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Federal Communications Commission
Office of Secretary

JAMES L. CASSERLY

March 13,2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ex Parte Notice

Re: 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 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.**

Dear Ms. Dortch:

On March 12, 2003, representatives of Comcast Corporation ("Comcast") met with members of the Commission's Media Bureau to discuss the above-captioned rulemaking. Comcast was represented by James R. Coltharp, Senior Director, Public Policy, Comcast, Jim Casserly, Willkie Farr & Gallagher, and the undersigned. We met with W. Kenneth Ferree, Bureau Chief, Deborah Klein, Chief of Staff, and Royce Sherlock, Division Chief, Industry Analysis Division.

The Comcast representatives reiterated the point (explained in greater detail in documents previously filed by Comcast) that the ***Time Warner II*** decision gives the FCC virtually no opportunity to adopt any particular ownership limit, particularly a "hard cap" with an impermeable limit, in light of the fact that the record in the ownership rulemaking does not contain evidence that there is any current impediment to the flow of video programming to consumers.

The Comcast representatives discussed potential alternatives to a fixed limit on horizontal growth, such as the adoption of a "soft cap." Under such an approach, all proposed mergers would be reviewed, and subject to a public interest analysis, as has been the practice both with and without the presence of a horizontal ownership limit. Proponents of mergers above the cap would bear the burden

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of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. This is the standard of review used by the FCC in recent cable mergers. Proponents of mergers below the cap would still have the ultimate burden of proving that the proposed merger is in the public interest, but they would be able to establish a *prima facie* case that the merger is in the public interest -- at least with regard to any competitive concerns that could flow from their horizontal size -- by certifying that the combined entity's size does not exceed the cap. The *prima facie* case would not be irrebutable. However, once the *prima facie* case is established, the burden of proof would shift to opponents of the merger. Such opponents could file a petition to deny containing specific allegations of fact -- supported by credible evidence -- sufficient to show that there are extraordinary circumstances, beyond the mere fact of serving a given number of MVPD customers, which demonstrate that the merger poses competitive concerns. The FCC would retain the right to request additional information and analysis from the merger applicants in cases where the merger opponents carried their burden of proof.

The Comcast representatives also reiterated comments contained in documents previously filed by Comcast concerning OPP Working Paper No. 35. They maintained that the study, whose results were presented in that working paper, bears so little resemblance to the real-world conditions of the marketplace for buying and selling programming that the study is of no utility in crafting any ownership rule (whether restrictive or unrestrictive) in this proceeding.

This letter is filed pursuant to section 1.1206(b)(2) of the Commission's rules. Copies are being sent to all of the Media Bureau representatives mentioned above. Please let me know if you have any questions.

Respectfully submitted,

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cc: W. Kenneth Ferree
Deborah Klein
Royce Sherlock