purposes of calculating the ownership limit in the formula set out above, as previously proposed, we rely upon an analysis that estimates the probability that a programming network will continue to operate based on the number of subscribers it has at a point in time.[182] The Commission previously proposed using the methodology set forth in the *Media Bureau Survival Study* to calculate the minimum viable scale and sought comment on this proposal.[183] That study was based on survival analysis and is a standard method used in the fields of economics, biology, and engineering. The study accounts for all of the revenue sources that maintain the viability of the programming network, including international distribution, and reflects the impact of advertising revenues, which may vary based on the markets where the programming network is carried. It is based on an unbiased sample of networks that have launched service and gained distribution.[184] The data also account for the impact of DBS competition on the carriage decisions of cable operators. For example, any competitive pressure from DBS that makes a cable operator's refusal to carry a particular programming network more costly will be reflected in an increase in the odds of network survival. The study also accounts for the effect of vertical integration with a cable operator on the viability of a network and the value of being associated with a successful network (a "spin-off").[185] Because the study evaluates the viability of a network over its lifecycle beginning with its inception, it is able to account for the relatively small number of subscribers a network requires to remain viable in its early stages, while accounting for the larger number of subscribers necessary at later stages.[186]

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[182] Keith Brown, *How many viewers does a cable network need? A survival analysis of cable networks*, 39 APPLIED ECON. 2581 (*"Network Survival Study"*). The study is based on the same data and method as a Media Bureau Staff Research Paper (Keith S. Brown, *A Survival Analysis of Cable Networks*, Media Bureau Staff Research Paper No. 2004-1 (*"Media Bureau Survival Study"*) (rel. Dec. 7, 2004)).

[183] *2005 Second Further Notice*, 20 FCC Rcd at 9420 ¶ 84.

[184] Erdem, Katz and Morgan claim that the sample is biased because it is based on financially successful networks. Comcast March 16, 2007 Further Supp. Comments, Erdem, Katz, and Morgan Decl. at 36. However, the sample includes successful as well as unsuccessful networks and therefore is not biased. In fact, it is not possible to estimate a survival model if the sample only includes successful networks. Of the networks in the sample, 31.5 percent were unsuccessful in the sense that they exited the market during the sample period. *See infra* ¶ 56. The author of the study attempted to obtain data on all networks that were in existence during the sample period. While it is possible that the author did not obtain data on all networks, we are confident that the majority of existing networks are in the sample. Furthermore, the *Media Bureau Survival Study* lists all of the networks in the sample, and Comcast has failed to identify any "unsuccessful" networks that should have been included in the sample but were not.

[185] *Network Survival Study*, Table 2.

[186] Erdem, Katz and Morgan claim that the study is not based on any underlying economic theory that would provide a foundation for the estimation method. Comcast March 16, 2007 Further Supp. Comments, Erdem, Katz, and Morgan Decl. at 36. However, economic theory examining the effect of uncertainty in a dynamic context on firm decisions, a well-developed area of economics, indicates that longitudinal studies such as the *Network Survival Study* that can incorporate state dependence are more appropriate tools than those that do not. State dependence occurs when current actions are affected by past decisions and conditions, even after controlling for the explanatory variables used in the model to describe current conditions. Jeffrey D. Wooldridge, *Econometric Analysis of Cross Section and Panel Data* (MIT Press 2002). For example, Jovanovic illustrates the importance of the need to account for the history of firms when examining exit. Boyan Jovanovic, *Selection and the Evolution of Industry*, 50 ECONOMETRICA 649-70 (1982). Dixit also uses dynamic optimization to develop a model explaining exit decisions of firms. Avinash Dixit, *Entry and Exit Decisions under Uncertainty*, 97 J. OF POL. ECON. 620-38 (1989). In these models, and their many derivatives over the intervening years, the cause of firm exit is unpredictable fluctuations in cost, demand, or other parameters. *See also* David B. Audretsch and Talat Mahmood, *The rate of hazard confronting new firms and plants in U.S. manufacturing*, 9 REV. OF INDUS. ORG. 41-56 (1994); Rajshree Agarwal and Michael Gort, *The Evolution of Markets and Entry, Exit and Survival of Firms*, 78 REV. OF ECON. AND STAT. 489-98 (1996); Dietmar Harhoff, Konrad Stahl and Michaerl Woywode, *Legal Form, Growth and Exit of West German Firms - Empirical Results for Manufacturing, Construction, Trade and Service Industries*, 46 J. OF INDUS. (continued....)

53. We reject Erdem, Katz, and Morgan's allegation that the study failed to address network heterogeneity and account for the endogeneity of network decisions on cost and quality.[187] This is a curious position since the *Media Bureau Survival Study* discusses and estimates models that account for these issues.[188] Unfortunately, there is not a statistical model that will address both issues simultaneously. It is necessary to choose the lesser of two evils. In the end, we have chosen to rely on the model that does not require strict exogeneity. We do so because one of the common causes of endogeneity is a failure to control for unobserved characteristics that influence the probability of survival.[189] We believe that relaxing the assumption on strict exogeneity is more appropriate than using the model that requires strict exogeneity. Furthermore, we note that the peer-reviewed *Network Survival Study* on which we base our calculations reports results only for the model that eases the assumption on strict exogeneity.

54. We also reject Erdem, Katz, and Morgan's contention that the study is flawed because it does not explicitly model the source of dynamics and state dependence.[190] The Commission's reasoning behind the ownership limit is to ensure that the actions of a single cable operator cannot unilaterally eliminate a network. Erdem, Katz, and Morgan's suggestion that larger cable operators could ensure that new networks grow more quickly is true only for those networks that the large cable operator chooses to carry. However, it does not address our concern that the largest cable operator would be able to effectively dictate which networks will be carried by all operators due to its ability to eliminate the viability of networks that it does not carry. The source of the state dependence is very clear. For an average cable network to be successful, it must reach a certain number of subscribers. While there may be other means to meet Congress' goal regarding the flow of video programming, the statute directs us to use a limit on the size of a cable operator to accomplish the goal. Our limit is designed to ensure that a large cable operator cannot unilaterally condemn a cable network by refusing carriage.

55. In order to use the *Network Survival Study* to estimate the minimum viable scale of a programming network, it is necessary to choose the point in the network's life at which to measure viability, as well as the probability that the network survives past that point. We consider five years from the launch of a network to be an appropriate point for measuring viability. In the course of its first five years, a network will have an opportunity to market itself to MVPDs, as well as to attract the attention of consumers, advertisers, the investment community, and the popular press.[191] On the other hand, we believe that measuring viability at a later time (e.g., ten years) may be excessive. We have attempted to choose a viability date that is beyond the "start-up" phase and permits a programmer to establish itself, but not so long that it attempts to ensure success for an extended period.

(Continued from previous page)
ECON. 453-88 (1998); Jose Mata and Pedro Portugal, *The survival of new domestic and foreign-owned firms*, 23 STRAT. MGMT. J. 323-43 (2002). The estimation strategy is designed to model these fluctuations without assigning an underlying cause to each fluctuation. In fact, we think it is impractical to obtain the precise reason that each network failed and incorporate it into an empirical model. The model we have chosen acknowledges the basic reality that if a network has sufficient subscribers to generate revenue to cover its costs, failure is much less likely.

[187] *See supra* note 186.

[188] *Media Bureau Survival Study*, Table 2.

[189] Jeffrey Wooldridge, *Econometric Analysis of Cross Section and Panel Data*, MIT Press, 2002, p. 50-51.

[190] Comcast March 16, 2007 Further Supp. Comments, Erdem, Katz, and Morgan Decl. at 36-37. As noted above, state dependence occurs when current actions are affected by past decisions and conditions, even after controlling for the explanatory variables used in the model to describe current conditions. *See supra* note 186.

[191] This is consistent with TAC's claim that the success of programming networks is generally evaluated over a five-to-seven-year time horizon. TAC Comments to the *2005 Second Further Notice* at 16.

56. Next, we must select an appropriate probability of survival.[192] The *Network Survival* study calculates minimum viable scale at survival probabilities of 50 percent, 70 percent, and 90 percent. We choose to base our limit on the average survival rate of a programming network observed in the industry.[193] According to the *Network Survival Study*, from 1984-2001 the failure rate among the 305 networks in the sample was 31.5 percent,[194] indicating that 68.5 percent of networks in the sample survived. Thus, we choose a survival probability of 70 percent at the five year mark as this is the closest of the three choices we calculated to the number we observed in the study. In other words, we find that the minimum viable scale is represented by the number of subscribers a network needs to serve after five years in the market to have a 70 percent probability of survival.

57. We also need to decide which characteristics of a network should be taken into account when calculating the survival probability. We use the survival probability for a network that is not vertically integrated and is not a "spin-off" of an existing network. We exclude the effect of vertical integration and "spin-offs" from the calculation in order to account for the additional difficulties faced by independent and unaffiliated programming networks. Thus, we rely on empirical data indicating the number of subscribers needed for a network with the characteristics specified above to have a 70 percent probability of survival after five years. These choices lead to a minimum viable scale of 19.03 million subscribers.[195]

3. Subscriber Penetration Rate

58. In 1999, the Commission estimated that the typical programming network had only a 50 percent chance of actually serving all available "open field" MVPD subscribers, based on lack of channel capacity on cable systems, penetration of digital tiers, and other factors.[196] Today, that 50 percent chance is much lower as a consequence of the proliferation of digital tiers on which new programming networks are typically placed. When the impact of this digital tier placement is factored in with the number of MSOs a network is able to reach, and the limited number of systems under each of those MSOs in which they are given carriage rights, the result is a significantly lower penetration rate. In the present Order, we calculate more precisely the percentage of subscribers a programming network will serve.

59. Several commenters dispute the Commission's prior assumption that cable networks are available to only 50 percent of the subscribers to the MVPD on which they are carried, an assumption the Commission relied upon in determining that programmers need an open field equal to 40 percent of all MVPD subscribers.[197] AT&T contends that a number of programming networks are viewed by more

[192] To derive estimates of programmers' subscribership requirements, the *Network Survival Study* uses a survival/duration model that estimates a programming network's probability of exit from the marketplace based on different characteristics, including the network's subscribership at specific points in time.

[193] We chose a minimum viable scale and penetration rate that reflect the average cable network. Our calculations provide a minimal amount of protection to average networks. Networks that choose high-cost strategies that require a large number of subscribers to remain viable will not be protected under this ownership limit, contrary to the allegations of Erdem, Katz and Morgan. Comcast March 16, 2007 Further Supp. Comments, Erdem, Katz, and Morgan Decl. at 33; see *supra* note 49. Furthermore, even these networks are protected only for the first five years of their existence. After those five years, the ownership limit will not provide them with a safe harbor in which they can survive without carriage by the largest MSO.

[194] That is, of all the networks in the sample at any time, 31.5 percent of them exited the market at some point. *Network Survival Study* at 18, Table 1.

[195] *Network Survival Study* at 10 and Table 4 at 22. This figure will be inserted in the formula above for the variable "MVS."

[196] *1999 Cable Ownership Order*, 14 FCC Rcd at 19114-18 ¶¶ 40-50.

[197] AT&T Comments to the *2001 Further Notice* at 65-66; Time Warner Comments to the *2001 Further Notice* at 26-28; Time Warner Reply Comments to the *2001 Further Notice* at 18.

than 50 percent of all MVPD subscribers.[198] AT&T also contends that competition in the MVPD market has grown rapidly, which gives all cable operators strong incentives to secure carriage rights for new programming that has received favorable consumer response.[199] Additionally, AT&T asserts that increased channel capacity resulting from the deployment of digital technology has greatly expanded cable and non-cable outlets for programming and increased the demand for programming by cable operators and other program purchasers and distributors.[200] On the other hand, cable operators have complained about capacity constraints because of the increased capacity demands of digital television, including high definition television, and their need to increase the speed of data services they provide. [201] Time Warner maintains that the Commission's reliance on average penetration numbers for all national video programming services was misplaced because these subscribership numbers are not a valid proxy for entrants' probability of carriage success.[202] Comcast argues that the Commission must clarify the meaning of the success rate assumption before the Commission can rely on it.[203] It further argues that the fact that a network is denied carriage does not mean it was denied unfairly, and that the market factors used to set the success rate do not have any relevance to whether cable operators are acting in an "unfair" manner.[204] It complains that the data used to establish the 50 percent rate was flawed and out of date, and that the use of current data would yield a much higher rate.[205]

60. We agree with commenters who contend that we must take into account tier placement and other carriage arrangements when determining the open field necessary to ensure that the decision of a single cable operator does not cause a network to exit the market. Accordingly, we take into account tier placement in our current analysis, and recognize that many, if not most, new cable networks are placed on a digital tier. A consequence of being placed on a digital tier versus one of the basic levels of service with the greatest penetration rates is a much lower penetration rate. Previously the Commission relied on a general 50 percent penetration rate for a new programming network that was based on an analysis which ignored the increased difficulties of recently launched networks in obtaining distribution. Instead,

[198] *See* AT&T Comments to *the 2001 Further Notice* at 65; *see also* Time Warner Comments to the *2001 Further Notice* at 26.

[199] AT&T Comments to the *2001 Further Notice* at 65

[200] *Id.* at 66.

[201] *See, e.g.,* NCTA Comments in Docket No. 98-120 (June 14, 2006) at 7-8, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359837 (stating that cable operators have to choose among the content offered by broadcasters because of the "scarce available capacity;" the competitive marketplace in which cable does business requires that operators use their capacity to promote services, particularly in light of their decreasing market share); NCTA Comments in Docket No. 98-120 (June 12, 2006), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359613 (stating that full carriage of digital signals would interfere with the ability of independent programmers to compete for carriage on cable systems.); NCTA Comments in Docket No. 98-120 (June 8, 2006) at 2, 6, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359266 (stating that full carriage of digital broadcast signals consumes cable capacity that would otherwise be available for other consumer services); *Ex Parte* Letter from Willkie, Farr and Gallagher, LLP on behalf of Comcast (Nov. 15, 2004) at 2, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516882143 (stating that full carriage of digital signals would interfere with the ability of Comcast to offer additional services, such as VOIP).

[202] Time Warner Comments to the *2001 Further Notice* at 27 (arguing that low penetration rates in certain instances were due to poor marketing, unappealing content, and recent market entrance).

[203] Comcast June 8, 2007 Further Supp. Comments at 3, 5-8.

[204] *Id.* at 11-15.

[205] *Id.* at 15-19.

the Commission calculated a value based on the penetration of a limited sample of successful networks.[206] Because our minimum viable scale estimate is based on the survival probability of a network five years after launch, our present analysis focuses on the subscriber penetration that a network is likely to achieve in that time frame.

61. For this purpose, we use data from the Commission's Cable Price Survey to estimate the likely penetration of a programming network given its age.[207] Thus, our new calculation is based on empirical study of system carriage and tier placement of networks. The Cable Price Survey sampled 783 cable community units as of January 1, 2006. For each franchise, the respondent provides a list of the programming networks that are carried, the tier on which each network is carried, and the number of subscribers to the tier. By aggregating all of this information to the level of an MSO, we calculate the fraction of each MSO's subscribers who have access to a specific programming network.[208] We then calculate a weighted average of the MSO-specific penetration rates using the size of the MSO as the weight. In this manner we construct an estimate of the fraction of MSO subscribers that have access to the specific programming network on those MSOs that carry the network.[209] The number of years since the launch of each of the networks is also calculated.[210] With this information it is possible to predict the fraction of an MSO's subscribers a programming network is likely to have access to at any point in its lifecycle. Due to the small number of programming networks in any single age category, we use linear regression to develop a more robust estimate of the relationship between the subscriber penetration rate and the age of a network. As described in the technical appendix, ordinary least squares estimation yields:

$$Pen = 0.0489 + 0.0493 \cdot Age - 0.0008 \cdot Age^2$$

The regression predicts that five years after launch a network will be available to 27.42 percent of the subscribers of the MSOs that carry the network.[211] Thus, 0.2742 will appear in the formula above in place of the variable for penetration rate, "Pen"[212]

62. We note that this calculation represents an average value for penetration after five years. Alternatively, we could have chosen a value that reflects the typical penetration rate of either smaller or larger networks. As the Commission previously has noted, some networks can survive with greater or

[206] *1999 Cable Ownership Order*, 14 FCC Rcd at 19117 ¶ 49.

[207] This data is drawn from the Cable Price Survey as of January 1, 2006.

[208] We base our calculation on the responses of Comcast, Time Warner, Cox, Charter, Adelphia, Cablevision, BrightHouse, Mediacom, Insight, Cable One, RCN, BellSouth, Knology, WideOpenWest, and WEHCO. These firms comprise approximately 90 percent of cable subscribers. We are unable to account for DBS in this calculation because we do not have information on the number of subscribers to the various tiers of service sold by each DBS operator.

[209] We exclude premium networks such as HBO and Showtime as well as high-definition and foreign language networks. Premium networks operate on a significantly different economic footing than other networks since they are sold individually to consumers. We exclude high-definition networks because this market remains in early growth phases and does not provide sufficient long-term data to develop estimates. Foreign language networks are excluded since in many cases the fixed costs of program production are recovered in the home countries of the networks and therefore the need to recover fixed costs from U.S. distribution is lessened. Our estimation procedure uses data on 135 programming networks.

[210] *12th Annual Video Competition Report*, 21 FCC Rcd at 2622-43, Tables C-1 and C-2.

[211] Due to rounding, the listed regression coefficients do not generate exactly 27.42 percent, which is calculated using the full precision of the regression coefficients.

[212] *See supra* ¶ 40.

fewer subscribers than the average.[213] Our direction under the statute, however, is to protect the flow of programming to consumers, while taking account of the efficiencies and benefits that may result from increased ownership. If we selected a penetration rate more suitable for networks that can survive with fewer subscribers, our calculations would result in a higher limit. Such a limit, though, would allow the largest MSO to impede the flow of programming from networks that require an average amount of subscribers or more to survive, in contravention of our statutory mandate. Reliance on the penetration rate for more widely distributed networks, on the other hand, would produce a lower horizontal limit potentially maximizing the flow of programming to consumers, but also denying consumers the benefits that result from economies of scale that cable operators can achieve through growth. Choosing an average network penetration rate balances these two concerns and thus fulfills our mandate most effectively.

4. Accounting for Coordinated Action

63. In 1999, the Commission implicitly used a coordination index of two because it was concerned that two cable operators could jointly refuse to carry a programming network and therefore prevent the network from becoming viable. The court rejected the Commission's analysis and held that the Commission must present empirical or theoretical evidence that coordinated action is likely in order to sustain a limit based on a theory of joint action.

64. TAC asserts that the behavior of the two largest cable operators, Comcast and Time Warner, is indicative of joint action. It contends that if one of the two cable operators agrees to carry a programming network, the other is likely to carry it as well. In addition, TAC contends that if one of the operators denies carriage, the other is very likely to deny carriage as well.[214] CFA claims that "[t]he Court's standard, which requires the Commission to demonstrate the virtual certainty of collusion in analyzing the impact of two cable operators' refusal to grant carriage, fails to recognize that when a small number of firms are present in an industry, parallel actions accomplish virtually all of the anticompetitive harm of collusive activity."[215] Consequently, they propose that the Commission should assume that the two largest firms engage in some level of coordination. Kang provides evidence that vertically integrated cable operators are more likely to carry the recently launched programming networks of other vertically integrated cable operators than are non-integrated cable operators. He states that this is evidence that a group of cable operators might collectively deny carriage to a start-up programming network.[216] Ordover and Higgins suggest that Kang's results may be evidence that non-integrated cable operators favor non-integrated programming networks rather than evidence of discrimination on the part of integrated cable operators.[217] Erdem, Katz and Morgan argue that Kang's study suffered from severe sample selection bias and that his study fails to distinguish between large MSOs and all owners of multiple cable networks. They also contend that Kang's conclusion that vertically integrated cable operators are likely to collude, causing harm to consumers and reduced entry by new networks, does not necessarily follow

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[213] *2001 Further Notice*, 16 FCC Rcd at 17323 ¶ 13.

[214] TAC Comments to the *2005 Second Further Notice* at 29.

[215] CFA asserts that the Commission should continue to use the open field approach, and account for both Comcast and Time Warner in its analysis, not just the top firm as it has in the past. CFA maintains that the Commission should include Comcast and Time Warner in its open field analysis because "[n]o current programmer denied carriage by either of the top two firms has come close to achieving the necessary reach to attract advertising on the scale that is widely recognized as the threshold for long term survival of national programming." CFA Comments to the *2005 Second Further Notice* at 15-17.

[216] Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study* at 21.

[217] Comcast Reply Comments to the *2005 Second Further Notice*, Ordover & Higgins Decl. at 11-12.

from the observed pattern of carriage his study purports to detect.[218]

65. Other commenters state that the Commission's theory of collusion is flawed. AT&T asserts that the Commission's collusion theory is "entirely conjectural" and cannot stand without substantial evidence showing the existence or likelihood of unilateral or collusive anticompetitive actions by MSOs.[219] In particular, AT&T asserts that cable operators have not disfavored unaffiliated programmers or unfairly favored affiliated programmers in their carriage decisions.[220] Comcast finds a lack of evidence that collusion is "likely" and criticizes the Commission for not addressing (1) how or why participants in an allegedly collusive refusal to deal would reach an agreement to refuse to deal in the first place, (2) the extent to which they would have an incentive to deviate from such agreement, (3) whether participants could punish a firm for deviating, and (4) the role of maverick firms in preventing coordinated interaction.[221] NCTA emphasizes that the court rejected the Commission's open field approach because the Commission lacked evidence that the top two cable operators are likely to collude.[222] Reiterating its comments filed in response to the *2001 Further Notice*, NCTA states that beyond the lack of evidence of actual collusion, there is "no reason to believe that MSOs have any incentive to engage in such activity."[223]

66. Accordingly, we do not include an adjustment for coordinated action. While commenters have provided some evidence that large cable operators tend to carry the same programming networks, they have not provided a sufficient set of arguments to demonstrate that it is coordinated action rather than individual action generating the observations. It is not surprising, for example, that nearly every cable MSO carries the most popular networks. Such an observation likely arises from the popularity of the network, not necessarily from collusive action. Thus, we lack evidence to draw definitive conclusions regarding the likelihood that cable operators will behave in a coordinated fashion.

5. The Cable Horizontal Ownership Limit

67. After careful consideration of the evidence before us, including the language and intent of the statute and our understanding of the programming market, we determine that use of the open field approach to set a horizontal limit is the most appropriate means of ensuring that the flow of programming to consumers is not unfairly impeded. The modified open field method that we adopt in this *Order* yields a horizontal ownership cap that ensures that no cable provider is so large that it can prevent a programmer from serving "the number of viewers needed for viability – independent of concerns over anticompetitive conduct."[224] We apply the first three values discussed above to the ownership limit formula, and reject the fourth value concerning coordinated action. The values we apply are (1) a total

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[218] Comcast March 16, 2007 Further Supp. Comments, Erdem, Katz, and Morgan Decl. at 44-45.

[219] AT&T Comments to the *2001 Further Notice* at 67-68

[220] *Id.*

[221] Comcast Comments to the *2005 Second Further Notice* at 75. Comcast Supp. Comments at 12-14. Comcast Further Supp. Comments at 11. Comcast March 16, 2007 Further Supp. Comments, Erdem, Katz, and Morgan Decl. at 38-43.

[222] NCTA Comments to the *2005 Second Further Notice* at 13-14.

[223] *Id.* at 13-14 (quoting NCTA Comments to the *2001 Further Notice* at 19 (arguing that cable operators' incentives to collude to deny carriage to a programming network or to artificially suppress the price or quality of programming are constrained by the same changed marketplace conditions that make unilateral anticompetitive activity unlikely)). NCTA also claimed in its comments in response to the *Second Further Notice* that the open field approach is too difficult to apply empirically because there is not a single "critical mass" of households that a programmer must achieve to be viable. *Id.* at 14.

[224] *Time Warner* II, 240 F.3d at 1131-32.

MVPD subscriber number of 95,784,478;[225] (2) a minimum viable scale of 19,030,000;[226] and (3) a subscriber penetration rate of 0.2742.[227] The calculation generates a result of .28, which reflects that as long as the largest cable operator does not serve more than 28 percent of all MVPD subscribers, that operator cannot significantly undermine the viability of a programming network by refusing to carry the network.[228]

68. Based on this calculation, we conclude that a horizontal limit of 30 percent will best serve the public interest. As noted above, the Commission first established a 30 percent horizontal ownership limit in 1993.[229] In 1999, the Commission revised the method by which horizontal ownership was calculated, but retained a 30 percent ownership limit.[230] Although that limit was subsequently remanded by the court, the Commission has continued to apply the 30 percent limit in merger reviews since that time and the media marketplace has continued to operate under this requirement. Therefore, for consistency, we adjust the limit slightly upward, from 28 percent to 30 percent. This small upward adjustment is unlikely to cause harm. We do not believe this minor adjustment will adversely affect our ability to provide the protection the statute requires. Moreover, this adjustment will have no affect on the largest cable operator in the market today because it would satisfy either a 28 percent or 30 percent limit.[231] For these reasons, we set a 30 percent horizontal limit.

69. In setting the 30 percent limit, we must, as instructed by the *Time Warner II* court, assess "the determinants of market power in the cable industry" and draw "a connection between market power and the limit set."[232] Comcast argues that the Commission should account for MVPD competition by excluding for the purposes of determining compliance with the ownership limit all of an MSO's cable subscribers in areas where the Commission has granted effective competition petitions.[233] Admittedly, the focus of our open field analysis is on cable operators' influence and impact on the upstream programming market, not on their economic position in the downstream MVPD market. We recognize that competition in the downstream market may affect the ability of a large cable operator to prevent successful entry by a programming network, and that our open field analysis does not directly measure this. For example, it is possible that a large cable operator may be pressured by competition in the MVPD market, principally from DBS, into carrying reasonably popular networks within the five-year timeframe contemplated in our probability survival analysis, thus leaving a large operator unable to "unfairly impede" the success of that network.[234] Alternatively, however, a cable operator controlling

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[225] *See supra* ¶ 43.

[226] *See supra* ¶ 57.

[227] *See supra* ¶ 61

[228] 1- (19,030,000 / (0.2742 x 95,784,478)) = 0.28.

[229] *See 1993 Second Report and Order,* 8 FCC Rcd at 8567, ¶ 3.

[230] *See 1999 Cable Ownership Order,* 14 FCC Rcd at 19101, ¶ 6.

[231] Letter from Peter H. Feinberg, Assoc. General Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Sept. 24, 2007) at 1-2. In its latest filing, Comcast states that it reaches 27.1 percent of U.S. MVPD subs. Comcast uses a figure of 95.7 million for total MVPD subscribers, based on an August 2006 Kagan report. http://fccweb01w.fcc.gov/prod/ecfs/retrieve.cgi?native_or_ df=pdf&id_ document =6518508506.

[232] *Time Warner II*, 240 F.3d at 1133-34.

[233] Comcast Supp. Comments at 27-28.

[234] The modified open field approach, however, appropriately accounts for the effects of competition from DBS providers in one important respect. Because of the inclusion of DBS subscribers in the calculation of the size of the MVPD market, continued growth of DBS subscribers will increase the size of the open field available to a network, which will be reflected in our calculations by a reduction of cable operators' share of the MVPD market. This effect (continued....)

more than 30 percent of the MVPD market may be able to significantly undermine the viability of a reasonably popular programming network by indefinitely refusing to carry it, notwithstanding that network's level of popularity and carriage by DBS competitors. We note that measuring cable operators' downstream market power, and determining its impact on the flow of programming in the upstream retail market, is quite difficult, and that no commenter has provided a reliable and appropriate theoretical framework or empirical data by which to do so.[235] Thus, we are forced to make a determination concerning whether competition in the retail MVPD market negates the importance of having a sufficiently open field and, without the benefit of definitive evidence, we conclude for the reasons detailed below that it does not.

70. Most importantly, we do not believe that a single new programming network, having failed to gain carriage on the largest cable operator's system, would have a good chance of both gaining carriage on other MVPDs and then induce enough of the large cable operator's subscribers to switch to the other MVPDs either to allow the network to gain sufficient subscribership to be financially viable, or to place substantial pressure on the large cable operator to carry the network within a reasonable period of time. Specifically, we find that the shift of subscribers would be unlikely to be significant or sufficient to permit entry for several reasons. First, due to switching costs, consumers are reluctant to switch MVPDs except when there is a large benefit.[236] Second, cable operators reduce the likelihood of switching by offering non-video services (e.g., broadband Internet access and phone service), giving the cable operator some market power in video service.[237] Third, consumers are unlikely to switch providers to gain access to new programming because video programming is a product, the quality of which cannot be known with certainty until it is consumed. It is difficult for consumers to know whether they would

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is real, not hypothetical. From 2001 through 2005, the number of MVPD subscribers increased by 8.16 million, but the number of cable subscribers *decreased* by 1.3 million, and cable's share of MVPD subscribers declined from 77.54 percent to 69.41 percent. During the same period, DBS providers added 10 million subscribers, and their share of MVPD subscribers increased from 18.67 percent to 27.72 percent. *See 2005 Video Competition Report*, Table B-1.

[235] There is no simple rule concerning the relationship between the level of competition in the downstream market and the likelihood of foreclosure in the upstream market. It is possible for the downstream market to be a perfect monopoly while the upstream market is perfectly competitive, if many firms that are monopolists in their local market compete with each other for inputs in the upstream market. It is also possible for the downstream market to be perfectly competitive, while each firm has a perfect monopsony in the upstream market.

[236] *See* Andrew Wise & Kiran Duwadi, "*Competition between Cable Television and Direct Broadcast Satellite – It's More Complicated than You Think*," FCC Working Paper, Jan. 2005, at 21("Wise & Duwadi"). For example, DBS providers typically require customers to agree to one year service commitments to receive subsidized equipment and installation. Customers that do not meet credit criteria may be required to purchase equipment. DirecTV requires customers who do not have a sufficiently high credit score to pay an upfront fee of $200 to $300 that is paid back to them in the form of credits each month they remain subscribers. These subscribers receive their full upfront fee back in $5 increments over 40 to 60 months. *Satellite Business News Fax Update*, Mar. 7, 2007 at 2. These costs are not insignificant and will limit the number of subscribers willing to switch MVPDs. Moreover, we note that some cable subscribers are unable to switch to DBS because it requires a sufficient view of the southern sky in order to aim the receiving dish at the DBS satellites. In northern latitudes, as well as highly urbanized or forested locations, it may not be possible to receive a DBS signal because of these line of sight issues. Residents on the north side of large buildings with multiple dwelling units may also be unable to receive a DBS signal. For an explanation of various signal interference issues, *see* http://www.dishnetwork.com/content/faq/general_information/index.shtml.

[237] Wise & Duwadi at 21; *Adelphia Order*, 21 FCC Rcd at 8286 ¶¶ 186-87. *See also 2005 Video Competition Report* at ¶ 72 (noting that DBS providers' penetration rate was 36 percent in areas where cable operators did not offer advanced services such as digital cable, cable modem service, or telephone service, but only 16 percent in areas where cable operators offered some but not all of those advanced services, and only 14 percent where cable operators offered all three).

enjoy viewing a network which they have never seen before. While consumers can and do switch MVPDs in response to the loss of a program network with which they are familiar, they are unlikely to respond similarly for a program network that distributes content that they have never viewed.[238] Consequently, DBS provides very little competitive pressure when it comes to carriage of new program networks.[239]

71. In addition, without an open field that is large enough, many new programming networks might not even attempt to enter the market without a contract from the largest cable operator. If entering programming networks are unable to sign contracts with MVPDs that have enough subscribers to ensure reasonable prospects for survival, they may be unable to secure financing.[240] Competitive pressures from DBS will not provide any assistance to networks that do not launch due to a lack of financing. In addition, smaller MVPDs may not want to carry networks that lack access to a sufficient number of subscribers to ensure a reasonable chance for survival because of the problems associated with carrying a weak network that eventually disappears (e.g., consumer dissatisfaction with changing channel lineups or other issues relating to obtaining substitute programming).[241] If we allowed the largest cable operator to become so large that the open field is insufficient to permit a new programming network to enter the market with a reasonable probability of survival without gaining carriage on the largest cable operator, then competing MVPDs might not even have the opportunity to carry the network because it will not enter the market at all, thus impeding the flow of new programming to consumers.[242] We therefore cannot rely on competitive pressures to ensure the flow of programming if there is not a sufficiently large open field for entry, because a large cable operator may not be aware, or may not care, that its choices have prevented entry by a cable network that would have become popular.[243]

72. For all of these reasons, we think that it is quite likely that a large cable operator controlling more than 30 percent of the MVPD market would have the power to significantly undermine

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[238] Even in instances where the program network may be highly valued by consumers, a cable operator may refuse carriage for unspecified reasons. For example, Comcast did not carry the regional sports network MASN in the Washington D.C. area, despite the strong value consumers place on the programming of regional sports networks, and apparently with little harm to its subscribership count. *Adelphia Order*, 21 FCC Rcd at 8286 at ¶¶ 186-87.

[239] Our *Cable Price Report* demonstrates the lack of aggressive substitution between cable and DBS. In the large number of communities in which there has been a finding that the statutory test for effective competition has been met due to the presence of DBS service, competition does not appear to be restraining price as it does in the small number of communities with a second cable operator. *Report on Cable Industry Prices* at ¶ 14 (Dec. 27, 2006).

[240] TAC Comments to the *2005 Second Further Notice* at 26 (citing *How Come Vultures Don't Flock to Cable*, CABLEWORLD, Apr. 5, 2005.

[241] The America Channel indicates that investors are reluctant to provide financing, and MVPDs are reluctant to provide carriage, for a new network whose survivability is uncertain. For investors and MVPDs, a new network's likelihood of survival is indicated by the network's ability to obtain contracts for carriage with the largest MVPDs. Thus a new network that fails to obtain carriage with the largest MVPDs will find it difficult to even enter the market, because it will be unable to obtain the financing and carriage necessary to begin operations. TAC Comments to the *2005 Second Further Notice* at 15-17, 22-23, 25-27, 31-32.

[242] The open field approach, in fact, ensures that the downstream MVPD market provides effective competition to the incumbent cable operator, because it ensures that a popular programming network that fails to secure distribution by the incumbent cable operator will have sufficient subscribership to enter the marketplace viably and make itself available to competing MVPDs. Without an adequate open field, a programming network's failure to secure distribution by the largest cable operator may prevent the network from entering the market, thus denying consumers the ability to receive desired programming from any MVPD.

[243] A cable operator will not learn of its mistake, or find out the cost of not carrying the network, unless there is a sufficiently large open field for the network to gain carriage and demonstrate its popularity with other MVPDs.

the viability of a reasonably popular programming network by refusing to carry it, despite the presence of competitive pressures from DBS and other competing MVPDs. Moreover, evidence submitted by The America Channel illustrates the importance of large cable operators in reaching the minimum viable scale. It shows that of the 92 non-premium nationally–distributed networks with more than 20 million subscribers, only one network, INSP – Inspiration Network, was able to reach that scale without receiving carriage from the largest cable operator.[244] Also evident is the importance of the second largest cable operator, Time Warner. Only two networks were able to reach 20 million subscribers without carriage by Time Warner,[245] and no networks reach that scale without carriage by at least one of these large operators. This demonstrates the sensitivity of network survival to the size of the largest cable operator. Very few networks can reach minimum viable scale without carriage on a large MVPD. The record indicates that no networks with more than 24 million subscribers have been able to do so without carriage by both of the largest cable operators.[246]

73. Finally, to the extent that there is an inherent lack of certainty as to the operation of the MVPD market for these purposes, we believe that the statute provides guidance as to how we should weigh the relevant risks in formulating our regulations. In particular, while the statute compels the Commission to "take particular account" of the market structure, "including the nature and market power of the local franchise," it also requires us to "*ensure* that no cable operator . . . can unfairly impede . . . the flow of video programming from the video programmer to the consumer."[247] Thus, although some uncertainty exists, we believe that our priority should be to make sure that a single cable operator may not significantly undermine the viability of programming network, and we do so here by establishing a 30 percent limit.

D. Relevant Geographic Market

74. In 2005, the Commission tentatively concluded that the relevant market for purposes of setting the horizontal ownership limit under the Section 613(f) is no greater than the United States.[248] In other words, the Commission tentatively concluded that the international market is not relevant to the establishment of the horizontal limit. We now affirm that tentative conclusion.

75. Very few commenters address the relevant geographic market. Comcast disagrees with the Commission's tentative conclusion to ignore the international distribution market, given what it characterizes as the increasing importance of the market to the health and vitality of programmers. Comcast states that the global marketplace offers program providers with significant alternative outlets for content. It claims that media companies have a strong presence in overseas markets and that many media companies view international sales as critical to their profit margins. As an example, Comcast states that in 2004, 22 percent of Disney's $30.8 billion in revenue and 35 percent of the company's $4.5 billion in operating profit came from the international market.[249]

76. We find it reasonable to concentrate our inquiry on the effects of cable concentration in the United States. The Commission has concluded in the past that the programming market is at least national.[250] No commenter has presented economic data that define the contours of the programming

[244] TAC Comments to the *2005 Second Further Notice*, Exh. 2 at 56-58.

[245] According to TAC, these two networks are TV One and The NFL Network. *Id.* at 58.

[246] Id. at 56-58.

[247] 47 U.S.C. § 533(f)(2)(A), (C) (emphasis added).

[248] *2005 Second Further Notice*, 20 FCC Rcd at 9413 ¶ 70.

[249] Comcast Comments to the *2005 Second Further Notice* at 47.

[250] *See AT&T-Comcast Order*, 17 FCC Rcd at 23261 ¶ 43; *Adelphia Order*, 21 FCC Rcd at 8237 ¶ 68.

market. Instead, commenters make the uncontroversial point that United States programmers sell some programming to international buyers and also rely on distribution outlets other than cable or DBS.[251] Accordingly, we limit our inquiry to the national programming market and cable operators' effect on it. Nevertheless, our open field analysis accounts for the effects of international distribution in estimating the minimum viable scale needed for a programmer to achieve viability.

E. Regional Limits

77. The Commission also sought comment on whether and to what extent a regional limit on concentration would better effectuate the statutory mandates set forth in Section 613(f)(2).[252] Very few commenters directly address the issue of regional limits.[253] Instead, a number of commenters discuss the importance of regional concentration to any analysis of market power. Some of these commenters offer proposals for taking regional concentration into account in formulating a horizontal limit, but no commenter proposes specific regional limits or a defined approach for devising them. As explained below, we decline to adopt regional limits.

78. CFA and MAP advocate adoption of regional limits, arguing that market power in the cable industry is expanding and is being reinforced by control and distribution of regional sports programming.[254] In addition, CFA and CWA ask the Commission to go beyond simply counting subscribers, and, instead, to consider the effects of regional clustering, which they claim reinforces cable operators' market power and creates significant barriers to entry.[255] Citing to the *11th Annual Video Competition Report*, CFA points out that DBS penetration is lower in areas where cable operators carry regional sports networks.[256] In addition, CWA states that clustering allows MSOs to attain regional market shares that make them indispensable to local and regional programming networks seeking distribution.[257]

79. CFA also asks the Commission to consider, in both transaction review and its efforts to adopt a horizontal limit, the importance of the top 25 markets, which comprise 49 percent of the national TV households and 59 percent of advertising revenues.[258] Specifically, CFA states that in determining whether a merging firm would exceed the national limit, the numerator (the market share of the merging firm) should be increased by the advertising premium of the top markets.[259] In addition, as discussed above, it states that the Commission should discount the relative weight of DBS by applying a 10 percent discount in the denominator to reflect the advertising-revenue-adjusted weight of satellite subscribers.[260]

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[251] *See, e.g.*, AT&T Broadband Comments to the *2001 Further Notice* at 30; Comcast Comments to the *2005 Second Further Notice* at 45-48; Comcast Comments to the *2001 Further Notice* at 17-20.

[252] *2005 Second Further Notice*, 20 FCC Rcd at 9413 ¶ 70.

[253] *See, e.g.*, AT&T Comments to *2001 Further Notice* at 30-34; Comcast March 16, 2007 Further Supp. Comments at 20-22.

[254] CFA Comments to the *2005 Second Further Notice* at 25-26; MAP Comments to the *2005 Second Further Notice* at 29-35.

[255] CWA Comments to the *2005 Second Further Notice* at 8-10, CFA Comments to the *2005 Second Further Notice* at 54-55.

[256] CFA Comments to the *2005 Second Further Notice* at 53-54.

[257] CWA Comments to the *2005 Second Further Notice* at 8-10.

[258] CFA Comments to the *2005 Second Further Notice* at 55-56.

[259] *Id.*

[260] *Id.* at 58-60, 69.

When these factors are considered, CFA concludes that the horizontal limit should be 20-30 percent.[261]

80. DirecTV maintains that satellite providers are at a competitive disadvantage in the broadcast and regional programming market because clustering has given cable operators a significant advantage due to their large subscriberships within regions. It states that cable operators can withhold or raise prices of "must-have" regional programming from rivals because "the cost of withholding programming from rivals may be outweighed by whatever premium the cable operator is willing to pay for the exclusivity."[262] DirecTV, however, does not advocate regional caps, but instead believes that the Commission's transaction review process should be used to address regional concentration issues.[263] Specifically, DirecTV states that, in transaction review, the Commission can define geographic and product markets more accurately based on the facts of each case.[264] It also states that the Commission should not consider all programming to be of equal value to consumers. For instance, DirecTV asserts that withholding regional sports is more likely to cause subscriber shifts than withholding other types of programming.[265]

81. Comcast claims that it does not impede the flow of programming in regional markets, as evidenced by the increase in the number of regional networks.[266] It notes that since 1998, regional networks have grown from 61 to 96, an increase of 57 percent, and that from 1998 to 2004, regional sports networks have increased from 29 to 38 and news networks have increased from 25 to 40.[267] Comcast claims that clustering benefits subscribers because it enables cable operators to compete with DBS operators, which have "ubiquitous national coverage allowing for cost-effective national advertising campaigns and tie-ins to national retail chains to aggressively market services and promotions."[268] It also states that clustering enables cable operators to compete with incumbent LECs with respect to geographic scope, and it provides examples of the markets where it has launched its competitive digital voice service.[269] Finally, Comcast asserts that clustering stimulates investment and delivery of new local and regional programming services, offering examples of markets in which it has launched cable news networks.[270]

82. The Commission previously considered whether to adopt regional subscriber limits, and declined to do so.[271] In 1993, the Commission stated that other provisions of the 1992 Cable Act were specifically designed to introduce local competition and would better address issues regarding regional concentration.[272] In addition, the Commission observed that there was no evidence in the record

[261] *Id.* at 68-70.

[262] DirecTV Comments to the *2005 Second Further Notice* at 5.

[263] *Id.* at 6-7

[264] *Id.* at 8.

[265] *Id.* at 8-9. In its reply comments, Comcast notes DirecTV's opposition to regional limits, and claims that if DirecTV and other competitive outlets offer programmers a viable alternative to cable for program distribution, then a cable ownership limit is unnecessary. Comcast Reply Comments to the *2005 Second Further Notice* at 8-10.

[266] Comcast Comments to the *2005 Second Further Notice* at 43-45.

[267] *Id.* at 43-44

[268] *Id.* at 51.

[269] *Id.* at 51-53

[270] *Id.* at 51-53.

[271] *1993 Second Report and Order*, 8 FCC Rcd at 8572-73 ¶ 16; *1999 Cable Report and Order*, 14 FCC Rcd at 19124 ¶ 63.

[272] *1993 Second Report and Order*, 8 FCC Rcd at 8572-73 ¶ 16.

indicating that any anticompetitive effects outweighed the potential benefits of cable clustering, such as regional programming, upgraded cable infrastructure, and improved customer services.[273] In 1999, the Commission found that the record in the proceeding showed that the benefits of clustering – including market efficiencies and the deployment of telephony and Internet access services – outweighed any alleged anti-competitive effects on local programming.[274] We do not have a sufficient evidentiary basis here to reverse the Commission's previous decisions. Instead, we conclude that our case-by-case review of transactions will allow us to identify and prevent any unfair impediments to the flow of programming that may arise from regional concentration.

83. We also decline to adjust systematically the market share of a merging firm by advertising premiums, as suggested by CFA. We do not have definitive evidence in the record that distributors in all of the top 25 DMAs command significant premiums over, for example, the next 25 DMAs. Certainly, in some of the top DMAs, the existence of many outlets for advertising, and competition among them, may serve to reduce advertising rates. Rather than determine a mathematical formula for examining this issue, we will examine all aspects of regional concentration, including the market for advertising and its effect on programmers, when proposed transactions are before us.

F. Application of the Limit

84. In 1999, the Commission revised the prior methodology by counting against a cable operator's horizontal limit only those cable subscribers served by its "incumbent cable franchises," excluding new subscribers gained through overbuilding "non-incumbent cable systems."[275] The Commission also endorsed the use of published, current and widely-cited industry data to establish the number of MVPD subscribers nationwide, for purposes of establishing cable operators' share of the market.[276]

85. CFA challenges the Commission's exclusion of non-incumbent cable franchise subscribers (the overbuild exception) in calculating compliance with the horizontal limit.[277] Additionally, CFA challenges the *1999 Cable Ownership Order's* reliance upon industry data to establish cable operators' share of the MVPD market.[278] As explained below, we reject in part and accept in part CFA's specific challenges to the overbuild exception. Specifically, we find that the exception creates the potential for a cable operator's use of the overbuild exception to reduce the open field below the required 70 percent, and we therefore eliminate it. At the same time, we reject CFA's challenge to the use of industry data for purposes of establishing a cable operator's share of the market to determine compliance with the cap.

1. Exclusion of Overbuild, Non-Incumbent Cable Systems from the Horizontal Limit Calculation

86. We conclude that excluding overbuild subscribers from the numerator in the calculation of a cable operator's market share is fundamentally inconsistent with the open field approach we utilize to calculate the horizontal limit and must be eliminated. The overbuild exception would allow a cable operator near the horizontal limit to use the exception to exceed the 30 percent limit, which would have

[273] *Id.* at 8573 ¶ 17

[274] *1999 Cable Ownership Order*, 14 FCC Rcd at 19124 ¶ 63.

[275] *See 1999 Cable Ownership Order*, *see also* 47 C.F.R. §§ 76.503(b)-(d)(defining incumbent cable franchise as including all franchises, and all successors in interest to those franchises, that were in existence on October 20, 1999, the date on which the *1999 Cable Ownership Order* was released).

[276] *See 1999 Cable Ownership Order*, 14 FCC Rcd at 19112 ¶ 35.

[277] CFA Comments to the *2001 Further Notice* at 45.

[278] *Id.* at 45-47.

the effect of reducing the open field below the 70 percent that is necessary to ensure that no single operator can, by simply refusing to carry a video network, cause it to fail. Accordingly, we conclude that exclusion of subscribers in overbuild cable franchises should be eliminated.[279]

2. Reliance on Industry Data

87. In addition, CFA faults the *1999 Cable Ownership Order* for allowing cable operators to rely on industry-wide data in determining and reporting their share of the MVPD subscribership market. CFA maintains that because industry reporting services derive information and figures from cable operators and vary in their reported figures, the *1999 Cable Ownership Order's* reliance upon such reported data invites manipulation[280] and forum shopping.[281] Additionally, CFA claims that the *1999 Cable Ownership Order* improperly delegated the government's role in monitoring and regulating the cable industry to private research and reporting services and thereby disallowed public input and scrutiny.[282]

88. In an *ex parte* letter, CFA challenges the Commission's reliance on this standard based on several disclosures of questionable subscriber counts.[283] CFA questions whether third-party publishers are a reliable source of industry data. CFA alleges that these publishers have a disincentive to question the information provided by cable operators because the operators are valued customers who provide a substantial amount of revenue to the publishers for their products and services. CFA contends that even if industry analysts questioned the numbers provided by cable operators, they would have no means to audit the numbers.[284] Further, CFA asserts that MVPDs have incentives to over- or under-report their subscriber figures for various reasons. For example, CFA claims that small cable operators and competitive MVPDs have an incentive to inflate their subscriber numbers to impress Wall Street, which inflates the pool of total MVPD subscribers and reduces the apparent percentage of the largest MVPDs, while the largest MVPDs have an incentive to lower their subscriber counts to avoid the Commission's horizontal ownership limit.[285]

89. CFA recommends that the Commission require all MVPDs to regularly file subscriber counts with the Commission under penalty of sanctions for falsifying information and that the Commission should establish the figure for total MVPD subscribers.[286] CFA further urges the Commission to consider deliberate overcounts provided to private entities or government agencies, such as in statements to the Securities and Exchange Commission, evidence of bad character, such that licensees would jeopardize their licenses by engaging in such activities.[287] NCTA contends that these

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[279] In light of our decision to eliminate the overbuild exception, we need not reach CFA's argument regarding our statutory authority to retain it.

[280] CFA Comments to the *2001 Further Notice* at 45-47.

[281] CFA Feb. 28, 2000 Reply at 6.

[282] CFA Comments to the *2001 Further Notice* at 45-47; CFA Feb. 28, 2000 Reply at 8-10.

[283] CFA cites to DirecTV's counting of subscribers who merely expressed interest in its service and its subsequent revision of its subscriber numbers significantly downward to correct its improperly inflated subscriber count. CFA Oct. 11, 2002 *ex parte* at 3. CFA also cites to inflated subscriber counting by Charter and Adelphia. *Id.* at 3-4.

[284] *Id.* at 4.

[285] *Id.* at 4.

[286] *Id* at 4-5.

[287] *Id.* at 5.

proposed remedies are inappropriate and would be counterproductive.[288]

90. We will continue to rely on widely accepted industry reports to establish the total number of U.S. MVPD subscribers. For purposes of establishing cable operators' market share and compliance with the horizontal rule provisions, the *1999 Cable Ownership Order* endorsed the use of any published, current, and widely cited industry data source to establish estimates of nationwide MVPD subscribership.[289] Section 613(f) directs the Commission to establish reasonable limits.[290] The *1999 Cable Ownership Order* accepted a certain degree of variance, estimation, and double counting, cognizant of the fact that the horizontal rule provisions are based on estimates.[291] Utilization of current, widely accepted industry data represents a reasonable means by which to gauge cable operators' share of the MVPD market and fulfills the Commission's mandate under the statute.[292] We reject CFA's contention that by relying on industry data, we improperly delegated our statutory obligations to monitor and regulate the cable industry. Utilization of industry data merely affords a reasonable means by which to estimate cable operators' market share. We agree with NCTA that the use of third-party industry-wide data conserves administrative resources and is consistent with this agency's reliance on industry data to carry out regulatory functions in other areas.[293]

91. We agree with CFA that cable operators should be expected to report their subscriber figures accurately. The Commission's rules require any cable operator serving 20 percent or more of nationwide MVPD subscribers to certify, prior to acquiring additional MVPDs, "that no violation of the national subscriber limits prescribed in this section will occur as a result of [its] acquisition [of additional cable systems]."[294] These rules do not prescribe a particular form of certification. We clarify here that certifications must be executed by an officer of the corporation and must state that the number of attributable subscribers served by the applicant is reported accurately in the certification. If this number varies from subscriber counts the cable operator has provided to the Commission in other contexts, other government agencies, financial institutions, or third-party publishers of industry-wide subscriber data, the certification shall disclose and explain the nature of such discrepancies.[295] We will consider specific allegations of misrepresentation on a case-by-case basis.

[288] Letter from Daniel L. Brenner, Senior Vice President, NCTA, to Marlene H. Dortch, Secretary, FCC (Oct. 23, 2002) at 2 ("NCTA Oct. 23, 2002 *ex parte*").

[289] *See 1999 Cable Ownership Order*, 14 FCC Rcd at 19112 ¶ 35.

[290] *See* 47 U.S.C. § 533(f)(1); *Senate Report* at 80.

[291] *See 1999 Cable Ownership Order*, 14 FCC Rcd at 19112 ¶ 35.

[292] NCTA states that industry data research and reports are reliable, and are followed and utilized "by all segments of the video industry, not merely cable operators." NCTA Feb. 17, 2000 Opposition at 16. NCTA maintains that small operators will not inflate their numbers because their license fees are based on their actual subscribership, and large cable operators will not understate their numbers because they are required to report their compliance with the horizontal limit. *Id.* at 14-15.

[293] *E.g.*, 47 U.S.C. § 548(g) (annual assessment of MVPD competition); 47 U.S.C. § 159 (regulatory fees).

[294] *See* 47 C.F.R. § 76.503(g).

[295] Certifications need not identify each and every subscriber count that has been provided to another entity. Rather, they should explain whether the filing company has reported or routinely reports subscriber counts to other entities using methodologies that differ from those used for purposes of compliance with the Commission's horizontal limit.

III. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Attribution

1. Background

92. The cable attribution rules seek to identify "those corporate, financial, partnership, ownership, and other business relationships that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holders should be subject to the Commission's regulation."[296] Similarly, the broadcast attribution rules define which financial or other interests in a licensee must be counted in applying the broadcast ownership rules, and seek to identify "those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[297] At the same time, the attribution rules "permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry."[298] Depending on the particular substantive rule and objective to be accomplished, a variety of different attribution standards are used in the Commission's rules.[299]

93. *The General Attribution Standard.* In the cable television context, there are two strains of cable attribution rules: "the general attribution standard,"[300] relevant here, and the "program access attribution standard."[301] The general attribution standard, which applies to the cable horizontal

[296] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19014, 19016 ¶ 2 (1999) (*1999 Cable Attribution Order*).

[297] *Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross Interest Policy*, 14 FCC Rcd 12559, 12560 ¶ 1 (1999) (*1999 Broadcast Attribution Order*), *recon. granted in part, 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*, 16 FCC Rcd 1097 (2001) (*Broadcast Ownership Reconsideration Order*), *stayed*, 16 FCC Rcd 22310 (2001).

[298] *See 1999 Broadcast Attribution Order,* 14 FCC Rcd at 12562-63 ¶ 5.

[299] The broadcast attribution rules are detailed in Note 2 of Section 73.3555 of the Commission's rules. *See* 47 C.F.R. § 73.3555 Note 2. In the cable context, as discussed below, there are two strains of attribution rules, the general attribution standard, which applies to the cable horizontal and vertical ownership rules, and the program access attribution standard. *See infra* ¶ 93. The Commission also applies attribution rules in other services not pertinent here, such as, for example, in the wireless context. *See* 47 C.F.R. § 1.919(2)(C)(ii).

[300] The general cable attribution standard applies to the horizontal ownership limits, 47 C.F.R. § 76.503; the channel occupancy limits, 47 C.F.R. § 76.504; the cable/SMATV cross-ownership limits, 47 C.F.R. § 76.501(d); the cable-telco buyout prohibition, 47 C.F.R. § 76.505; and the effective competition test, 47 C.F.R. § 76.905.

[301] The Commission adopted the more restrictive program access attribution standard for its rules imposing specific behavioral restraints on cable operators and programmers, such as its rules regarding program access and program carriage, "both of which were designed, in part, to prevent cable operators from using their market power to engage in improper conduct." *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules, Notice of Proposed Rulemaking*, 13 FCC Rcd 12990, 12993 ¶¶ 5-6 (1998) (*1998 Cable Attribution NPRM*). The program access attribution standard attributes an entity's stockholdings, whether voting or non-voting, and all partnership interests above 5 percent. The single majority shareholder exemption and insulated limited partner exceptions do not apply. *See 1999 Cable Attribution Order*, 14 FCC Rcd at 19018 ¶ 4. The program access attribution rules apply to cable commercial leased access, 47 C.F.R. § 76.970; program access, 47 C.F.R. § 76.1000; carriage discrimination, 47 C.F.R. § 76.1300; open video systems, 47 (continued....)

ownership limits and vertical channel occupancy limits, is similar to the broadcast attribution rules. As the Commission has noted, "the broadcast attribution standard governs broad structural rules, such as the horizontal cable ownership limits and vertical channel occupancy limits that are designed to ensure competition and diversity in the video marketplace."[302] The Commission also observed that the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 expressly suggested use of the broadcast attribution standard in the context of the horizontal ownership and channel occupancy rules.[303] The general attribution standard and the broadcast attribution rules attribute corporate voting stock interests of five percent or more.[304] In other words, an investor owning five percent or more of the voting stock of a cable company will be attributed with all of that company's subscribers for purposes of the Commission's ownership limits. For specified "passive" institutional investors,[305] voting stock interests of 20 percent or more are attributable in both the cable and broadcast contexts.[306] Non-voting stock interests, options, warrants, and debt are not attributable, subject to the equity and debt (ED) rule in the cable context,[307] and the equity/debt plus (EDP) rule in the broadcast context, [308] both of which are discussed below.

94. Both the general cable attribution standard and the broadcast attribution rules include a single majority shareholder exemption, which provides that a minority shareholder's corporate voting interests will not be attributed where a single corporate shareholder owns more than 50 percent of the outstanding voting stock.[309] The Commission justified the exemption, which it first adopted for the broadcast attribution rules in 1984, on the grounds that without the agreement or assistance of any other shareholder, a minority shareholder cannot ordinarily direct the activities of a company when a single person or entity can outvote all other shareholders.[310] The Commission later found that the same

(Continued from previous page)
C.F.R. § 76.1500; asset transfers between a cable operator and affiliate, 47 C.F.R. § 76.924(i); and rate pass-throughs for programming services between a cable operator and an affiliated programmer, 47 C.F.R. § 76.922(f)(6). The program access attribution standard is not at issue here.

[302] *See 1998 Cable Attribution NPRM*, 13 FCC Rcd at 12993 ¶ 4 (citing *Implementation of Sections 11 & 13 of Cable Television Consumer Protection and Competition Act of 1992 – Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8568-69, 8577-79 (1993)).

[303] *See 1999 Cable Attribution Order*, 14 FCC Rcd at 19017-18 ¶ 3; *1998 Cable Attribution NPRM*, 13 FCC Rcd at 12993 ¶ 4. *See also* Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et. seq.* (1992).

[304] *See Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Amendment of Sections 73.35, 73.240, 73.636 and 76.501 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems, Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television, and Newspaper Entities*, 97 FCC 2d 997, 1005-06 ¶ 14-15 (1984) (*1984 Broadcast Attribution Order*), *recon. in part*, 58 R.R.2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986) ("*1985 Attribution Reconsideration Order*"). *See also* 47 C.F.R. § 73.3555 Note 2(a).

[305] Passive investors are "investment companies, as defined by 15 U.S.C. § 80a-3, insurance companies, and banks holding stock through their trust departments in trust accounts." 47 C.F.R. § 76.501 Note 2(b).

[306] 47 C.F.R. § 73.3555 Note 2(b); 47 C.F.R. § 76.501 Note 2(b).

[307] 47 C.F.R. § 76.501 Notes 2(e) & (i); *see also 1999 Cable Attribution Order*, 14 FCC Rcd at 19049-50 ¶¶ 88-89.

[308] 47 C.F.R. § 73.3555 Notes 2(e) & (i).

[309] *See* former 47 C.F.R. § 73.3555 Note 2(b); former 47 C.F.R. § 76.501 Note 2(b).

[310] *See 1984 Broadcast Attribution Order*, 97 FCC 2d 997, 1008-09 ¶ 21; *1999 Cable Attribution Order*, 14 FCC Rcd at 19044-46 ¶¶ 74-81.

rationale justified application of the exemption to the cable attribution rules.[311]

95. *EDP/ED Attribution Rules and Single Majority Shareholder Exemption.* In 1995, the Commission initiated a broad review of its broadcast attribution rules based on several considerations: (1) changes in the broadcasting industry and in the multiple ownership rules since its revision of the attribution rules ten years earlier and its consequent desire to ensure that the attribution rules remained effective in identifying interests to be counted for purposes of applying the multiple ownership rules; (2) concerns raised that certain nonattributable investments, while permissible under the rules in effect, may have permitted a degree of influence that warranted attribution; (3) concerns that individually permissible cooperative arrangements between broadcasters were being used in combination, resulting in significant influence in multiple stations that the multiple ownership rules were intended to prohibit; and (4) the need to address attribution treatment of Limited Liability Companies.[312]

96. In the *1999 Broadcast Attribution Order* proceeding, the Commission adopted the EDP attribution rule. Under the broadcast EDP attribution rule, where an investor is either (1) a major program supplier (supplying over 15 percent of a broadcast station's total weekly broadcast programming hours); or (2) a same-market media entity subject to the broadcast multiple ownership rules, its interest in a licensee or other media entity will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33 percent of the total assets (equity plus debt) of the licensee or media entity.[313] In other words, attribution results where the financial interest exceeds 33 percent and there is a triggering relationship, *i.e.*, either the investor is a major program supplier or a same-market media entity subject to the broadcast multiple ownership rules. The EDP rule was intended to operate "in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad."[314] The Commission targeted its remedy to address its concerns.[315]

97. In the *1999 Broadcast Attribution Order*, the Commission did not eliminate the single majority shareholder exemption. Rather, by adopting the EDP attribution rule, it narrowed the availability of that exemption. The EDP attribution rule limits the applicability not only of the single majority shareholder exemption, but also the limited partnership exemption and the exemptions for nonvoting stock and debt, under the broadcast attribution rules.[316]

98. In 1998, after commencing the broadcast attribution proceeding, the Commission also began a rulemaking to consider modifying the cable attribution rules, in light of developments in the cable industry, including numerous strategic alliances, partnerships, system swaps, and mergers and acquisitions of cable entities.[317] In the *1999 Cable Attribution Order*, the Commission revised several aspects of its cable attribution rules to track changes made to the broadcast attribution rules, and it adopted the cable ED attribution rule based on similar reasons expressed when it adopted the broadcast EDP rule. The cable ED rule attributes financial interests that exceed 33 percent of the total asset value (equity plus debt) of the entity in which the investment is held. Unlike the EDP rule, no other triggering

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[311] *See 1993 Second Report and Order*, 8 FCC Rcd at 8580-81¶¶ 34-35.

[312] *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12561 ¶ 2.

[313] 47 C.F.R. § 73.3555 Notes 2(a) & (i).

[314] *Id.* at 12573 ¶ 27.

[315] *Id.* at 12580 ¶ 41.

[316] *See 1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579 ¶ 36.

[317] *1998 Cable Attribution NPRM*, 13 FCC Rcd at 12999 ¶ 16.

relationships are required for attribution under the ED rule where the requisite financial interest is present.[318] Both the EDP rule and the ED rule are designed to improve the precision of the Commission's attribution rules with respect to otherwise non-attributable interests by capturing those financial interests that afford the incentive and ability to exert significant influence, as well as those that create significant common economic interests.

99. In contrast to the Commission's decision to retain the single majority shareholder exemption in the broadcast attribution context and to adopt the EDP attribution rule to address concerns regarding the under inclusiveness of the attribution rules,[319] the Commission eliminated the single majority shareholder exemption from the general cable attribution rules in the *1999 Cable Attribution Order*. It found insufficient evidence to support retaining the exemption and expressed concern that a minority shareholder might be able to exert significant influence over a company even when a single majority shareholder exists.[320] Thereafter, on reconsideration of the broadcast attribution rules, the Commission eliminated the exemption in the broadcast context as well, relying, in part, on the rationale for eliminating the exemption in the cable context.[321]

100. The *Time Warner II* court reversed, remanded, and vacated the Commission's elimination of the single majority shareholder exemption in the cable attribution rules.[322] The court held that the Commission's decision to eliminate the single majority shareholder exemption in the cable context was not sufficiently justified and dismissed the Commission's stated rationales that there was no record to support retaining the exemption and that no one claimed to be using the exemption.[323] Finding that absence of current use is no reason to delete an exemption and that the removal of the exemption affected companies' investment plans, the court noted that the elimination was a "tightening of the regulatory screws" and therefore required some affirmative justification.[324]

101. The Commission subsequently suspended the elimination of the single majority shareholder exemption in the broadcast context as well, thereby allowing the exemption for the broadcast and cable/MDS[325] attribution rules pending resolution of this cable ownership proceeding.[326] While *Time*

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[318] *See 1999 Cable Attribution Order*, 14 FCC Rcd at 19047 ¶ 82.

[319] *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*, 11 FCC Rcd 19895, 19901 ¶ 12 (1996).

[320] *1999 Cable Attribution Order*, 14 FCC Rcd at 19046 ¶ 81.

[321] *Broadcast Ownership Reconsideration Order*, 16 FCC Rcd at 1116-17 ¶¶ 41-44.

[322] *See Time Warner II*, 240 F.3d at 1139-43. The D.C. Circuit both vacated and remanded the Commission's decisions on the single majority shareholder exemption and the no sale prong of the ILP exemption. *See id.*, 240 F.3d at 1128, 1144.

[323] *Time Warner II*, 240 F.3d at 1142-43.

[324] *Id.* at 1143.

[325] In 2004, the Commission changed the name of "Multichannel Distribution Services" to "Broadband Radio Service." *see Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico*; 19 FCC Rcd 14165 (2004) ("*MDS/ITFS Order*").

Warner II did not directly address the Commission's elimination of the broadcast single majority shareholder attribution exemption, the Commission recognized that it had relied in part on the rationale rejected by the *Time Warner II* court in eliminating the exemption in the broadcast context.[327] The Commission also noted that a suspension would enable it to consider all evidence provided in response to its *2001 Further Notice* on whether to reinstate the single majority shareholder exemption in the broadcast context and that the suspension would allow consistent processing of pending and future applications, among other benefits.[328]

102. *Limited Partnership Interests.* Under the attribution rules governing partnership interests, general partnership and limited partnership interests are attributable regardless of the level of equity held.[329] An exception from attribution applies only to those limited partners who meet the Commission's insulation criteria. In setting specific guidance as to what kind of insulation is sufficient to exempt a limited partnership interest from attribution, the Commission originally established seven criteria, collectively referred to herein as the "ILP criteria," which, if met would make it safe to presume that a limited partner would not be materially involved in the management and operations of the media-related activities of the partnership.[330]

103. The Commission considers attribution in the partnership context separately from attribution in the corporate context because, in the abstract, all partners may bind the partnership, and because partnership governance is far more a matter of the terms of the specific partnership agreement than it is of any general standards mandated by law or practice.[331] Thus, for example, a partner contributing no equity might be entitled to a majority of the economic return or have very significant managerial control.[332] Also, the Commission has recognized that because of the flexibility a partnership structure offers, certain partners, like individual corporate shareholders, may be involved on a largely passive basis or without any significant potential to influence or control the partnership operations in a manner that should trigger the Commission's ownership rules. Accordingly, the Commission developed insulation criteria to recognize these circumstances.

(Continued from previous page)

326 *See Order,* 16 FCC Rcd 22310 (2001) ("*Suspension Order*"). In the *2001 Further Notice*, adopted to address the issues on remand of the *Time Warner II* decision, the Commission incorporated, by reference, the three petitions for reconsideration and comments supporting reconsideration of the Commission's decision to eliminate the single majority shareholder exemption in the context of the broadcast attribution rules filed by NBC, Paxson, and Viacom. *See 2001 Further Notice*, 16 FCC Rcd at 17356-57 ¶ 91.

327 *See Suspension Order*, 16 FCC Rcd at 22311-12 ¶ 4.

328 *Id.*

329 47 C.F.R. § 76.501 Note 2(a).

330 *1999 Cable Attribution Order*, 14 FCC Rcd at 19038 ¶ 57 n.163. The Commission adopted insulation criteria in the broadcast context because there is no uniform state law that establishes criteria with respect to the scope of permissible limited partner activities. State laws vary significantly and may fail to provide sufficient assurance that a limited partner will lack the ability to significantly influence or control the partnership's activities of concern. The Commission initially decided to use the Revised Uniform Limited Partnership Act ("RULPA") when determining which limited partnership interests should be attributed and which should be held exempt. Ultimately, however, the Commission rejected that approach. It noted that the RULPA provisions were not uniformly interpreted and that the scope of permissible limited partner activities was not statutorily set by the RULPA, but rather was determined by the limited partnership agreement. The Commission also decided that the RUPLA provisions did not provide adequate assurance that limited partners would not significantly influence or control partnership affairs. *1985 Attribution Reconsideration Order*, 1 FCC Rcd at 804 ¶ 9.

331 *See id* at 803-04 ¶ 9.

332 *See 1984 Broadcast Attribution Order*, 97 F.C.C.2d at 1022 ¶ 50; 47 C.F.R. §§ 73.3555 Notes 2(a)&(g), 76.501 Note 2(a), 76.503 Note 2(c).

104. In the *1999 Cable Attribution Order*, the Commission revised the attribution rules governing partnership interests. The sixth insulation criterion applicable to cable ownership had generally barred a limited partner from performing "any services to the partnership relating to its media activities." Based on concerns that the cable attribution ILP criteria might inhibit investments in cable Internet and telephony services, the Commission narrowed the sixth insulation criterion, in the cable context, to prohibit only services performed by the limited partner for the partnership that are materially related to the partnership's *video programming* activities. The Commission thereby broadened the range of activities that could be performed without loss of insulation for the limited partner.[333]

105. Thereafter, in its review of the *AT&T-MediaOne* license transfer application, the Commission clarified that the revised insulation criterion maintains the prior prohibition against a limited partner's sale of video programming to the partnership. Thus, a limited partner that operates cable systems and owns programming interests is prohibited from selling programming to the partnership ("the no-sale rule or criterion").[334] Noting the prior insulation criterion prohibiting the sale of services related to the media activities of the partnership, the Commission reasoned that, "given that a cable operator's core media activity is the provision of video programming, there is no service more material to a cable operator's video programming than the sale of programming to the cable operator."[335] The Commission also relied upon its interpretation of the sale of services insulation criterion in its *Twentieth Holdings* decision.[336] The Commission made clear that the revised insulation criterion was intended to allow a limited partner to insulate its partnership interest even if the partner participates in the partnership's other media activities, including the provision of telephony services, so long as the partner is not materially involved in the partnership's video-programming related activities. It also noted that the rule thus maintains the earlier prohibition against an insulated limited partner's sale of video programming to the partnership.[337]

106. The *Time Warner II* court reversed, remanded, and vacated the Commission's application of the cable limited partnership insulation rule that barred vertically integrated insulated limited partners from selling video programming to their general partner entities.[338] The court found that the no-sale

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[333] *Id.* at 19039-41 ¶¶ 61-64; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9838 ¶ 45 (2000) (*AT&T-MediaOne Order*). In various filings, CFA challenges the modification of the insulation rule provisions for limited partners and for officers and directors for purposes of implementing the cable ownership limits. CFA argues that the *1999 Cable Attribution Order* impermissibly modified the insulation criteria in violation of Section 613(f). In opposition, NCTA asserts that the *1999 Cable Attribution Order's* adoption of the video programming insulation standard is consistent with the language and purpose of Section 613(f). In its comments, CFA reiterates arguments raised in its petition for reconsideration of the *1999 Cable Attribution Order*, which the Commission had dismissed as moot in the *2001 Further Notice*, 16 FCC Rcd at 17316 ¶ 2 n.11. We will address this issue in the Order arising out of the *Further Notice*.

[334] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9839-40 ¶¶ 47-49 (finding that the no-sale rule is intended to determine whether a shareholder has the ability or influence to control a licensee but determining that under the facts of the transaction, adequate safeguards exist to protect against such influence); *see also AT&T-Comcast*, 17 FCC Rcd at 23279-82 ¶¶ 84-88.

[335] *AT&T-MediaOne Order*, 15 FCC Rcd at 9839-40 ¶ 47.

[336] *See Twentieth Holdings Corp. (Transferor) and Edward W. Brooke and Hugh L. Carey, Trustees (Transferees)*, 4 FCC Rcd 4052, 4054 ¶¶ 15-17 (1989) (*Twentieth Holdings*).[336] Because video programming is at the heart of media activities, the Commission in *Twentieth Holdings* held that an investor in a broadcast station could not shield its investment from attribution if it sold video programming to the company in which the investment was made. *Id.*

[337] *AT&T-MediaOne Order*, 15 FCC Rcd at 9840 ¶ 48.

[338] *See Time Warner II*, 240 F.3d at 1139-43.

criterion is not rationally related to the goal of circumscribing a limited partner's control of, or influence on, the partnership's video programming decisions. The court recognized that a programmer might secure certain contractual terms giving the programmer some control over the programming choices of the partnership, but reasoned that the exercise of such power is barred by the criterion restricting communications related to the video programming business of the partnership. The court further noted that, even if the criterion did not bar such communications, "the bargaining opportunity would depend on the desirability of the partner's programming, not on its status as a partner."[339]

107. *2001 Further Notice.* In the *2001 Further Notice*, the Commission invited commenters to address, *inter alia*, the *Time Warner II* court's remand of the cable single majority shareholder exemption and the cable no-sale prong of the ILP exemption.[340] The Commission asked for empirical and/or theoretical evidence, including evidence from the cable industry or evidence based on studies of other industries, to support or contradict the Commission's prior decisions on these issues.[341] It also sought comment on whether to retain or eliminate the broadcast single majority shareholder exemption, having incorporated into the proceeding requests that the Commission reconsider eliminating that exemption.[342] We incorporate those petitions for reconsideration and comments into the record in this proceeding.[343] We issue this *Further Notice* to update the record and obtain more specific comment on all of these attribution issues.

2. Single Majority Shareholder Exemption

108. As discussed above, the Commission eliminated the single majority shareholder exemption from the general cable attribution rules because the record (1) failed to show that commenters were using this exemption and (2) lacked "credible arguments that it should be retained."[344] In the record to date, the majority of commenters support retaining the single majority shareholder exemption.[345] They state that the Commission has received no empirical evidence and little theoretical evidence to support eliminating the exemption, and no evidence of abuse or harm from the exemption.[346]

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[339] *Id.*

[340] *2001 Further Notice*, 16 FCC Rcd at 17355-56 ¶¶ 88-90, 17358-59 ¶¶ 93-97.

[341] *Id.*

[342] *Id.* at 17356-57 ¶¶ 91-92. *See also* National Broadcasting Company, Inc., Petition for Reconsideration, MM Docket Nos. 94-150, 92-51, and 87-154 (Mar. 12, 2001); Paxson Communications Corporation, Petition for Reconsideration, MM Docket Nos. 94-150, 92-51, and 87-154 (Mar. 15, 2001); Viacom Inc., Petition for Reconsideration, MM Docket Nos. 94-150, 92-51, and 87-154 (Mar. 15, 2001). These three petitions all challenged the Commission's reliance on the rationale for eliminating the exemption rejected by the *Time Warner* II decision, which is discussed below.

[343] *Id.*

[344] *1999 Cable Attribution Order*, 14 FCC Rcd at 19046 ¶ 81.

[345] *See, e.g.*, AT&T Comments to *2001 Further Notice* at 77-81; Media General Comments to *2001 Further Notice* at 3; Paxson Comments to *2001 Further Notice* at 3; Time Warner Comments to *2001 Further Notice* at 38-40; Viacom Comments to *2001 Further Notice* at 5-21; NAB Comments to *2001 Further Notice* at 5-10; Cablevision Comments to *2001 Further Notice* at 12-14; Comcast Comments to *2001 Further Notice* at 41-42; and Fox et. al. Reply Comments to *2001 Further Notice* at 3. Because the D.C. Circuit reversed and remanded the elimination of the single majority shareholder exemption, Comcast argues that it was effectively reinstated by the court's decision. *See* Comcast Reply Comments to *2001 Further Notice* at 41-42.

[346] *See, e.g.*, AT&T Reply Comments to *2001 Further Notice* at 29; Comcast Reply Comments to *2001 Further Notice* at 41-42; Paxson Comments to *2001 Further Notice* at 3; Viacom Comments to *2001 Further Notice* at 10; NAB Reply Comments to *2001 Further Notice* at 2; and Media General Comments to *2001 Further Notice* at 2, 5.

109. In this *Further Notice*, we seek to update the record. We tentatively conclude that the record to date supports reinstating the single majority shareholder exemption and seek comment on that general conclusion. We invite commenters to address whether the goals of the attribution rules -- capturing interests that convey the potential to exert significant influence such that they should be counted in applying the ownership rules, while not unduly restricting capital investment, as well as precision and regulatory certainty-- would be better served by retaining or eliminating the exemption. Can a minority shareholder in a corporation with a single majority shareholder exert significant influence or control such that its interest should be counted? If so, how can it exert such influence or control? We ask that commenters provide empirical or theoretical evidence to support their proposals or points of view. In particular, we seek comment on whether eliminating the exemption would have a negative impact on capital investment, particularly in small businesses. Although the *Time Warner II* decision addressed only the cable exemption, we tentatively conclude that the cable and broadcast single majority shareholder exemptions should be applied in the same manner to promote consistency in the processing of applications.[347] We seek comment on this tentative conclusion and on whether there is any reason to apply the exemption differently in the broadcast and cable contexts.[348]

110. Generally, the record in response to the *2001 Further Notice* supports the conclusion that the existence of a single majority shareholder sufficiently attenuates the voting power of minority shareholders such that it should not be a basis for attribution. While corporate management could ordinarily be expected to be influenced by a 5 percent shareholder who is one of the largest shareholders in a widely held corporation, we tentatively conclude that corporate management cannot be expected to be significantly influenced by a minority shareholder where there is a single majority shareholder. Further, as a general matter, a majority shareholder has the right to manage and control a corporation.[349] Therefore, we tentatively conclude that a single majority shareholder, absent a special shareholder agreement, would be able to outvote any minority shareholders on any issue, including the election of the corporation's board of directors.[350] We seek comment on these tentative conclusions.

111. We also invite comment as to whether other factors weigh in favor or against attribution of minority shareholders in a corporation with a single majority shareholder. Could a minority shareholder exert influence either by virtue of its access to confidential information or by threatening to sell shares to depress the share price?[351] Are there other situations in which contractual rights such as super-majority voting rights agreements afford minority shareholders voting power notwithstanding the general voting control of the single majority shareholder?

112. We have sought to make the Commission's attribution rules bright-line tests in order to

[347] *Cf.*, *Suspension of the SMS Elimination Order*, 16 FCC Rcd at 22311-12 ¶ 4.

[348] We ask that parties submit comments only in MM Docket Nos. 92-264, 94-150, and CS Docket No. 98-82. All other proceedings referenced in the caption are being terminated or severed. *See supra* note 4.

[349] *See* AT&T Comments to *2001 Further Notice* at 77-78 (citing 12B FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 5783); *see also* NAB Reply Comments to *2001 Further Notice* at 3; NCTA Comments to *2001 Further Notice* at 27 n. 54; Time Warner Comments to *2001 Further Notice* at 39; and Paxson Reply Comments to *2001 Further Notice* at 3.

[350] *See* Viacom Comments to *2001 Further Notice* at 8.

[351] Viacom notes that a minority shareholder's threat to trade the stock based on confidential information may be illegal. *See* Viacom Comments to *2001 Further Notice* at 16-17 (citing 17 C.F.R. § 243.100 (requiring that if a corporation discloses material, non-public information to one of its shareholders under circumstances in which it is reasonably foreseeable that the shareholder will either purchase or sell the corporation's shares on the basis of that information, the corporation must make a public disclosure of that information unless the shareholder expressly agrees to hold that information in confidence)).

provide reasonable certainty and predictability to our regulatees, to ease administrative processing, and to avoid unduly disrupting capital flow.[352] As a bright-line test, the single majority shareholder exemption may, like any other attribution limit or regulatory line an agency draws, miss some interests that could conceivably convey significant voting power or significant influence given special contractual rights or other factors. Are there such situations? If so, are these situations adequately covered by the EDP and ED attribution rules and by the Commission's "discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review"?[353]

3. Cable Insulated Limited Partnership Criteria

113. Under the insulated limited partnership or "ILP" criteria of the cable attribution rules, a limited partner can avoid attribution for purposes of Sections 76.501, 76.503, and 76.504 of the Commission's cable ownership rules if it is not "materially involved" in the management and operations of the partnership with respect to its video programming activities.[354] "Non-material" involvement is permitted in some significant partnership activities, without attribution, so that limited partners can ensure that their investments are protected.[355] More particularly, a limited partnership interest is not attributable for purposes of applying those ownership rules if it satisfies each of the following seven criteria, which are referenced in, but not included in, the rule and which identify those situations in which it is reasonable to assume no material involvement in partnership decisions by the limited partner.[356] A limited partner seeking to avoid attribution in the cable context cannot:

> (1) act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video-programming enterprises of the company; (2) serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video-programming enterprises; (3) communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video-programming business; (4) vote on the admission of additional general partners subject to the power of the general partner to veto any such admissions; (5) vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) perform any services for the partnership materially relating to its video-programming activities, except that a limited partner may make loans to or act as a surety for the business; and (7) become actively involved in the management or operation of the video-programming businesses of the partnership.[357]

114. Following the court's decision in *Time Warner II*, a question remains regarding the extent to which a limited partner may engage in the sale of programming to the general partnership and still remain exempt from attribution. The court found no fault with the limitation on communications relating to video programming as an attribution insulation criterion, but it also found no basis for using

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[352] *See 1999 Broadcast Attribution Order*, 14 FCC Rcd at 12560, 12562, 12581 ¶¶ 1, 5, 43.

[353] *See id.* at 12581 ¶ 44.

[354] *See 1999 Cable Attribution Order*, 14 FCC Rcd at 19039-41 ¶¶ 61-64.

[355] *See Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television, and Newspaper Entities*, 1 FCC Rcd 802, 803 ¶ 6 (1986).

[356] *See 1999 Broadcast Attribution* Order, 14 FCC Rcd at 12615-16 ¶ 130; Reexamination *of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 58 R.R.2d 604, 618-19 ¶ 46 (1985) (*1985 Broadcast Attribution Reconsideration Order*).

[357] *See* 47 C.F.R. § 76.503 Note 2(b)(2); 47 C.F.R. § 76.504 Note 1(b)(2); *1999 Cable Attribution Order*, 14 FCC Rcd at 19040-41 ¶ 64.

programming sales by the limited partner to the partnership to trigger attribution.[358] Left unclear is the manner and extent to which program promotions, sales, marketing, and contractual negotiations may take place without breaching the limitation on communications, as well as the scope of a limited partner's ability to perform services for the partnership materially related to its video programming activities without the interest being attributable.

115. The Commission received few comments on these issues in response to the *2001 Further Notice*. Although some commenters generally supported abandoning the "no-sale" provision of the cable limited partner insulation criteria, they did not address specifically whether a limited partner could sell programming to the partnership without violating the bar on communications with respect to the day-to-day operations of the video programming business.[359] While one commenter supported retaining the no-sale provision, it did not explain how the sale of programming to the partnership would increase the influence or control of the limited partner.[360] Therefore, we seek additional comment on this issue to address these issues and to update the record.

116. In particular, we seek comment with respect to the court's conclusion "that the no-sale criterion bears no rational relation to the goal" of ensuring that the limited partner will not be materially involved in the video-programming activities of the partnership.[361] Does the sale of programming to the partnership by a limited partner provide the limited partner with the ability or the incentive to influence the partnership to make specific decisions, and, if so, would the limited partner otherwise have no such ability or incentive absent its status as a seller of programming?

117. In reversing and remanding the prohibition on the sale of programming by an insulated limited partner, the court relied, in part, on the continued existence of the prohibition on communications with respect to the day-to-day operations of the video programming business. Thus, the court noted that a programmer might secure contract terms giving it some control over a partnership's programming choices, "but, given the independent criterion barring even communications on the video-programming business,... exercise of that power would seem to be barred."[362] The court also noted, however, that "even if it weren't, the bargaining opportunity would depend on the desirability of the partner's programming, not on its status as a partner."[363]

118. We ask commenters to address the court's conclusion that the sale of programming is not rationally related to the control of program choices. Does status as a limited partner affect the willingness of the partnership to carry the partner's programming? Does it affect the terms and conditions on which that programming is carried? Are there scenarios in which a limited partner could improve its bargaining position with respect to the sale of its programming to the partnership by virtue of its status as a limited partner? If so, how could the limited partner achieve such a result without engaging

[358] *See Time Warner II*, 240 F.3d at 1143.

[359] *See* AT&T Comments at to *2001 Further Notice* 71-73, Time Warner Comments to *2001 Further Notice* at 41-42, Fox *et. al* Reply Comments to *2001 Further Notice* at 5; Comcast Reply Comments to *2001 Further Notice* at 42; AT&T Comments to *2001 Further Notice* at 71; and Time Warner Comments to *2001 Further Notice* at 40-41. The commenters note only that a limited partner cannot be materially involved in the video programming activities of the partnership because the limited partner is separately prohibited from communicating about day-to-day activities. They do not address how the two provisions relate.

[360] *See* CFA Reply Comments to *2001 Further Notice* at 27-28.

[361] *Time Warner II*, 240 F.3d at 1143 (stating that the Commission "has drawn no connection between the sale of programming and the ability of a limited partner to control programming choices.").

[362] *Id.*

[363] *Id.*