BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Commission's Cable Horizontal and	)	MM Docket No. 92-264
Vertical Ownership Limits	)	

COMMENTS OF TIME WARNER CABLE

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Summary

Any channel-occupancy limit that the Commission might impose would be subject to strict First Amendment scrutiny. The purpose of a channel-occupancy limit would be to promote speech diversity by prohibiting discrimination on the basis of affiliation. But a speaker's inclusion of affiliated speech is the essence of free expression. First Amendment doctrine recognizes this by treating measures intended to alter speech content as "content-based." Content-based measures are subject to strict scrutiny: they must be narrowly tailored to a compelling governmental interest. That principle applies whether or not a speaker is subject to competition, but access rights intended to promote diversity are particularly vulnerable where competition is as vibrant as it is in the cable industry.

A channel-occupancy limit could not survive even intermediate scrutiny, under which it would have to promote an important government interest and be no more burdensome than essential to the furtherance of that interest. The *FNPRM* suggests that a channel-occupancy limit is necessary because cable operators discriminate against independent programmers. But the *FNPRM* cites no evidence of such discrimination: the two papers on which it relies do not show this. To the extent that the papers show even disparate treatment, it is *de minimis*; a prophylactic measure thus would not be justified. At a minimum, the Commission may not impose a percentage limit that is unrelated to the problem that it seeks to solve. Nor may the Commission apply the limit to systems that are subject to effective competition.

If the Commission does revive its channel-occupancy limit, it should not expand it. The statute does not permit the Commission to treat as "affiliated" video-programming services owned by broadcasters. It makes no sense to treat as affiliated video-programming

services owned by other cable operators: cable operators have no economic interest to favor such video-programming services, and the Commission may not assume collusion. The Commission also should not expand the channel-occupancy limit beyond 75 channels. The Commission previously formulated a sound policy basis for a 75-channel limitation (expanded channel capacity reduces the need for a channel-occupancy limit), and the *FNPRM* does not identify any ground to turn back on that reasoning. Finally, the Commission should not extend the channel-occupancy limit to regional networks. The Commission previously recognized that exempting regional networks is necessary to encourage investment. Although there are now more regional networks than there were before, that does not demonstrate that cable operators would continue to invest in new regional services without the exemption.

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This is the third time that the Commission has invited channel-occupancy-related comment on remand from the D.C. Circuit's decision in *Time Warner II*. Counting the round of comment preceding the Commission's 1993 *Second Report* and the round of reconsideration comment in its wake, this is the Commission's fifth attempt at promulgating a channel-occupancy limit that can survive judicial review. The Commission's 1993 *Second Report* adopted a 40% limit, but, because that number was not in any way related to a cogent rationale, the D.C. Circuit rejected it as being "plucked . . . out of thin air."[1] In the three notices of proposed rulemaking issued after the D.C. Circuit's decision, the Commission has never taken the necessary first step toward correcting that error: it has never identified a rationale that might point to a fixed percentage limit. It is time to acknowledge the inevitable: a plausible rationale cannot be found.

Background

Section 613(f)(1)(B) of the Communications Act provides: "In order to enhance effective competition, the Commission shall . . . conduct a proceeding . . . to prescribe rules

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[1] *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001) ("*Time Warner II*").

and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[2] Subsection (f)(2) states that, in crafting a limit, the Commission must target only "unfai[r] imped[iments]" to "the flow of video programming from the video programmer to the consumer."[3] The same subsection instructs the Commission to "take particular account of the market structure . . . of the cable television industry," and to make rules that "reflect the dynamic nature of the communications marketplace."[4]

In the wake of Section 613(f)(1)(B)'s enactment in 1992, the Commission conducted a rulemaking proceeding adopted a vertical limit barring any cable operator from filling more than 40% of its channels with affiliated video-programming services.[5] The Commission said at the time: "a 40% limit is appropriate to balance the goals of increasing diversity and reducing the incentive and ability of vertically integrated cable operators to favor their affiliated programming, with the benefits and efficiencies associated with vertical integration."[6] At the same time, the Commission restricted its limit in three ways: services would be considered "affiliated" only if they were affiliated with the particular cable operator

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[2] 47 U.S.C. § 533(f)(1)(B).

[3] *Id.* § 533(f)(2)(A).

[4] *Id.* § 533(f)(2)(C), (E).

[5] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8565 (1993) ("*Second Report*").

[6] *Id.* ¶ 68.

involved,[7] the 40% limit would apply only to 75 channels,[8] and regional services would not be counted as affiliated.[9]

In 1995, the Commission reaffirmed each of its conclusions on reconsideration.[10] Although the Commission stated that it "continue[d] to believe that the 40% limit strikes the appropriate balance," the Commission again did not explain why it drew the line at 40%.[11] The Commission did explain why it reaffirmed restrictions on its channel-occupancy limit, including the 75-channel limit, and the exemption of regional services: it repeated the explanations that it had provided in the *Second Report*.[12]

The D.C. Circuit invalidated the Commission's channel-occupancy limit in 2001, criticizing the Commission on two grounds.[13] *First*, the court held that the Commission had failed to provide a plausible rationale for pegging the limit at 40%. As the court explained, the Commission seemed "to have plucked the 40% limit out of thin air," and had done

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[7] *See id.* ¶ 52.

[8] *See id.* ¶ 84.

[9] *See id.* ¶ 78.

[10] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Vertical Ownership Limits*, Memorandum Opinion and Order on Reconsideration of the Second Report and Order, 10 FCC Rcd 7364, ¶ 14 (1995) ("*Recon Order*").

[11] *See id.*

[12] *Id.* ¶ 30 (concluding that petition for reconsideration "does not challenge the value of local and regional programming, or our conclusion that given the cost and limited appeal of such programming, an exception may be necessary to encourage continued MSO investment"); *id.* ¶ 34 ("we still believe that the vast expansion of channel capacity may obviate the need for a rigid occupancy limit").

[13] *See Time Warner II*, 240 F.3d at 1137-39.

nothing to explain "[w]hat are the conditions that make 50% too high and 30% too low."[14] Because of that failure, the court held, the Commission's order could not survive arbitrary and capricious review, much less intermediate First Amendment scrutiny.[15]

Second, the court held that the Commission had acted unlawfully in refusing to exempt systems subject to effective competition. The court noted that MVPD-level competition affects cable operators' "ability to indulge in favoritism for in-house productions."[16] Thus, the court held, the Commission was required to provide a justification for its failure to exempt cable systems that are subject to effective competition.[17] If the "effective competition" measure of the Communications Act's rate regulation provision was not appropriate for the purpose, the court held, the Commission should use some other measure — not skip the question altogether.[18] The court was also unconvinced by the argument that rivals might also favor affiliated speech. As the court noted, "the Commission nowhere explains why, in the pursuit of diversity, the independence of competing vertically integrated MVPDs is inferior to the independence of unaffiliated programmers."[19]

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[14] *Id.* at 1137.

[15] *See id.*

[16] *Id.* at 1138.

[17] *See id.*

[18] *See id.* at 1138-39.

[19] *Id.* at 1139.

In the wake of the D.C. Circuit's decision, the Commission invited another round of comment in 2001.[20] In doing so, the Commission acknowledged that "the competitive MVPD marketplace has evolved since the time the vertical limits were adopted, both locally and nationally, particularly as a result of DBS."[21] The Commission further acknowledged that, "with increased channel capacity and a trend away from cable ownership of programming, the landscape of the cable industry has undergone marked changes."[22] The Commission therefore asked commenters to address whether the statute left it the option to "forgo imposing" a new vertical limit.[23] In response, not a single commenter's opening comments urged the Commission to readopt a channel-occupancy limit.

The issue remained dormant for several years, but, in 2005, the Commission took the issue up again.[24] The Commission now decided that it lacked authority to refrain from imposing a vertical limit.[25] The Commission acknowledged, however, that, "on the record before us, we lack the evidence necessary under *Time Warner II* to establish a firm channel

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[20] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312 (2001) ("*2001 NPRM*").

[21] *Id.* ¶ 77.

[22] *Id.*

[23] *Id.* ¶ 83.

[24] *See The Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374 (2005) ("*2005 NPRM*").

[25] *See id.* ¶¶ 48, 147.

occupancy limit . . . ."[26] Accordingly, the Commission sought a whole new round of comments on potential harms and benefit of vertical integration.[27]

Apparently believing the record outdated again, the Commission now seeks post-remand comment for a third time.[28] In doing so, the Commission acknowledges that, despite multiple rounds of comment, "the record evidence so far is inadequate to allow us to set [a channel occupancy] limit."[29] And, the Commission once again fails to do what the D.C. Circuit said it must do in any final order: formulate a rationale that would justify any particular percentage limit. The Commission also fails to address the other ground on which the D.C. Circuit rested its decision — effective competition. The Commission does signal that it is considering a channel-occupancy limit even more stringent than the one the court invalidated: it proposes to redefine "affiliated" services as including services affiliated with another cable operator,[30] it proposes to eliminate the 75-channel ceiling,[31] and it asks whether it should include regional services in the cap.[32]

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[26] *Id.* ¶ 162.

[27] *Id.* ¶¶ 150-162.

[28] *The Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, FCC 07-219, 2008 WL 360668 (rel. Feb. 11, 2008) ("*FNPRM*").

[29] *Id.* ¶ 3.

[30] *See id.* ¶ 145.

[31] *See id.* ¶ 143.

[32] *See id.* ¶ 144.

Argument

I. ANY CHANNEL-OCCUPANCY LIMIT WOULD TRIGGER STRICT FIRST AMENDMENT SCRUTINY.

The channel-occupancy provision of Section 613(f)(1)(B) adds a prophylactic measure to the program-carriage provision of Section 616(a)(3).[33] The latter prohibits cable operators "from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation."[34] Section 616(a)(3)'s ultimate goal is to promote the diversity of speech on cable.[35] Section 613(f)(1)(B) likewise seeks to fight discrimination on the basis of affiliation and to promote the diversity of speech on cable.[36] But Section 613(f)(1)(B) does so in a prophylactic way: where its cap has been reached, the provision prohibits the carriage of additional affiliated video-programming services even in the absence of any showing of unlawful discrimination. In that sense, Section 613(f)(1)(B) pursues diversity in cable speech with uncommon zeal.

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[33] 47 U.S.C. § 536(a)(3).

[34] *Id.*

[35] *See* 1992 Cable Act, § 2(b)(1) ("It is the policy of the Congress in this Act to . . . promote the availability to the public of a diversity of views and information through cable television . . . ."); H.R. Rep. No. 102-628, at 41 (1992) ("The Committee received testimony that vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services.").

[36] *See*, *e.g.*, *Time Warner II*, 240 F.3d at 1130 ("The interests asserted in support of the . . . vertical limits are the . . . promotion of diversity in ideas and speech and the preservation of competition.") (internal quotation marks omitted); *Second Report* ¶ 42 ("Congress was concerned that vertical integration limits diversity of cable programming and reduces the number of voices available to the public"); *Recon Order* ¶ 4 ("the record before Congress indicated that vertical integration could limit the diversity of cable programming and reduce the number of voices available to the public").

Any measure prohibiting discrimination on the basis of affiliation imposes a heavy burden on free speech, as the ability to determine the content and mix of speech — including the inclusion of speech that is affiliated with the speaker, free of government interference — is the very essence of free expression.[37] For example, the New York Times routinely fills its pages with news stories, editorials, and opinion pieces produced by journalists and editors affiliated with it — not with the work product of independent sources. It does so in an attempt to compile a mix of speech that is coherent and distinctive, and that represents its own point of view. Far from condemning it, the First Amendment applauds and protects that goal: distinctive media voices are central to a functioning democracy.

Not surprisingly, then, First Amendment doctrine approaches regulation impeding the creation of such distinctive voices with hostility. When government regulation seeks to alter a speaker's mix of speech in the name of diversity, it is fundamentally premised on a judgment about content: that the speech is not sufficiently diverse and therefore in need of governmentally supervised improvement. That judgment is "content based" for purposes of First Amendment analysis, and therefore triggers strict scrutiny.[38] "[C]ontent-based

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[37] *See*, *e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("*Turner I*") ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

[38] *See*, *e.g.*, *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 20 (1986) ("[T]he State's asserted interest in exposing appellant's customers to a variety of viewpoints is not — and does not purport to be — content neutral."); *Turner I*, 512 U.S. at 677 (O'Connor, J., concurring and dissenting in part) ("Preferences for diversity of viewpoints . . . make reference to content.").

regulations of speech are presumptively invalid":[39] they cannot pass muster unless they are "narrowly tailored to a compelling state interest."[40]

It is no answer to say that the statute and its objective "are framed in terms of the sources of information rather than the substance of the information."[41] Strict scrutiny is triggered whenever government regulation suppresses one person's speech to amplify the speech of another — even absent evidence that the regulation sought to suppress speech of a particular content.[42] Nor is it an answer to say that the fine-tuning of a medium's mix of speech was blessed in *Turner*.[43] There, the Supreme Court upheld a cable-access right for broadcasters on the theory that, without such a right, the separate broadcast medium would

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[39] *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007).

[40] *Turner I*, 512 U.S. at 680 (O'Connor, J., concurring and dissenting in part).

[41] *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996); *see also Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1317 (D.C. Cir. 2000).

[42] *See, e.g.*, *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (plurality) ("the State cannot advance some points of view by burdening the expression of others"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) ("One might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members. Except in the special context of limited access to the channels of communication, . . . this concept contradicts basic tenets of First Amendment jurisprudence."); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (stating that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others").

[43] *See Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1317-18, 1321 (D.C. Cir. 2000).

come to harm.[44] But the Court was careful to note that the government had not acted in an effort to improve the mix of speech on cable itself.[45]

All of the above is true regardless of market structure. The Supreme Court has expressly rejected the notion that it becomes permissible for the government to meddle with content when a newspaper is not subject to competition from other newspapers.[46] That said, speech regulation premised on enhancing diversity is particularly vulnerable in the presence of competition. When there is competition, there is no need to promote diversity: competing

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[44] *See Turner I*, 512 U.S. at 646, 649, 652, 658-59.

[45] *See id.* at 652 (Government did not act "in an effort to exercise content control over what subscribers view on cable television"); *id.* at 645 (strict scrutiny due if Congress used "subtle means of exercising a content preference"); *id.* at 646 (same if "purpose in enacting [must-carry measures] was to promote speech of a favored content"); *id.* at 648 (same if "Congress' purpose in enacting must-carry was to force programming of a 'local' or 'educational' content on cable subscribers"); *id.* at 649 (same if "Congress designed the must-carry provisions . . . to promote speech of a particular content"); *id.* at 649-50 (same if "Congress mandated cable carriage of broadcast television stations as a means of ensuring that particular programs will be shown, or not shown, on cable systems"); *id.* at 655 (same if Congress had "grant[ed] access to broadcasters on the ground that the content of broadcast programming will counterbalance the messages of cable operators"); *id.* at 658-59 (same if Congress prefers one group over another "based on the content of programming each group offers"); *see also Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (promoting diversity of voices within a single medium "may well give rise to enormous tensions with the First Amendment").

[46] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974) ("However much validity may be found in these arguments [about newspapers having market power], at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.") (footnotes omitted); *see also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) ("*Tornillo* . . . struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. It rests on the principle that the State cannot tell a newspaper what it must print.").

newspapers — even when they each favor their own affiliated writers — already adequately promote diversity, simply by compiling their own distinctive mix of speech.[47] Imposing an access requirement under such circumstances would harm (not help) the values underlying the First Amendment: it would require multiple outlets to compete with an identical mix of obligatory content.[48]

What goes for newspapers goes for cable. Cable operators are presumptively entitled to the same First Amendment protection as that applicable to newspapers.[49] The acknowledged purpose of both the program-carriage statute and the channel-occupancy statute is to promote diversity of speech on cable. Thus, both trigger strict scrutiny, which they cannot withstand. Further, cable operators are subject to vigorous competition from two DBS operators (DirecTV and Dish), as well as from telephone companies, distribution over

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[47] *See Time Warner II*, 240 F.3d at 1139 ("Even if competing MSOs filled all of their channels with affiliates' products (as unlikely as that seems), the Commission nowhere explains why, in the pursuit of diversity, the independence of competing vertically integrated MVPDs is inferior to the independence of unaffiliated programmers.").

[48] It would also harm (not help) consumers: instead of having a choice between distinctive formats (say, the New York Times and the New York Post), consumers would have a choice only between different packagers of generic content.

[49] *See Turner I*, 512 U.S. at 639 (cable operators must be judged by "settled principles of our First Amendment jurisprudence"); *id.* at 675-76 (O'Connor, J., concurring in part and dissenting in part) ("As the Court explains in Parts I, II-A, and II-B of its opinion, which I join, cable programmers and operators stand in the same position under the First Amendment as do the more traditional media."); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 815 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) (in *Turner*, "there was agreement that cable operators are generally entitled to much the same First Amendment protection as the print media").

the Internet, and other sources.[50] In the presence of competition, it is particularly inappropriate to meddle with cable operators' programming choices.[51]

II. A REVIVED CHANNEL-OCCUPANCY LIMIT COULD NOT SURVIVE EVEN INTERMEDIATE SCRUTINY.

Even if a channel-occupancy limit would not trigger strict scrutiny, it would still face intermediate scrutiny. That is because any government mandate that a cable operator carry a particular video-programming service saddles protected speech with an onerous burden.[52] Any measure that "impose[s] special obligations upon cable operators" triggers "some

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[50] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 6 (2006) ("The second and third largest MVPDs now are DBS operators . . . [and] LECs, such as [AT&T] and Verizon . . . have spent the past year preparing to offer video in their operating areas and are building out their facilities to add video offerings."). The Commission is wrong in suggesting that the effectiveness of competition is reduced because of switching costs. *See FNPRM* ¶ 70 & n.236. Cable operators have churn rates as high as 3% per month. *See* Bear, Stearns & Co., *Resetting the Bar — 2008 Outlook*, Jan. 7, 2008, at 11, *available at* WL Investext 12994177. That dispels any notion of switching costs: video subscribers who want to switch providers do so in vast numbers. Accordingly, cable operators must be attuned to the wishes of their customers or risk losing even more subscribers.

[51] *See Turner I*, 512 U.S. at 670 (Stevens, J., concurring in part and concurring in the judgment) ("Cable operators' control of essential facilities provides a basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media.") (internal quotation marks and brackets omitted). We acknowledge that, in *Time Warner I*, the D.C. Circuit held that a purpose to promote diversity does not trigger strict scrutiny. *See Time Warner Entm't Co. v. FCC*, 211 F.3d 1313, 1320-22 (D.C. Cir. 2000). We respectfully submit that the analysis contained *Time Warner I* is unpersuasive: it did not come to terms with any of the points explained above. In any event, the Commission cannot take *Time Warner I* as its loadstar: its decision may be reviewed by the D.C. Circuit *en banc* or the Supreme Court. Moreover, even the D.C. Circuit has expressed doubt about "how far [*Time Warner I*'s] theory may be pressed against First Amendment norms." *Time Warner II*, 240 F.3d at 1135.

[52] *See Time Warner II*, 240 F.3d at 1129 ("The vertical limit restricts [cable operators'] ability to exercise their editorial control over a portion of the content they transmit.").

measure of heightened First Amendment scrutiny"[53] — namely, at the very least, "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech."[54]

Under intermediate scrutiny, a prohibition on preferring affiliated speech can survive constitutional scrutiny only if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[55] In this connection, government must do more than simply "posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[56]

The Commission points to two academic papers that, it suggests, show "that vertically integrated cable operators . . . are more likely to carry a program network in which they have an ownership interest than they are to carry a program network with similar content but in which they do not have an ownership interest."[57] But both of these papers (which, incidentally, are the product of a single academician and his students) are based on stale data:

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[53] *Turner I*, 512 U.S. at 641.

[54] *Id.* at 662.

[55] *Id.* (quotation marks and citation omitted); *see also Time Warner II*, 240 F.3d at 1130 ("a governmental regulation subject to intermediate scrutiny will be upheld if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests") (quotation marks and citation omitted).

[56] *Turner I*, 512 U.S. at 664 (plurality).

[57] *FNPRM* ¶ 138.

one paper relies on data from the late 1990s,[58] and the other relies on data from 2003[59] — too old by the Commission's own reckoning.[60] And, to the extent that these papers point to carriage discrepancies at all, their size is underwhelming.[61] Indeed, the papers show that, in the case of some Time Warner-affiliated services, there is either no discrepancy at all (not surprising when many of those services are well-established and carried by virtually all cable operators) or a discrepancy the other way.[62] The authors have no explanation for these inconvenient facts.

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[58] *See* Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study* at 13 (July 28, 2005) (available at http://www.indiana.edu/~telecom/faculty/waterman/kang.pdf) (paper is based on *1999 Television & Cable Factbook*, which reflects data as of 1998, and on *Economics of Basic Cable Networks*, which reflects data as of 1997).

[59] *See* Dong Chen and David Waterman, *Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning* (Aug. 7, 2005), at 10-12 (available at http://www.indiana.edu/~telecom/faculty/waterman/vertical_foreclosure05.pdf) (paper is based on *2004 Television & Cable Factbook*, which reflects data as of 2003).

[60] *See FNPRM* ¶ 128 (recounting that, in the *2005 NPRM*, the Commission found "little probative value" in 2001 studies by Time Warner and AT&T "[b]ecause the industry had undergone tremendous change, including increases in channel capacity, since these studies were performed"); *see also 2005 NPRM* ¶ 136 ("Studies submitted by commenters should be based on current technological and market conditions.").

[61] *See*, *e.g.*, *Kang Paper* at 14 ("The [paper] indicates that a vertically integrated cable system is approximately *4 percent points* more likely than non-vertically integrated cable systems to carry the start-up basic cable networks of other MSOs.") (emphasis added).

[62] *See Chen/Waterman Paper* at 15 ("Time Warner is . . . , . . . contrary to the foreclosure hypothesis, 29% more likely to offer its rival Toon Disney."); *id.* at 16 (Time Warner's "much greater than normal carriage of FMC is contrary to foreclosure"); *id.* at 17 ("Marketing of cable networks is too complex, and the relevant substitution effects too murky for us to confidently conclude that foreclosure occurs in the case of these basic networks."). It also bears mention that most of the coefficients in the regression models of the *Chen/Waterman Paper* are not statistically significant at conventional confidence levels. For example, only one of the 14 coefficients relating to Toon Disney is statistically significant,

Besides, as these papers themselves point out, carriage discrepancies do not necessarily bespeak discrimination.[63] Discrimination occurs only where there is disparate treatment of parties that are similarly situated,[64] and discrimination cannot result from "legitimate . . . editorial choices."[65] Thus, even if vertically integrated cable operators were slightly more likely to carry affiliated video-programming services than non-vertically integrated cable operators, there are legitimate reasons why that may be the case. For example, the Commission itself has pointed out that vertical integration gives rise to efficiencies.[66] Moreover, when cable operators invest in a video-programming service, they presumably do so because they believe the service would be of interest to their subscribers. It is not surprising that they would carry such a service at a slightly higher rate than cable operators whose editorial judgment does not lead them to make the same investment.

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only two of the 14 coefficients relating to AMC are statistically significant, and the "Pseudo R^2" for each is only about 20%.

[63] *See Chen/Waterman Paper* at 19 ("It was not possible to conclude from this study whether the foreclosure patterns we observe are efficiency or anti-competitively motivated, or how measures of consumer welfare are affected."); *Kang Paper* at 19 ("The study focuses on the existence of reciprocal carriage, rather than on assessing the welfare effects of these integrations.").

[64] *See* H.R. Rep. No. 102-628, at 110 (1992) ("An extensive body of law exists addressing discrimination in normal business practices, and the Committee intends the Commission to be guided by these precedents."); *see also General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.") (footnote omitted).

[65] *Time Warner II*, 240 F.3d at 1135 & n.6 (emphasis added).

[66] *See*, *e.g.*, *Second Report* ¶ 68 ("a 40% limit is appropriate to balance the goals of increasing diversity and reducing the incentive and ability of vertically integrated cable operators to favor their affiliated programming, with the *benefits and efficiencies associated with vertical integration*") (emphasis added).

Regardless of the reasons, the supposed carriage discrepancies cannot justify a draconian channel-occupancy limit. Even accepting for the sake of argument that the papers' outdated findings were relevant, the discrepancies in carriage to which they point are at best *de minimis*. That is consistent with the experience under Section 616(a)(3): over the years, only a handful of discrimination complaints has been filed. Intense competition, channel capacity increases, and declines in vertical integration have been strong and effective checks against any purported ills, and will only become more effective going forward. Thus, even assuming that there is any disease to be cured, it can be easily cured through Section 616(a)(3) alone. A prophylactic measure cannot be justified.[67]

If the Commission nonetheless adopts a channel-occupancy limit, it must at a minimum show that its chosen limit is properly tailored to the disease sought to be cured. The D.C. Circuit previously struck down the 40% limit because the Commission "seem[ed] to have plucked the 40% limit out of thin air"[68]: as the Court noted, the Commission had done nothing to explain why "50% [is] too high and 30% too low,"[69] or otherwise to "link the numerical limits to the benefits and detriments depicted."[70] Given that this is now the third time that the Commission seeks comment in the wake of the court decision, it is troubling that the *FNPRM* does not suggest any specific limit, much less explain how any

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[67] *See*, *e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (internal citation and quotation marks omitted).

[68] *Time Warner II*, 240 F.3d at 1137.

[69] *Id.* (internal quotation marks and citations omitted).

[70] *Id.* at 1138.

particular limit might be related to the limit's purpose.[71] Indeed, throughout the recent history of this proceeding, no commenter has even hinted at how the Commission should go about this task.[72]

The Commission must also exempt cable systems that are subject to effective competition. As the D.C. Circuit explained in *Time Warner II*, the existence of competition renders any concerns with discrimination implausible.[73] Again, the point here is not that,

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[71] *See*, *e.g.*, *FNPRM* ¶ 135 ("The record developed in response to the *2005 Second Further Notice* remains inadequate to support a specific vertical limit. No commenter proposed a specific limit, provided us with evidence to support a specific limit, advanced any methodology that could help us to determine a specific limit, or demonstrated a link between any of the harms identified and a specific limit designed to prevent these harms."); *id.* ¶ 143 ("We ask that commenters provide theoretical or empirical evidence to support any specific proposed limit and discuss how the proposed limit will appropriately balance the potential harms and benefits of vertical integration. Alternatively, we invite commenters to advance a particular methodology and rationale that will help us to determine a specific limit that is supported by record evidence. In either case, we request that commenters demonstrate a link between the specific harms sought to be prevented and the specific limit proposed to prevent or remedy such harms."); *2005 NPRM* ¶ 146 ("None of the comments filed in response to the *2001 Further Notice* yielded a sound evidentiary basis for either retaining the current 40% vertical limit or for setting a different limit."); *id.* ¶ 162 ("on the record before us, we lack the evidence necessary under *Time Warner II* to establish a firm channel occupancy limit that would both preserve the benefits of vertical integration and protect against potential harms without unduly burdening cable operators' First Amendment rights").

[72] *FNPRM* ¶ 135 ("No commenter proposed a specific limit, provided us with evidence to support a specific limit, advanced any methodology that could help us to determine a specific limit, or demonstrated a link between any of the harms identified and a specific limit designed to prevent these harms."); *id.* ¶ 135 n.419 ("No commenter . . . links any of these issues to a specific vertical limit.").

[73] *See Time Warner II*, 240 F.3d at 1138 ("while reliance on in-house suppliers offering an inferior price-quality trade-off will reduce a monopolist's profits, it may threaten a competitive firm's very survival"); *id.* at 1139 ("competition raises the stakes for a firm that sacrifices the optimal price-quality trade-off in its acquisition of programming, the issue seems to trigger the legislative directive"); *id.* ("competition spurs a firm's search for the best price-quality trade-off").

where there is competition, cable operators will never favor affiliated programmers. Rather, the point is that, where there is competition, cable operators cannot favor affiliated programmers simply for being affiliated: to the extent they favor affiliated programmers, they will do so in the exercise of legitimate editorial choices.[74] As we have already shown, the Commission's qualms with the effectiveness of DBS competition are baseless.[75] In any event, the Commission does not even suggest any no excuse for not exempting at least all systems that are subject to head-to-head competition from a telephone company.

III. AT A MINIMUM, THE CHANNEL-OCCUPANCY LIMIT SHOULD NOT BE EXPANDED.

When the Commission adopted its 40% channel-occupancy rule in 1993, it limited that rule in three important ways. Swimming against the current of industry developments, the Commission now threatens to eliminate those restrictions: despite intensified competition, increased channel capacity, and diminished vertical integration, the Commission proposes putting in place a channel-occupancy limit that is significantly more exacting than that adopted in 1993. It does so, moreover, without proffering any cogent reason. That "result first, reasoning later" approach is fundamentally incompatible with the Administrative Procedure Act.[76]

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[74] *See*, *e.g.*, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits*, Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd 210, ¶ 54 (1992) ("*1992 NPRM*").

[75] *See supra*, p.12 n.50.

[76] *See*, *e.g.*, *Telephone & Data Sys. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) ("The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside.").

First, when the Commission adopted its 40% channel-occupancy rule in 1993, it determined that it should count as "affiliated" networks only networks affiliated with the particular cable operator to whom the cap is being applied — not those affiliated with other cable operators.[77] Now, the Commission proposes to count not only networks affiliated with other cable operators but possibly even networks affiliated with broadcast networks.[78] The statute makes clear, however, that the Commission may prescribe a limit only with respect to video-programming services "in which *a cable operator* has an attributable interest."[79] By mentioning only cable-affiliated networks, the statute makes clear that the Commission may not expand the ban to networks affiliated with broadcast networks.[80]

As for the proposal to expand the limit to video-programming services affiliated with other cable operators, it is contradicted by the legislative history: as noted in the *Second Report*, the Conference Report to the 1992 Act states that the limit applies only to "channels that can be occupied by a video programmer . . . in which *the* operator has an attributable interest."[81] That only makes sense: Congress's concern with vertical integration was that it "gives cable operators the incentive and ability to favor their affiliated programming

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[77] *Second Report* ¶ 52.

[78] *FNPRM* ¶ 145 ("We tentatively conclude that we should expand the channel occupancy limit to include video programming networks owned by or affiliated with any cable operator.").

[79] 47 U.S.C. § 533(f)(1)(B) (emphasis added).

[80] *See*, *e.g.*, *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (an agency "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines [its] relevant functions . . . in a particular area.").

[81] *Second Report* ¶ 51 (quoting H.R. Conf. Rep. No. 102-862, at 81 (1992)) (emphasis added).

services."[82] Cable operators have no economic interest in favoring video-programming services affiliated with other cable operators.[83]

The Commission hints that cable operators do have an incentive to favor video-programming services affiliated with other cable operators if they have entered into an agreement in which they are promised reciprocal treatment.[84] But the D.C. Circuit has made clear that, before the Commission may predicate a limit on collusion, it must document a factual predicate.[85] Although the Commission points to an academic paper as suggesting that MSOs "might be colluding tacitly,"[86] the paper at best documents parallel conduct. There is a vast gap between parallel conduct and collusion.[87]

The *FNPRM* points out that the Commission has interpreted the exclusive-contract ban of Section 628(c)(2)(D) as covering all cable operators — whether they have an interest in the

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[82] S. Rep. No. 102-92, at 25 (1991); *see also* H.R. Rep. at 41 ("some cable operators favor programming services in which they have an interest").

[83] *See Second Report* ¶ 53 ("We agree that cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO.").

[84] *See FNPRM* ¶ 139.

[85] *See Time Warner II*, 240 F.3d at 1132 ("[T]he economy is filled with firms that, like MSOs, display partial upstream vertical integration. If that phenomenon implies the sort of collusion the Commission infers, one would expect the Commission to be able to point to examples. Yet it names none. Further, even if one accepts the proposition that an MSO could benefit from sharing the services of specific programmers, programming is not more attractive for this purpose merely because it originates with another MSO's affiliate rather than with an independent.").

[86] *FNPRM* ¶ 139.

[87] *See generally Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) ("parallel conduct or interdependence, without more," is "in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market").

programmer or not.[88] But that interpretation is not exactly compelled by the statutory text either.[89] The interpretation is also readily distinguishable. At least in the early 1990s, and at least in theory, all cable operators had an independent interest in withholding cable programming from DBS operators: doing so would limit competition. By contrast, Time Warner Cable has no independent interest in favoring (say) Comcast's programming services,[90] and, as the D.C. Circuit explained, an agreement to favor Comcast's programming services may not be presumed.

Second, when the Commission adopted its 40% channel-occupancy rule in 1993, it made the rule applicable to only 75 channels.[91] As the Commission explained at the time, "expanded channel capacity will reduce the need for channel occupancy limits": because typically only a handful of video-programming services are affiliated with a single cable operator, expanded channel capacity lessens any concern that independent programmers might

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[88] *See FNPRM* ¶ 145 n. 440.

[89] *See* 47 U.S.C. § 548(c)(2)(D) (Commission must prohibit "exclusive contracts . . . between *a cable operator* and a satellite cable programming vendor in which *a cable operator* has an attributable interest") (emphasis added).

[90] *See Second Report* ¶ 53 ("We agree that cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO."); Brief for Cable Operator Petitioners at 29, *Time Warner Entm't Co. v. FCC*, No. 94-1035, 2000 WL 35587377 (filed D.C. Cir. Mar. 7, 2000) ("Presumably, the FCC would have [Comcast] agreeing with Time Warner (tacitly or otherwise) not to purchase a new service competing with, say, CNN (a service that Time Warner owns) in the hope that, some day, Time Warner will return the favor by refusing to carry a new service competing with a service attributed to [Comcast]. As the only record evidence on this issue made clear, this kind of collusion is unlikely to occur in reality. If the new service is attractive, refusing to carry it would result in an immediate opportunity cost for [Comcast] (in the form of lost subscription revenues) without any immediate gain. And [Comcast] would have no guarantee that it could ever recoup this cost.").

[91] *See Second Report* ¶ 84.

not get their turn.[92] On reconsideration, the Commission specifically reaffirmed that reasoning.[93] The Commission now nonetheless proposes to eliminate the 75-channel cap.[94] The *FNPRM* does not point to any reason for the about-face. If there were a cogent reason, the Commission would no doubt have identified it.

Finally, when the Commission adopted its 40% cap in 1993, it specifically exempted regional networks.[95] It did so by way of "encouraging continued MSO investment in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism."[96] The Commission recognized that, "because local and regional programming services are usually costly to produce and appeal only to a limited population of subscribers, such an exception may be necessary to encourage MSOs to continue investing in such local programming."[97] On reconsideration, the Commission specifically reaffirmed this reasoning.[98] Now, the Commission seeks comment on this limitation, noting only that regional networks are more prolific now than they were in 1993.[99] But that suggests only that the Commission's goal of

[92] *See id.* ¶ 83; *1992 NPRM* ¶ 53 ("Cable systems with such dramatically expanded capacity will require programming from many different sources in order to program so many additional channels.").

[93] *See Recon Order* ¶¶ 34-35.

[94] *FNPRM* ¶ 143.

[95] *See Second Report* ¶ 78.

[96] *Id.*

[97] *Id.*

[98] *Recon Order* ¶ 30.

[99] *FNPRM* ¶ 144.

promoting localism has worked — not that the reasons why the Commission acted in the first place have changed.

Conclusion

The Commission should not and may not adopt any vertical limit.

Respectfully submitted,

/s/

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