital lineup that features news, sitcoms, soap operas, daily news reports, talk shows, town hall meetings, and religious programs. *See* Kathy Brister, *AT&T Digital Cable Adding Korean Channel*, Atlanta J. & Const., Nov. 14, 2001. *See also* Thomas Umstead, *African-Americans Targeted for Family Programming*, Cablevision, Feb. 14, 2000 (reporting AT&T's decision to endorse and sign distribution agreements with the

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also tackling challenging social topics with thought-provoking, issue-oriented programming.[86] Indeed, there is a general consensus that cable is doing much better than the broadcast networks in presenting a more diverse slate of programs.[87]

AT&T and other cable operators have taken a leading role in providing community-oriented programming services, as well.[88] For example, in 1995, AT&T launched in its Atlanta system a local cable channel that features high-school football games, talk shows and community affairs segments, and has established similar locally-based programming services in New

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MBC Network and New Urban Entertainment TV, two new African-American-targeted services that hope to challenge Black Entertainment Television).

86 *See Cable Television Overview* at 9 (noting Showtime's *Queer as Folk*, which provides a candid glimpse of homosexual life); Press Release, NCTA, *New Cable Programming Addresses Tough Social Issues*, Jan. 18, 2002 (noting, for example, HBO's *The Laramie Project*, which addresses a community's effort to overcome hatred and prejudice after the murder of Matthew Shepard, a homosexual man).

87 *See* Gail Pennington, *TV Puts a New Face on Diversity*, St. Louis Post-Dispatch, Aug. 27, 2000. *See also* Simon Applebaum, *Kweisi Mfume: Getting the Picture*, Cablevision, Sept. 3, 2001 (quoting NAACP president and CEO Kweisi Mfume stating that "juxtaposed against broadcast TV, cable has proven that it offers diversity of programming").

88 *See* Will Lee, *Battling Satellite with Homespun Programming*, Cable World, Jan. 14, 2002. *See also* Kathy Brister, *Local Programs Selling Point for AT&T Cable*, Atlanta J. & Const., Dec. 27, 2000 (noting that, according to a cable industry expert, "there is power in local programming, and it's vital for cable operators to tap into it" and that "local programming for the first time puts cable operators in competition with broadcasters").

England and the Midwest.[89] Other cable operators have shown a similar commitment to local origination programming.[90]

Finally, contrary to the claims of the Conference of Catholic Bishops regarding the allegedly harmful effects of cable consolidation on religious program carriage, AT&T has consistently taken a strong interest in telecasting religiously-oriented programming over its systems.[91] AT&T cable systems typically offer national religious cable networks, such as the Eternal Word Television Network, Trinity Broadcasting Network, Total Life Network, Inspirational Life Network, and the Hallmark Channel (which airs programming from Faith and Values Television on Sunday mornings).[92] In addition, public access and broadcast channels on cable typically carry a substantial amount of local-origination religious programming. For example, AT&T's Boston system carries, among other services, the Boston Catholic Television

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89 *See* R. Thomas Umstead, *AT&T 3 Provides Outlet For Broadcast Syndicators*, Multichannel News, Dec. 10, 2001 (noting that AT&T Broadband 3, a New England-based service, provides coverage of local news, sports, and political developments); Carmen Greco, Jr., *Carol Stream to Debut New Series*, Chi. Daily Herald, Jan. 12, 2002 (describing "Stream Scene," an AT&T-funded programming service in Carol Stream, Illinois that features community news, village-wide events, and other stories of public interest).

90 *See Cable Television Overview* at 9 (noting Cablevision's MetroChannels in the greater New York area; Time Warner's Central Florida News 13 and New York 1; and Cox's Arizona News Channel). Comcast also provides local and regional programming services, such as cn8, a regional programming service available throughout the Mid-Atlantic region that provides a mix of locally-focused call-in programs, regional sports coverage, and family entertainment.

91 *See* Catholic Bishops at 4. It is important to note that most of the Bishops' concerns appear to be directed at local broadcasters, whom they assert have become increasingly less interested in carrying religious programming as they have become larger. While the Bishops go on to express a concern that cable operators may be following the broadcasters' approach, they do not provide, nor could they based on the ensuing discussion, specific evidence of a problem with AT&T or other large cable operators in terms of a reduced commitment to religious programming.

92 The HITS service also includes Inspirational Life, Trinity Broadcast Network, and the Word Network.

Center as well as the Boston Neighborhood Network, a community access service on Channel 23 offering a wide array of Sunday morning religious programming.[93] Likewise, AT&T's Chicago system includes several regularly scheduled religious programs on Channel 36 of Chicago Access Network Television,[94] and its Atlanta system carries WATC, a local independent religious channel, and Atlanta Interfaith Broadcasters.[95] In addition, in Dallas, sixteen percent of all public access programming on AT&T's system is religiously-oriented. AT&T has demonstrated a similar commitment to local and national religious programming in its other cable systems, as well.

In sum, the Commission must conclude there is no record evidence in this proceeding that comes close to meeting the substantial burden of demonstrating non-conjectural harm established by *Time Warner II*.

IV. THE RECORD DEMONSTRATES THAT THE COMMISSION SHOULD ABANDON THE "SALE OF PROGRAMMING" ATTRIBUTION RULE AND RETAIN THE "SINGLE MAJORITY SHAREHOLDER" EXEMPTION.

A. No Commenter Provided Any Evidence To Support Reinstatement Of The No-Sale Rule.

The court in *Time Warner II* made plain that the Commission must show that any rule barring insulated limited partners from selling programming to the limited partnership (the "no

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93 Sunday morning broadcast schedules on Boston-area cable systems include programs such as "In Touch Ministries," "It is Written," "Kenneth Copeland," and "Sunday Mass."

94 A sampling of the available broadcast religious programming in the Chicago area that is available on AT&T cable includes "Hour of Power," "Ever Increasing Faith," "Mass at Mercy Home," "Chicagoland Christian Center," and "Faith Chapel."

95 The Atlanta public access channel offers a variety of religious programs, such as "The Power of Deliverance" and "30 Minutes of Gospel." As in other areas, leased access space is also available. Furthermore, broadcasters carried on cable offer religious programming, such as "Touching Lives," "Peachtree Presbyterian Church," and "Church in the Now."

sale" rule) must bear a "rational relation" to the underlying goal of a subscriber limit. The court was highly dubious that the Commission could make such a showing. *No commenter in this proceeding has even attempted to demonstrate how the Commission could make such a showing*.[96]

In contrast, AT&T and other cable commenters provided detailed analysis establishing that the Commission may not resurrect the no-sale rule consistent with the *Time Warner II* decision. First, as both AT&T and Time Warner point out, a limited partner seeking insulated status must comply with each of the seven criteria set out in the Commission's rules, which include a bar on communications regarding the limited partner's day-to-day video programming operations and on the limited partner's active involvement in the management or operation of the video programming businesses of the partnership.[97] Therefore, as the *Time Warner II* court concluded, even if a limited partner, by virtue of sales of programming to the partnership, had the theoretical ability to control or influence the partnership's programming choices, "given the independent criterion barring even communications on the video programming business, exercise of that power would seem to be barred."[98]

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[96] CFA argues that the Commission should re-establish the insulation rules for limited partners that pre-dated the *1999 Attribution Order* (*i.e.*, by changing the references to "video programming-related" back to "media-related"). *See* CFA at 40-42. *See also* CFA Reconsideration Petition, filed in CS Dkt. No. 98-82 (Jan. 3, 2000). NCTA fully answered CFA's arguments in the reconsideration phase of that proceeding, and AT&T incorporates those responses by reference here. *See* NCTA Reconsideration Opposition, filed in CS Dkt. No. 98-82, at 3-6 (Feb. 17, 2000) (noting that the Commission's change in the insulation rules from a focus on "media-related activities" to "video programming-related activities" was consistent with Section 613 and the accompanying legislative history).

[97] *See* AT&T at 71 (also noting that denying insulated status based solely on program sale is inconsistent with Commission precedent); Time Warner at 41.

[98] 240 F.3d at 1143. Moreover, as AT&T pointed out, neither the Commission nor any party has ever submitted empirical evidence to show a relationship between program sale and

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Second, the Commission's existing insulated limited partnership rules do not embody a no-sale rule.[99] As an initial matter, the general requirement of the insulation rules is that an insulated limited partner may not be "*materially involved*, directly or indirectly, in the management or operation of the video programming-related activities of the partnership."[100] The mere fact that an otherwise insulated limited partner may sell programming to the partnership, however, cannot reasonably be said to "materially involve" the limited partner in the complicated internal decisionmaking process which a cable limited partnership goes through in purchasing programming. In addition, Criterion 6 of the insulation rules prohibits the performance of video programming-related services *for* the partnership, not the selling of products *to* the partnership. When a limited partner sells programming to the partnership, it is not performing a service *for* the partnership, any more than a typical retailer is performing a service for a customer when the customer buys the retailer's product.[101]

In short, there is simply no logical reason or evidentiary basis for the Commission to re-impose the no-sale rule.

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control or influence over a cable operator's program choices, nor could there be a reasoned basis for asserting that the partnership would gratuitously act to foreclose a rival of a program service which is owned not by the partnership itself, but by one of its limited partners. *See* AT&T at 72-73.

[99] *See* AT&T at 73-75.

[100] 47 C.F.R. § 76.503, note 2(b)(1) (emphasis added).

[101] *See also* Time Warner at 41 ("Simply selling programming to a partnership no more increases a partner's influence than selling coffee cups."). AT&T and Time Warner also note that the Commission's 1989 decision in *Twentieth Century Holding Corp.* was irrelevant to the instant review of the no-sale rule because, among other things, it involved the relationship between a broadcast station and its wholly-owned affiliate station and also implicated a different set of insulation rules. *See* AT&T at 75-77; Time Warner at 41-42.

B. The Record Clearly Supports Reinstatement Of The Single Majority Shareholder Exemption.

The comments overwhelmingly support reinstatement of the single majority shareholder exemption ("SMS"). As various parties note, it is an elementary legal principle that a majority shareholder has the right to control the affairs of a corporation.[102] While a majority owner owes fiduciary duties to the other shareholders, those duties prohibit managing the company so as to injure the corporation in order to benefit a minority owner,[103] and the majority owner has no economic incentive for such behavior because it would be contrary to its own interests.

The commenters who address the issue also answer in the negative the *Further Notice*'s question (¶ 90) as to whether a minority owner with a relatively large stake might have influence over corporate decision-making by virtue of its ability to withdraw that investment. A minority shareholder would have to divest its interest by selling its shares at the prevailing market rate. Such a transaction would not affect the corporation because it would not share in any gains or losses from that sale.[104] Accordingly, it comes as little surprise that "[i]n the nearly 18 years since the adoption of the single majority shareholder exemption, the Commission has yet to receive any evidence" that the SMS has led to the exercise of control or undue influence by a minority owner.[105]

CFA, the sole party to oppose the SMS, offers two arguments, both of which are meritless. First, CFA argues that ownership of a minority stake in a company with a single

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102 *See* AT&T at 77-78; Time Warner at 39; Viacom at 8-9.

103 *See* AT&T at 78; NCTA at 26; Time Warner at 39; Viacom at 12.

104 *See* AT&T at 79; Viacom at 14-15.

105 Paxson at 3; *accord* NAB at 5; Viacom at 10.

majority owner would somehow permit "parties with joint interests" to coordinate their behavior "to the detriment of competition and diversity."[106] CFA makes no attempt to explain how ownership of shares in another corporation might facilitate collusion, or even whether such ownership makes collusion more likely than it would be in the absence of such an arrangement.[107] CFA also fails to explain why a majority owner would be willing to act for the benefit of a minority owner, unless such action benefited the corporation as a whole -- in which case, the majority owner would presumably undertake that action in any event. Indeed, CFA's argument does not directly address the SMS at all; instead, it simply contends (without support) that *any* investment by one firm in another has the potential to injure competition in some unspecified manner. Such an absolutist position finds no support in the Act, and is radically out of step with prevailing economic theory, antitrust law, and the capital requirements of cable companies and broadcasters.

CFA also asserts that the Commission should eliminate the SMS because "a substantial minority equity holder will have rights of access and inspection and other means to make its desires" known to a company's management.[108] These claims are irrelevant to the SMS, as they simply cite rights possessed by *all* shareowners, including those with stakes far too small to implicate the Commission's attribution rules. The Supreme Court long ago observed that "[t]here can be no question that the decisive weight of American authority recognizes the

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106 CFA at 43.

107 *Cf. Time Warner II*, 240 F.3d at 1130 ("[W]hile collusion is a form of anti-competitive behavior that implicates an important government interest, the FCC has not presented the 'substantial evidence' required by *Turner I* and *Turner II* that such collusion has in fact occurred or is likely to occur; so its assumptions are mere conjecture.")

108 CFA at 44.

common-law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member."[109] CFA's reference to "other means" by which a minority owner might exercise influence is completely unsupported, and there is simply no basis to assume that such "other means" exist -- apart from methods available to any shareowner -- as neither the Commission nor commenters have been able to identify any during the many years that the SMS has been at issue.

A minority shareholder plainly cannot be deemed to *control* a corporation with a single majority owner. Moreover, nothing in the record of this proceeding or the many prior proceedings considering the SMS indicates that minority owners of such a company could *influence* its operations in a manner that implicates the concerns underlying the Commission's attribution rules. The comments do show, however, that the SMS serves an important function by providing broadcasters and cable operators with additional sources of capital[110] -- a particularly critical point given the constriction of capital markets during the ongoing recession.

The record thus makes clear that the SMS should be retained, and that it should not be limited by the equity-plus-debt rule (the "ED rule").[111] There is no evidence before the Commission that suggests a minority shareholder in a company with a single majority owner acquires meaningful influence over programming decisions by virtue of owning 33% of the

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[109] *Guthrie v. Harkness*, 199 U.S. 148, 153 (1905). *See also* 18A Am. Jur. 2d Corporations § 348 (1985) (collecting authorities) ("It is well established that a stockholder has a right to inspect the books and records of the corporation. This right has been said to exist independently of statutes securing such a right to stockholders, and such statutes are generally regarded as supplementing, rather than abrogating, the common-law right.").

[110] *See* Paxson at 6; NAB at 6.

[111] *See* AT&T at 79; Time Warner at 39-40.

equity-plus-debt of the corporation. In all events, if the ED rule were to be applied in such situations, there could be no reasonable basis for eliminating the SMS.[112]

V. THE COMMISSION SHOULD REJECT CFA'S PROPOSAL TO ELIMINATE RELIANCE ON INDUSTRY ESTIMATES OF MVPD SUBSCRIBERS.

CFA rehashes almost verbatim various arguments it made previously in the reconsideration phase of the *1999 Horizontal Order*. In particular, CFA urges the Commission to reverse its decision in that order to allow cable operators to rely on the industry estimates of MVPD subscribers.[113] The Commission should reject this proposal for the reasons set forth in NCTA's opposition to the CFA petition.[114]

First, CFA's suggestion that the Commission cannot delegate a critical government function to a private reporting agency overlooks the Commission's well-established practice of using industry estimates for a broad range of Commission activities. For example, the Commission has used private industry data to help calculate its annually-adjusted regulatory fees[115] and to assess whether certain cable systems are subject to effective competition and therefore free from all rate regulation.[116] Second, CFA's contention that a cable operator would

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112 *See* AT&T at 79-81; NAB at 7-10; Paxson at 6; Time Warner at 40; Viacom at 10-11.

113 *See* CFA at 45-47. *See also* CFA Reconsideration Petition, filed in MM Dkt. No. 92-264 (Jan. 3, 2000).

114 *See* NCTA Reconsideration Opposition, filed in MM Dkt. No. 92-264, at 14-17 (Feb. 17, 2000).

115 *See, e.g., In Re Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, 16 FCC Rcd. 13525, at Att. B (2001) (describing how the Commission calculates individual service regulatory fees).

116 Specifically, for example, cable operators seeking to demonstrate that cable systems are subject to effective competition often rely on DBS subscriber information published by SkyTRENDS. *See, e.g., Texas Cable Partners, L.P.*, 16 FCC Rcd. 4886, ¶ 6 n.20 (2001) (relying

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under-report its subscribership levels to private industry reporting entities as it approached the 30% cap is not supportable. The Commission's remanded rules require a cable operator that serves 20% or more of all MVPD subscribers to report its subscriber numbers *directly to the Commission* at the time it files a license transfer application in connection with a proposed acquisition.[117] AT&T has continued to provide such reports to the Commission (even though the rules have been reversed) during the pendency of this remand proceeding.

Finally, contrary to the claims of CFA, the Commission's decision to allow cable operators to use "any published, current and widely cited industry estimate of MVPD subscribership"[118] clearly serves the public interest because: (1) the estimates of leading private data services are followed and respected by all segments of the video industry (as well as the Commission in its annual competition reports), not merely cable operators; and (2) relying on such services saves the Commission the time, expense, and resources that would be required to compile data from various MVPD sources and update that data to ensure accuracy throughout the year. Private services, such as Kagan and Nielsen, perform these functions well, without costing taxpayers anything. In short, there would be no benefit, but significant costs, associated with bringing this reporting and monitoring function within the Commission.

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on SkyTRENDS data to prove that DBS penetration exceeded 15% of households in the franchise areas).

117 *See* 47 C.F.R. § 76.503(g).

118 *See 1999 Horizontal Ownership Order*, 14 FCC Rcd. 19098, ¶ 35 (1999).

VI. CONCLUSION

For the foregoing reasons and the reasons set out in AT&T's initial comments, the Commission should conduct this proceeding in accordance with the dynamic market power analysis mandated by *Time Warner II* and the Commission's own longstanding policies. The Commission should abandon the no-sale rule for insulated limited partners, and also reinstate the single majority shareholder exemption.

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February 19, 2002

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